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CARSON'S
REAL PROPERTY STATUTES

COMPRISING, AMONG OTHERS,

THE STATUTES RELATING TO

PRESCRIPTION
LIMITATION OF ACTIONS
MARRIED WOMEN'S PROPERTY
ADMINISTRATION OF ESTATES
WILLS
JUDGMENTS
CONVEYANCING AND LAW OF PROPERTY
SETTLED LAND
TRUSTEES
REGISTRATION OF LAND

WITH NOTES OF DECIDED CASES.

THIRD EDITION

BY

H. W. LAW, M.A.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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The first nine editions were known as Shelford's Real Property Statutes. With the 1902 edition Mr. Carson's name took the place of Mr. Shelford's.

PREFACE.

SINCE the last edition of this work was published in 1910, under the editorship of the late Mr. T. H. Carson, K.C., and of Mr. H. B. Bompas, there have occurred the great changes in the law of land effected by the Property Acts passed in 1925, especially by the Law of Property, Settled Land, and Administration of Estates Acts of that year; as well as the abolition of copyhold and customary tenure, and of perpetually renewable leaseholds, by the Parts of the Law of Property Act, 1922, which have not been replaced by the legislation of 1925. It is on this account specially to be wished that this edition of the work with which Mr. Carson had so long been associated could have had the benefit of his exceptional knowledge of Real Property law, which the present editor learnt to appreciate in Mr. Carson's chambers.

The great length of the Acts of 1925, together with the adoption of a somewhat larger type, have increased inevitably the bulk of the present volume as compared with its predecessors; though space has been gained by the omission of the repealed Debts Recovery Acts, Trustees and Mortgagees ("Lord Cranworth's") Act, 1860, Settled Estates Act, 1877, and Partition Acts, 1868 and 1876; and of numerous repealed sections of the Fines and Recoveries Act, 1833, and by the shortening of the notes on the Inheritance and Dower Acts, the operation of which will now increasingly be limited.

The Land Registration Act, 1925, has been inserted at the end of the work, previous editions of which did

not contain the Land Transfer Act, 1875, or the Parts of the Land Transfer Act, 1897, relating to the Registration of Land. As regards the subjects unaffected by the recent Acts, many important decisions have been delivered in the interval since the publication of the last edition. On Prescription attention may specially be drawn to *Lyell* v. *Hothfield* ([1914] 3 K. B. 911); *Att.-Gen.* v. *Reynolds* ([1911] 2 K. B. 888); and *Hulley* v. *Silversprings Co.*, ([1922] 2 Ch. 268); and on Custom to *Derry* v. *Sanders* ([1919] 1 K. B. 223), where a manorial custom enabling the acquisition for demesne land of a right of way over the land of tenants was considered.

The right to support has been dealt with by the House of Lords in *Howley Park Co.*, v. *L. & N. W. Railway Co.*, ([1913] A. C. 11) and *Thomson* v. *St. Catharine's College* ([1919] A. C. 468); and the effect of the principles as to the right to light laid down in *Colls* v. *The Home and Colonial Stores* ([1904] A. C. 179) has been considered in *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* ([1919] 1 Ch. 407) and *Slack* v. *Leeds Industrial Co-operative Society* ([1924] 2 Ch. 475), and the jurisdiction to award damages in *Leeds Industrial Co-operative Society* v. *Slack* ([1924] A. C. 851).

The relation between section 25 sub-section 2 of the Judicature Act, 1873, and section 10 of the Real Property Limitation Act, 1874, as regards the effect of express trusts in preventing the running of the Statutes of Limitation, was discussed by the Court of Appeal in *Re Jordison, Raine* v. *Jordison* ([1922] 1 Ch. 440); and the authorities on the subject of acknowledgments taking cases out of the Statute were reviewed in *Spencer* v. *Hemmerde* ([1922] A. C. 507).

With regard to the law of Married Women's Property, section 125 of the Bankruptcy Act, 1914, has

rendered a married woman carrying on a trade or business, whether separately from her husband or not, subject to the bankruptcy laws; and in *Edwards* v. *Porter* ([1925] A. C. 1) the House of Lords defined the conditions under which a husband is liable for his wife's torts.

The general arrangement of the work adopted in former editions has been retained. The title "Administration of Estates of Deceased Persons" has been substituted for that of "Payment of Debts out of Real Estates," and that of "Conveyancing and Law of Property" for "Conveyancing Statutes."

The cases have been brought down to October, 1926.

Mr. E. Weston, of Goldsmith Buildings, Temple, has rendered valuable assistance in the preparation of the Table of Cases.

H. W. LAW.

CAMBRIDGE.
October 31, 1926.

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ADDENDA ET CORRIGENDA.

PAGE	LINE	
88	31	*Add* " See *Attwood* v. *Llay Collieries*, [1926] Ch. 444."
98	54	*Add* " As to the liability for nuisance arising from flooding through breach of a flood bank, see *Clayton* v. *Sale*, [1926] 1 K. B. 415."
110	17	*Add* " *Secus* as to artificial additions to lands (*Att.-Gen. for Nigeria* v. *Holt*, [1915] A. C. 599). But see *Brighton and Hove Gas Co.* v. *Hove Bungalows*, [1924] 1 Ch. 372, as to gradual accretions due to the erection of groynes."

Statutes relating to Real Property.

PRESCRIPTION.

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I.—The Prescription Act, 1832.

2 & 3 Will. IV. c. 71.

An Act for shortening the Time of Prescription in certain Cases (*a*). [1st August, 1832].

§ 1. *Time limited for establishing rights of common and other profits à prendre*...1.
§ 2. *Ways, easements, and watercourses*...4.
§ 3. *Light*...11.
§ 4. *How periods of limitation are to be computed*...14
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§ 8. *Time excluded in computation of period of forty years*...21
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2 & 3 Will. 4, c. 71, s. 1.

Whereas the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that

2 & 3 Will. 4, c. 71, s. 1.

have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant (*b*), to any right of common (*c*) or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall (*d*), or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claim to right of common and other profits *à prendre* not to be defeated after thirty years' enjoyment by showing the commencement.

After sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

(*a*) By 21 & 22 Vict. c. 42, this Act was extended to Ireland.

(*b*) The reader is referred to Note II. at the end of this Act (pp. 22 *et seq.*) dealing (A) with the question whether the above Act has superseded the common law; (B) with prescription generally, including prescription at common law and by lost grant; (C) with custom; and (D) with grants, express and implied, of incorporeal rights, and with licences in relation to real estate. By s. 12 of the Law of Property Act, 1925, *post*, nothing in Part I. of that Act affects the operation of the law with reference to the acquisition of easements or rights over or in respect of land.

(*c*) As to rights of common, see Note III. at the end of this Act, p. 43, *post*.

(*d*) The provisions of this Act are not affected by the Act for limiting Actions and Suits by the Duke of Cornwall, in relation to Real Property (23 & 24 Vict. c. 53, s. 2).

(1) *Subject-matter of the Section*...2.
(2) *Enjoyment under the Section*...4.

(1) Subject-matter of the first section.

The first section of this Act includes different subects from those in the second, and distinguishes easements from rights of common or profits *à prendre*; a different limitation is established for the former and latter cases (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Lawson* v. *Langley*, 4 Ad. & Ell. 890; *Jones* v. *Richard*, 5 Ad. & Ell. 413). The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement; but the right to take "*something out of the soil*" is a profit *à prendre*, and not an easement (*Manning* v. *Wasdale*, 5 Ad. & Ell. 764; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). A profit *à prendre* is a right to take something off another person's land (*Sutherland* v. *Heathcote*, [1892] 1 Ch. 484). This section

applies only to profits *à prendre* in the land of another, and has no application to a copyholder's acts on his copyhold tenement (*Hanmer* v. *Chance*, 4 D. J. & S. 626). 2 & 3 Will. 4, c. 71, s. 1.

The right to kill and carry away wild duck is a profit *à prendre* (*Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139; see *Davies' Case*, 3 Mod. 246). The liberty to hawk is one species of *ancupium*, the taking of birds by hawks, and seems to be also a profit *à prendre*. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit, and may carry them away (*Anon.*, Hardr. 407; *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96; see *Grove* v. *Portal*, [1902] 1 Ch. 727; *Fitzhardinge* v. *Purcell*, *sup.*). The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—"of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish, and fowl"—to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it, should exercise the right, it has been considered that an interest or profit *à prendre* was intended to be granted (*Wickham* v. *Hawker*, 7 M. & W. 78,79; see *Hooper* v. *Clark*, L. R. 2 Q. B. 200). The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil (*Blades* v. *Higgs*, 11 H.L.C. 621). He may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a licence of a profit *à prendre* (*Ewart* v. *Graham*, 7 H. L. C. 344; *Radcliff* v. *Hayes*, [1907] 1 I. R. 101). The lessee of a right of shooting cannot interfere with the ordinary management of the land even if injurious to the shooting (*Gearns* v. *Baker*, 10 Ch. 355). But he can take steps necessary to preserve game from fire (*Cope* v. *Sharpe*, [1910] 1 K. B. 168). In substance a profit *à prendre* may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee simple to the alienor (*Ewart* v. *Graham*, 7 H. L. 344, 345; see *Houston* v. *Sligo*, 52 L. T. 870; 55 L. T. 614). The following are other instances of profits *à prendre* which have been dealt with by the Courts; viz. As regards things renewable by nature; the right to cut down and carry away trees growing in another's close (*Bailey* v. *Stevens*, 12 C. B. (N.S.) 91; *Dowglass* v. *Kendal*, Cro. Jac. 256); the right to cut and carry away litter (*De la Warr* v. *Miles*, 17 Ch. D. 535); and see the rights to common of pasture, estovers and turbary mentioned in Note III., *post*, p. 45. As regards things not renewable by nature; the right to take clay from another's close (*Clayton* v. *Corby*, 5 Q. B. 420); and see the commonable rights of taking stone, coal, and sand mentioned in Note III., *post*, p. 54. Profits *à prendre*.

Rights to profits *à prendre* may exist as annexed or appurtenant to particular land, and only exercisable by the landowners. Or they may exist in gross, that is, apart from the ownership of land. See for instances, *Barrington's Case*, 8 Rep. 36B; *Welcome* v. *Upton*, 6 M. & W. 536; *Johnson* v. *Barnes*, 8 C. P. 527; *Devonshire* v. *Pattinson*, 20 Q. B. D. 274; *Neill* v. *Devonshire*, 8 A. C. 153; *Goodman* v. *Saltash*, 7 A. C. 633. In the former case (that is, as annexed to land), profits *à prendre* cannot be prescribed for without stint and for commercial purposes: but only when connected with the enjoyment of the land and limited accordingly (*Harris* v. *Chesterfield* [1911] A. C. 623; see *Bailey* v. *Stevens*, 13 C. B. (N.S.) 91; *Hoskins* v. *Robins*, 2 Wms. Saund. 727 n.). In Profits *à prendre* appurtenant and in gross.

2 & 3 Will. 4, c. 71, s. 1.

the latter case (that is, in gross) it seems that profits *à prendre* may be claimed as exclusive rights. See *Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687, and the cases as to profits *à prendre* in gross quoted above.

Profits *à prendre* in gross may be claimed by common law prescription (*Johnson* v. *Barnes*, L. R. 8 C. P. 527). An attempt was made to claim them under this Act, but the Court of Common Pleas held that having regard to sect. 5, prescriptive rights in gross were not within the scope of sect. 1 (*Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687; see *Foster* v. *Warblington*, [1906] 1 K. B. 664; *Ramsgate* v. *Debling*, 22 Times L. R. 369). A different view of the Act was raised before the Court of Appeal, but the point was not decided (*Mercer* v. *Denne*, [1905] 2 Ch. 574, 586).

(2) Enjoyment under the section.

Before this Act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now in the case of claims under the Act, the proof is limited to thirty years. But the party must prove his enjoyment for that whole period (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161). Undoubted enjoyment for twenty-nine years and three-quarters will not be sufficient (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 164; see *Flight v. Thomas*, 11 Ad. & Ell. 688; and compare *Battersea* v. *Commrs. of Sewers*, [1895] 2 Ch. 708). Taking the first, fourth, and fifth sections together, the period mentioned in the Act is thirty years next before some action in which the claim shall be brought into question (*Richards* v. *Fry*, 7 Ad. & Ell. 698; *Wright* v. *Williams*, 1 M. & W. 77). See further the note to sect. 4, *post*.

Period of enjoyment.

Nature of the necessary enjoyment.

Where on the ground of prescription profits *à prendre* are claimed under this section, the ordinary rules as to claims to prescriptive rights apply (see Note B, pp. 23, 30, *post*). Thus a grant of the right must be presumed. And a claim in respect of a tenement to common over a forest grounded on thirty years' enjoyment was defeated by showing that a grant of any right over the forest would have been void by statute (*Mill* v. *New Forest*, 18 C. B. 60). Nor can a tenant acquire a profit *à prendre* in other land belonging to his landlord (*Warburton* v. *Parke*, 2 H. & W. 64). Nor is an enjoyment sufficient which can be referred to an agreement in writing made by the owner of the servient tenement (*Lowry* v. *Crothers*, I. R. 5 C. L. 98). The enjoyment under this section must be enjoyment as of right (*De la Warr* v. *Miles*, 17 Ch. D. 591; as to enjoyment as of right, see *post*, p. 9). But where the acts were done as of right it was immaterial that they were done under a mistaken supposition of title (*De la Warr* v. *Miles*, 17 Ch. D. 585; *Dawson* v. *MacGroggan*, [1903] 1 I. R. 92, which cases were distinguished in *Lyell* v. *Hothfield*, [1914] 3 K. B. 911, where the claim was based on acts showing a claim of right to the soil itself, not to a right of common).

As to the nature of the evidence to be given in claiming a right under this section to common appurtenant, see *Commrs. of Sewers* v. *Glasse*, 19 Eq. 150, 151. A declaration by a tenant in derogation of the title of the reversioner was inadmissible (*Papendick* v. *Bridgwater*, 5 Ell. & Bl. 166; distinguish *Blandy Jenkins* v. *Dunraven*, [1899] 2 Ch. 121; and see *Scholes* v. *Chadwick*, 2 Moo. & R. 507; *R.* v. *Bliss*, 7 Ad. & Ell. 550).

Pleading.

As to pleading the section, see the note to sect. 5, *post*, and the early cases of *Welcome* v. *Upton* (6 M. & W. 401), and *Jones* v. *Price* (3 Bing. N.C. 52).

In claims of right of way or other ease-

2. No claim which may be lawfully made at the common law (*e*), by custom, prescription, or grant, to any way or

other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

2 & 3 Will. 4, c. 71, s. 2.

ment the period to be twenty years and forty years.

(*e*) As to the modes of claiming an easement by prescription at common law, and by non-existing grant, which were used before the passing of this Act, see Note II., *post*, p. 24. The Act has provided an additional mode of claiming easements, but has not abolished the former modes (see *post*, p. 22). As to the law of ways, see *post*, p. 61; and as to watercourses, see *post*, p. 86. As to the right to a pew, which is an easement, see *post*, p. 114.

Modes of claiming easements.

(1) *Definition and nature of Easements*...5.
(2) *Subject-matter of the Section*...7.
(3) *Enjoyment under the Section*...8.

(1) Definition and nature of easements.

An easement (from the French word *aise*, i.e., *commoditas*) is defined to be a privilege that one neighbour hath of another by writing or prescription without profit, as a way, or a sink through his land, or such like (Termes de la Ley, adopted *Hewlins* v. *Shippam*, 5 B. & C. 229; *Mounsey* v. *Ismay*, 3 H. & C. 497; *Metropolitan Ry. Co.* v. *Fowler*, [1892] 1 Q. B. 180). "A servitude is a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor" (Code Civ. Art. 637). There can be no easement, properly so called, unless there be both a servient and a dominant tenement (*Rangeley* v. *Midland Ry. Co.*, 3 Ch. 310; *Hawkins* v. *Rutter*, [1892] 1 Q. B. 671; see *post*, p. 27). The *servient* tenement is that over which a right claimed by custom, prescription, or grant is exercised, and the *dominant* tenement is that to which such right is attached. An easement must be connected with the enjoyment of the dominant tenement (*Ackroyd* v. *Smith*, 10 C. B. 164). It may benefit other tenements (*Simpson* v. *Godmanchester*, [1897] A. C. 696). The servient owner, however, cannot insist on a benefit therefrom (*Mason* v. *Shrewsbury Co.*, L. R. 6 Q. B. 587). It must be an incident of a known and usual kind (*Hill* v. *Tupper*, 2 H. & C. 121; see *Aspden* v. *Seddon*, 1 Ex. Div. 509). The public right of passage over a highway was said not to be a dominant tenement in respect of which they could acquire an easement of discharging water from the road on to other land (*Att.-Gen.* v. *Copeland*, [1901] 2 K. B. 101; see *S. C.*,

Servient and dominant tenements.

2 & 3 Will. 4, c. 71, s. 2.

[1902] 1 K. B. 690). On the other hand, a right of way may be appurtenant to a several fishery in gross (*Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; see *Edgar* v. *Fishery Commrs.*, 23 L. T. 732). It is essential that the two tenements should belong to different owners; for the owner of two tenements can have no easement over one of them in respect of the other (*Roe* v. *Siddons*, 22 Q. B. D. 236; *Bolton* v. *Bolton*, 11 Ch. D. 970). You cannot have an easement over your own land (*Metropolitan Ry. Co.* v. *Fowler*, [1892] 1 Q. B. 171; *Kilgour* v. *Gaddes*, [1904] 1 K. B. 461). And, if the ownership was originally separate, upon the two tenements becoming vested in the same person the inferior right of easement is merged in the superior title of ownership (*Holmes* v. *Goring*, 2 Bing. 83). Where there is a unity of seisin of the land and of the way over the land in one person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way (*James* v. *Plant*, 4 Ad. & Ell. 761).

Easements are incorporeal hereditaments.

As regards their legal character, easements are incorporeal hereditaments (*Bryan* v. *Whistler*, 8 B. & C. 293; *Jones* v. *Watts*, 43 Ch. D. 585; *Re Sanders*, [1896] 1 Ch. 494; *Hastings* v. *N. E. Ry.*, [1898] 2 Ch. 678; see *Re Brotherton; B.* v. *B.*, [1907] W. N. 230, where they are said to be rather "rights"; see further, 24 L. Q. R. 199, 259, 264). A contract to grant a right of way was held to be a contract for sale of real estate (*Rowe* v. *London School Board*, 36 Ch. D. 619).

It has been doubted whether there can be a grant of an incorporeal hereditament, such as an easement, subject to a perpetual payment in the nature of a fee farm rent (*Gardner* v. *Hodgson's Co.*, [1901] 2 Ch. 217, 220; see *S. C.*, [1903] A. C. 239). It is settled that rent cannot issue out of a mere easement (*Buzzard* v. *Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344; *Re Gerard and Beecham*, [1894] 3 Ch. 315; see *Gardner* v. *Hodgson's Co.*, [1900] 1 Ch. 601; [1901] 2 Ch. 217). But payment of money in respect of an easement may be secured by agreement (see *Hastings* v. *N. E. Ry.*, [1898] 2 Ch. 674; [1899] 1 Ch. 656; [1900] A. C. 260; see *Aspden* v. *Seddon*, 1 Ex. D. 504); and where the easement is granted for a term the reversioner of the land may sue for the money (*Ib*). See further, p. 140, *post*.

Instances of easements.

There are a great variety of easements. The following may be enumerated:—Right of way. Right to place over neighbouring soil clothes on lines (*Drewell* v. *Towler*, 3 B. & Ad. 735); or telephone wires (*Lancashire Co.* v. *Manchester*, 14 Q. B. D. 267; see *Wandsworth* v. *United Telephone Co.*, 13 Q. B. D. 904; *Midland Ry. Co.* v. *Wright*, [1901] 1 Ch. 783; *Finchley Co.* v. *Finchley Council*, [1903] 1 Ch. 437). The right to move a timber traveller through air over neighbouring land (*Harris* v. *De Pinna*, 33 Ch. D. 251); or to build so as to project over neighbouring land (*Lemmon* v. *Webb*, [1894] 3 Ch. 11, 18; [1895] A. C. 1, distinguishing the case of overhanging trees). The right of landing nets on another's ground (*Gray* v. *Bond*, 2 Brod. & B. 667). Right to make spoil banks upon the surface in working mines (*Rogers* v. *Taylor*, 1 H. & N. 706; see *Ramsay* v. *Blair*, 1 App. Cas. 701); or quarries (*Middleton* v. *Clarence*, I. R. 11 C. L. 499). The right to mix muck an another's land (*Pye* v. *Mumford*, 11 Q. B. 666). The right to place a pile in the soil of a river (*Lancaster* v. *Eve*, 5 C. B. (N.S.) 717; *Cory* v. *Greenwich* L. R. 7 C. P. 499); or to place stones on the foreshore for protection of adjoining land (*Philpot* v. *Bath*, [1905] W. N. 114). The right to place a signpost on a common (*Hoare* v. *Metropolitan Board*, L. R. 9 Q. B. 296); or to affix a signboard to the walls of another's house (*Moody* v. *Steggles*, 12 Ch. D. 261); or to use a fascia on another's house

(*Francis* v. *Hayward*, 22 Ch. D. 177); or to place an advertisement hoarding on land (*R.* v. *St. Pancras*, 2 Q. B. D. 581; see *Kerrison* v. *Smith*, [1897] 2 Q. B. 445). The right to go on the soil of another to clear a mill stream and repair its banks (*Beeston* v. *Weate*, 5 E. & B. 996); or repair the banks of a non-navigable river (*Long* v. *Gowlett*, [1923] 2 Ch. 177); or to fish (*Hanbury* v. *Jenkins*, [1901] 2 Ch. 401). The right to open locks on another's river (*Simpson* v. *Godmanchester*, [1897] A. C. 696). The right in the occupier of a messuage to water cattle at a pond, and to take water for domestic purposes (*Manning* v. *Wasdale*, 5 Ad. & Ell. 758; see *Fitch* v. *Rawling*, 2 H. Bl. 395). The right to go on a neighbour's close and to draw water from a spring there (*Race* v. *Ward*, 4 El. & Bl. 702); or from a pump (*Polden* v. *Bastard*, L. R. 1 Q. B. 156). The right to conduct water across a neighbour's close by an artificial watercourse (*Beeston* v. *Weate*, *supra*). The right to discharge polluted water into another's watercourse (*Wright* v. *Williams*, 1 M. & W. 77). The right to discharge rain-water by spout or projecting eaves (*Harvey* v. *Walters*, L. R. 8 C. P. 162). The right to commit a private nuisance by discharging coal dust over another's land (*Royal Mail Co.* v. *George*, [1900] A. C. 980), or by creating noise (*Elliotson* v. *Feetham*, 2 Bing. N. C. 134; *Ball* v. *Ray*, 8 Ch. 471), or by polluting water (*Baxendale* v. *McMurray*, 2 Ch. 790), or by polluting air by smoke or smell (*Crump* v. *Lambert*, 3 Eq. 413). The right to use the chimney of another's house for the passage of smoke (*Hervey* v. *Smith*, 1 K. & J. 389; 22 Beav. 299; see *Tebb* v. *Cave*, [1900] 1 Ch. 643; *Jones* v. *Pritchard*, [1908] 1 Ch. 630). The right to receive air by a defined channel (*Bass* v. *Gregory*, 25 Q. B. D. 481). Or to receive light by ancient windows (*Tapling* v. *Jones*, 11 H. L. C. 290). The right of support from land (*Dalton* v. *Angus*, 6 A. C. 740); or from buildings (*Tone* v. *Preston*, 24 Ch. D. 739; *Waddington* v. *Naylor*, 60 L. T. 480). The right to let down the surface of land (*Sitwell* v. *Londesborough*, [1905] 1 Ch. 460). The above rights in respect of air, light and support are sometimes referred to as negative easements; that is, a right to prevent the owner of the servient tenement from exercising over such tenement his ordinary rights of ownership, as he would have been entitled to do but for the easement. Compare restrictive covenants which have been said to bind the land in equity, as being in the nature of negative easements (*Re Nisbet & Potts*, [1906] 1 Ch. 402, 406).

2 & 3 Will. 4, c. 71, s. 2.

Negative easements.

The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the soil (9 B. & C. 109; *Hollis* v. *Goldfinch*, 1 B. & C. 205). And the following have been held to be easements: The licence to make a vault in a church, and to have the exclusive use of it (*Bryan* v. *Whistler*, 8 B. & C. 288). The right to sit in a pew in a church annexed to a house (*Mainwaring* v. *Giles*, 5 B. & Ald. 361; *Hinde* v. *Chorlton*, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, L. R. 5 C. P. 224; see *Crisp* v. *Martin*, 2 P. D. 15; *Halliday* v. *Phillips*, 23 Q. B. D. 53). The right to a fishing weir in non-tidal waters (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657).

Other easements.

(2) Subject-matter of the second section.

The 2nd section refers to easements properly so called, and it has been held that to be within its protection an easement must be in some way appurtenant to a dominant tenement (*Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687; 34 L. J. C. P. 309). Accordingly, the section was held not to extend to a custom for the freemen of a town to enter on land, to hold horse-races (*Mounsey* v. *Ismay*, 3 H. & C. 486), or to a custom for fishermen to dry nets on the beach (*Mercer* v. *Denne*, [1904] 2 Ch. 540, 554; see *Foster* v. *Warblington*, [1906] 1 K. B. 664; *Ramsgate* v. *Debling*, 22 Times L. R. 369). A

2 & 3 Will. 4, c. 71, s. 2.

different view of the section was raised before the Court of Appeal, but not decided ([1905] 2 Ch. 574, 586).

The above section extends to other easements besides ways and watercourses (*Dalton* v. *Angus*, 6 App. Cas. 798; *Simpson* v. *Godmanchester*, [1897] A. C. 709). Thus it extends to support for buildings from land (*Dalton* v. *Angus*, 6 App. Cas. 798), or from buildings (*Le Maitre* v. *Davies*, 19 Ch. D. 281); and to a right to open locks (*Simpson* v. *Godmanchester*, [1897] A. C. 696); and to easements of every description (*Ibid.* 709); except light (*Perry* v. *Eames*, [1891] 1 Ch. 665; *Wheaton* v. *Maple*, [1893] 3 Ch. 48). A claim to a watercourse within this section includes a claim to send through another's watercourse polluted water (*Wright* v. *Williams*, 1 M. & W. 77); or sand and rubble (*Carlyon* v. *Lovering*, 1 H. & N. 784); also a claim to have water which would otherwise flow down to the plaintiff's land diverted over other land (*Mason* v. *Shrewsbury Co.*, L. R. 6 Q. B. 578; see *Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 254), but not a claim to have water allowed to percolate through the banks of a stream (*Roberts* v. *Fellows*, 94 L. T. 279).

(3) Enjoyment under the section.

Sect. 2 provides a method of claiming easements (other than light) alternative to the methods of claiming them at common law or by lost grant (*Gardner* v. *Hodgson's Co.*, [1903] A. C. 238). Where these easements are claimed in either of the two last-mentioned methods a grant must be presumed (*Gardner* v. *Hodgson's Co.*, [1903] A. C. 239). Where they are claimed under this section, and the claim is based on user for twenty years, a grant must also be presumed (*Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 315). If the claim is based on user for forty years it seems that the same presumption must be made (*Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 260, 278; and see *Kilgour* v. *Gaddes*, [1904] 1 K. B. 457, deciding that enjoyment as of right is in this case necessary. See *contra*, *Tapling* v. *Jones*, 11 H. L. C. 290, and compare the language of sect. 7, *post*, p. 20).

Presuming a grant.

Enjoyment must justify the presumption of an absolute grant.

Where in the case of claims under sect. 2 a grant must be presumed, the enjoyment must be such as will justify the presumption. In general, the rules as to presuming a grant (see note on prescription, *post*, p. 31) apply. In particular the presumed grant must be an absolute one. For the easement must be acquired in favour of the dominant as against the servient tenement, in respect of the fee simple in both cases (*Kilgour* v. *Gaddes*, [1904] 1 K. B. 466). So in a leading case decided in 1834 it was held that under sect. 2 an enjoyment of twenty years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. And where for more than twenty years the plaintiff, holding a lease from a bishop of one close, enjoyed without interruption a way over another close occupied by the defendant holding a lease under the same bishop, such enjoyment did not give the plaintiff a right of way over the defendant's close (*Bright* v. *Walker*, 1 C. M. & R. 211; where see the discussion of the Act by Parke, B.).

Bright v. *Walker* was a decision on the part of the section relating to twenty years' enjoyment (see *Harris* v. *De Pinna*, 33 Ch. D. 251). And (apart from questions respecting light under sect. 3; as to which, see p. 12, *post*) it is clear in general that under this Act the tenant of one close cannot as such acquire a prescriptive easement over another close belonging to the same landlord either by twenty years' user (*Gayford* v. *Moffatt*, 4 Ch. 133; *Russell* v. *Harford*, 2 Eq. 507; *Bayley* v. *G. W. Ry.*, 26 Ch. D. 441; *Daniel* v. *Anderson*, 31 L. J. Ch. 610; *Sturges* v. *Bridgman*, 11 Ch. D. 855; *Macnaghten* v. *Baird*, [1903] 2 I. R. 731) or by forty years' user (*Kilgour* v. *Gaddes*, [1904] 1 K. B. 457; disapproving *Fahey* v. *Dwyer*, 4 L. R. Ir. 271,

and the *dictum* of Chitty, J., in *Harris* v. *De Pinna*, 33 Ch. D. 252). As to the presumption of a lost grant in such a case, see *Timmons* v. *Hewitt*, 22 L. R. Ir. 627.

2 & 3 Will. 4, c. 71, s. 2.

Since an absolute grant must be presumed, a person claiming an easement under sect. 2 must show that the right might have been granted by a person capable of making the grant (*Rochdale Co.* v. *Radcliffe*, 18 Q. B. 315). And the claim cannot be sustained where such a grant would have been *ultra vires* either as regards the grantee (*National Manure Co.* v. *Donald*, 4 H. & N. 28; 28 L. J. Ex. 185) or as regards the grantor (*Rochdale Co.* v. *Radcliffe*, *supra*; *Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 278; see *Mill* v. *New Forest*, 18 C. B. 60).

No presumption of grant where it would have been *ultra vires* as regards the grantee, or the grantor;

The various cases in which the Courts have refused to presume a grant are collected, *post*, p. 31. It may be mentioned here that a grant will not be presumed where the servient owner is incapable of preventing the user (*Sturges* v. *Bridgman*, 11 Ch. D. 852). Accordingly the owner of a windmill cannot under this section claim by twenty years' user a free passage of air to his mill (*Webb* v. *Bird*, 10 C. B. (N.S.) 283); nor can the right of access of air to chimneys over the unlimited surface of a neighbour be acquired (*Bryant* v. *Lefever*, 4 C. P. D. 172; see as to the passage of air through a defined channel, *Bass* v. *Gregory*, 25 Q. B. D. 481; *Chastey* v. *Ackland*, [1895] 2 Ch. 389; [1897] A. C. 155). Nor can subterranean water percolating in no known channels be acquired as an easement by user (*Chasemore* v. *Richards*, 7 H. L. C. 349). Nor can the right to annoy neighbours by noise be acquired by user, unless during the user the noise has amounted to an actionable nuisance (*Sturges* v. *Bridgman*, 11 Ch. D. 852; see *Murgatroyd* v. *Robinson*, 7 E. & B. 391).

or where servient owner incapable of preventing user;

Nor will a grant be presumed where the enjoyment was not "as of right" (*Hanna* v. *Pollock*, [1900] 2 I. R. 671). There must be enjoyment "as of right" whether the claim is made on the ground of forty, or of twenty, years' enjoyment (*Kilgour* v. *Gaddes*, [1904] 1 K. B. 457).

or where enjoyment was not "as of right."

In the case of prescription, long enjoyments, in order to establish a right, must have been "as of right," and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills* v. *Colchester*, L. R. 2 C. P. 486). The enjoyment must be "*nec per vim, nec clam, nec precario*" (Co. Litt. 113 b; *Gardner* v. *Hodgson's Brewery*, [1903] A. C. 238). It is not sufficient if it be "*per vim*" (*Eaton* v. *Swansea*, 17 Q. B. 267); or if it be "*clam*," as where there was no open and visible enjoyment of an unusual support for a dock from underground rods (*Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 557); or if it be "*precario*," as in the case of an artificial watercourse the user of which was permissive only (*Burrows* v. *Lang*, [1901] 2 Ch. 502; but see *Lewis* v. *Meredith*, [1913] 1 Ch. 571). Acts done under a mistaken supposition of title have been held to amount to enjoyment as of right (*De la Warr* v. *Miles*, 17 Ch. D. 535; *Dawson* v. *MacGroggan*, [1903] 1 Ir. R. 92). But the acts must show a claim to a right of profit *in alieno solo*, not to the soil itself (*Lyell* v. *Hothfield*, [1914] 3 K. B. 911). On the other hand, where a watercourse was made and enjoyed by a tenant, the landlord and tenant both being under the mistaken belief that this was authorised by the lease, there was no enjoyment as of right (*Chambers* v. *Hopwood*, 32 Ch. D. 549; see *Rivers* v. *Adams*, 3 Ex. D. 361; *Campbell* v. *Wilson*, 3 East, 294).

The words in sect. 5, "enjoyment as of right," must have the same sense as the words in sect. 2, "claiming right thereto" (*Tickle* v. *Brown*, 4 Ad. & Ell. 382). They do not mean rightful apart from the Act (*Gardner* v. *Hodgson's Co.*, [1900] 1 Ch. 596). An enjoy-

2 & 3 Will. 4, c. 71, s. 2.

ment which the owner of the servient tenement cannot stop is not an enjoyment as of right (*Winship* v. *Hudspeth*, 10 Exch. 5; see *Sturges* v. *Bridgman*, 11 Ch. D. 852; *Sanders* v. *Manley* (1878), W. N. 181). It was said by Lord Denman that the words "enjoyment thereof *as of right*," must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; see as to this dictum, *Gardner* v. *Hodgson's Co.*, [1900] 1 Ch. 599; [1901] 2 Ch. 217; and see *Beasley* v. *Clarke*, 2 Bing. (N.C.) 705; *Bright* v. *Walker*, 1 C. M. & R. 219; *Arkwright* v. *Gell*, 5 M. & W. 333).

Where an easement was enjoyed during part of the period in exercise of a statutory right, and, the statutory right having ceased, the enjoyment was continued for the rest of the period, no easement was acquired (*Kinloch* v. *Neville*, 6 M. & W. 806). The use of waste water from a canal was held not to be an enjoyment as of right (*Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 254; compare *Bankhart* v. *Tennant*, 10 Eq. 141; *McEvoy* v. *G. N. Ry.*, [1900] 2 I. R. 325; *Att.-Gen.* v. *Grand Junction Co.*, [1909] 2 Ch. 505). It was said by Blackburn, J., that *Wood* v. *Waud* (3 Ex. 748) was in effect a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose is served (*Mason* v. *Shrewsbury, &c., Ry. Co.*, 6 Q. B. 584; compare *Tone* v. *Preston*, 24 Ch. D. 739; see *Gaved* v. *Martyn*, 19 C. B. (N.S.) 732).

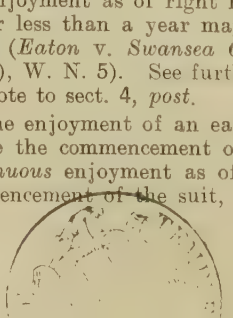
Where the simple issue is, whether there has been a continued enjoyment of a way for twenty years, any evidence negativing the continuance is admissible. "Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken" (*Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 615). In the case of twenty years' enjoyment it was said by Alderson, B., that if a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave be given from time to time within the twenty years (*Kinloch* v. *Neville*, 6 M. & W. 795). In the case of a forty years' enjoyment annual payments were made for the use of a cartway during the whole forty years. These payments were treated as having been made for permission to use the way during each successive year; and accordingly there was no user as of right (*Gardner* v. *Hodgson's Co.*, [1903] A. C. 229, see p. 238).

Effect of interruptions.

No interruption for less than a year breaks the period when once the enjoyment as of right has begun. But interruptions acquiesced in for less than a year may show that the enjoyment never was of right (*Eaton* v. *Swansea Co.*, 17 Q. B. 275; see *Brook* v. *Archer* (1868), W. N. 5). See further, as to interruptions in the enjoyment, the note to sect. 4, *post*.

Easement must have been enjoyed as such.

The enjoyment of an easement as of right for twenty years next before the commencement of the suit, within this statute, means a *continuous* enjoyment as of right for twenty years next before the commencement of the suit, of the easement as an easement, without



interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the period of enjoyment, although such unity of possession has its inception after the completion of twenty or forty years (*Battishill* v. *Reed*, 18 C. B. 696). Where a plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under this statute was defeated by a unity of possession from 1843 to 1853 (*Ibid.*; *Damper* v. *Bassett*, [1901] 2 Ch. 350; *Hulbert* v. *Dale*, [1909] 2 Ch. 576). And such unity of possession need not be specially replied under the 5th section (*Onley* v. *Gardiner*, 4 M. & W. 496; see *Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 631; *Richards* v. *Fry*, 7 Ad. & Ell. 698). Easements were defeated by showing unity of possession in *Clay* v. *Thackrah*, 9 C. & P. 47, and *Wilson* v. *Stanley*, 12 Ir. C. L. Rep. (N.S.) 345.

2 & 3 Will. 4, c. 71, s. 2.

Effect of unity of possession.

To support a plea framed on the 2nd section of this statute, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back (*Lawson* v. *Langley*, 4 Ad. & Ell. 890; see *Beeston* v. *Weate*, 5 E. & B. 986). As to pleading licences, see *Tickle* v. *Brown*, 4 Ad. & Ell. 369; *Davies* v. *Williams*, 16 Q. B. 546. See further, as to evidence of user, the note to sect. 4, *post*.

Evidence of user.

3. When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

As to the law of light generally and the modes of claiming it apart from the Act, see *post*, p. 119.

(1) *Period of Twenty Years*...11.
(2) *Subject-matter of the Section*...12.
(3) *Nature of the Enjoyment*...12.
(4) *Custom of London*...14.

(1) Period of twenty years.

The period of twenty years is not limited to the period next before the pending action, but is, by the 4th section, the period next before any action wherein the claim to the right was brought into question (*Cooper* v. *Hubbuck*, 12 C. B. (N.S.) 456). Until such an action is commenced, the right remains inchoate (*Hyman* v. *Van den Bergh*, [1908] 1 Ch. 171). It was said that this inchoate right was not an interest in land or easement known to the law (*Greenhalgh* v. *Brindley*, [1901] 2 Ch. 328). Compare, however, the compensation granted in such a case, *Re London and Tilbury Ry. Co.*, 24 Q. B. D. 326; *Barlow* v. *Ross*, *ibid.*, 381. The Court will not interfere to protect the inchoate right before the expiration of the full twenty years (*Battersea* v. *Commissioners of Sewers*, [1895] 2 Ch. 708; *Bridewell* v. *Ward*, 62 L. J. Q. B. 270). If, however, there has been an enjoyment for nineteen years and a fraction, and then an interruption takes place, the right may be established at the end of the twentieth year, inasmuch as the interruption, under the 4th section, in order to defeat the twenty years' user, must have been acquiesced in or submitted to for a whole year (*Flight* v. *Thomas*, 8 Cl & Fin. 231).

2 & 3 Will. 4, c. 71, s. 3.

No right can, under this section, be acquired as against the Crown, which is not bound thereby (*Perry* v. *Eames*, [1891] 1 Ch. 658; *Wheaton* v. *Maple*, [1893] 3 Ch. 48). There can be no prescription under the statute for light to open ground forming a garden (*Potts* v. *Smith*, 6 Eq. 311). Compare the case of a timber yard (*Roberts* v. *Macord*, 1 M. & Rob. 230). Under the statute light must be claimed in respect of a "building" (*Scott* v. *Pape*, 31 Ch. D. 554); and a structure for storing timber is not such a "building" (*Harris* v. *De Pinna*, 33 Ch. D. 238). Before the Act, light was held not acquired where the building was not permanent (*Maberley* v. *Dowson*, 5 L. J. K. B. 261). The right may be acquired for a church (*Eccl. Comm.* v. *Kino*, 14 Ch. D. 213; *Anderson* v. *Francis*, [1906] W. N. 160; but see *Norfolk* v. *Arbuthnot*, 5 C. P. D. 392); an unconsecrated chapel (*Att.-Gen.* v. *Queen Anne Co.*, 60 L. T. 759); a picture gallery (*ibid.*); a greenhouse (*Clifford* v. *Holt*, [1899] 1 Ch. 698). The building need not be occupied, or fit for occupation, during the period (*Courtauld* v. *Legh*, L. R. 4 Ex. 126; *Collis* v. *Laugher*, [1894] 3 Ch. 659). And even where the building has been pulled down, an injunction may be granted if the right has not been abandoned (*Eccl. Comm.* v. *Kino*, *supra*). Structural identity between the building which acquires the right, and the building which, after the period, is to enjoy the right, is not necessary (*Scott* v. *Pape*, *supra*.).

(2) Subject-matter of the section.

"Building."

"Access."

"Access," in the section, refers not to access through the aperture of the dominant tenement, but to freedom of passage over the servient tenement. The aperture defines the free area (*Scott* v. *Pape*, 31 Ch. D. 554). The aperture may be a skylight (*Easton* v. *Isted*, [1903] 1 Ch. 405), and the light may come through an arch (*Myers* v. *Catterson*, 43 Ch. D. 470), but not through a doorway (*Levet* v. *Gas Light and Coke Co.*, [1919] 1 Ch. 24). The access must be by one and the same definite channel (*Harris* v. *De Pinna*, 33 Ch. D. 238).

(3) Nature of the enjoyment.

Sect. 3 provides a method of claiming light alternative to the methods of claiming it at common law or by lost grant (*Aynsley* v. *Glover*, 10 Ch. 283; *Gardner* v. *Hodgson's Co.*, [1903] A. C. 238). Where light is claimed in either of the two last-mentioned methods, a grant must be presumed ([1903] A. C. 239) and the enjoyment must be as of right (*Colls* v. *Home Stores*, [1904] A. C. 206). Where light is claimed under sect. 3, it is not necessary either to presume a grant (*Tapling* v. *Jones*, 11 H. L. C. 290; *Jordeson* v. *Sutton*, [1898] 2 Ch. 636), or that the "actual enjoyment" should be as of right (*Colls* v. *Home Stores*, [1904] A. C. 205).

Sect. 3 converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years *in the character of an easement*, distinct from the enjoyment of the land itself (*Harbidge* v. *Warwick*, 3 Exch. 552; see *Mallam* v. *Rose*, [1915] 2 Ch. 222). During unity of possession of the dominant and servient tenements there is no such enjoyment (*Ladyman* v. *Grave*, 6 Ch. 763). And it was said that during such unity the running of the twenty years is suspended (*ibid.*, 768; but see *Hyman* v. *Van den Bergh*, [1907] 2 Ch. 526). There is no such unity of possession of glebe and church by a rector as to prevent the acquisition of an easement of light for the church (*Eccl. Comm.* v. *Kino*, 14 Ch. D. 213).

Light claimed under statute, where servient tenement is in occupa-

Where the servient tenement was in the occupation of a lessee for years, and different persons owned the fee simple of the dominant and servient tenements, light was enjoyed for the statutory period, and a right was claimed under sect. 3. The claim was dealt with by Wood, V.-C., who laid down in effect that where there has been

an enjoyment of light for a sufficient period as against the owner of a leasehold interest, the right is under sect. 3 acquired against all persons interested in the servient tenement, including the owners in fee (*Simper* v. *Foley*, 2 J. & H. 564; *Ladyman* v. *Grave*, 6 Ch. 769). The rule on this point where light is claimed by prescription at common law or by lost grant is different, no right being acquired unless the owner in fee has acquiesced for twenty years (*Daniel* v. *North*, 11 East, 370; *Barker* v. *Richardson*, 4 B. & Ald. 579; *Cross* v. *Lewis*, 2 B. & C. 686).

2 & 3 Will. 4, c. 71, s. 3.

tion of lessee for years. Dominant and servient tenements owned in fee; (*a*) by different persons,

The case where the fee simple in the dominant and servient tenements is owned by the same person, but the two tenements are in the occupation of different lessees, and the enjoyment has taken place during such occupation, has also been considered. In dealing with this case, it is necessary to bear in mind two rules of the old law:—(1) If the claimant of an easement be a lessee for years, he must show seisin of the dominant tenement in his lessor and prescribe in him, for a prescription in himself is bad (*Att.-Gen.* v. *Gauntlett*, 3 Yon. & J. 99; *Anon.* v. *Stringer*, 2 Cro. Car. 599; *Bean* v. *Bloom*, 2 W. Bl. 928; *Grimsted* v. *Marlowe*, 4 T. R. 718; *Wheaton* v. *Maple*, [1893] 3 Ch. 63). (2) A man cannot have an easement over his own land (*Metrop. Co.* v. *Fowler*, [1892] 1 Q. B. 71; *Rowe* v. *Siddons*, 22 Q. B. D. 236; *Ladyman* v. *Grave*, 6 Ch. 768). Having regard to these rules, it is clear that by an enjoyment under the circumstances above described, an easement other than light cannot be acquired either by prescription at common law or lost grant (*Large* v. *Pitt*, Peake, 152; *Gayford* v. *Moffatt*, 4 Ch. 133), or under sect. 2 of the Prescription Act (*Kilgour* v. *Gaddes*, [1904] 1 K. B. 462, and other cases, *ante*, p. 8). As regards the easement of light, it seems clear that by prescription at common law, this easement also could not be claimed on the ground of an enjoyment under the above circumstances (see *Fear* v. *Morgan*, [1906] 2 Ch. 416). The words of sect. 3, however (which differ from sect. 2), give rise to a new and exceptional result. It has been held by the House of Lords that under sect. 3 the right to light can be acquired by a termor over land held by another termor under the same reversion (*Morgan* v. *Fear*, [1907] A. C. 429). This holding was based upon earlier authorities which were referred to in the Court of Appeal as laying down that the rights so acquired enure not only as between the two lessees, but as against all owners of the servient tenement and in favour of all owners of the dominant tenement (*Fear* v. *Morgan*, [1906] 2 Ch. 422; see *Frewen* v. *Philipps*, 11 C. B. (N.S.) 449; *Mitchell* v. *Cantrill*, 37 Ch. D. 56; *Robson* v. *Edwards*, [1893] 2 Ch. 146; *Richardson* v. *Graham*, [1908] 1 K. B. 45). The Court of Appeal also approved *Wheaton* v. *Maple*, where Lindley, L.J., laid down ([1893] 3 Ch. 65) that under sect. 3 a right to light cannot be acquired for a term of years. It seems difficult to reconcile these holdings with the old rule that a man cannot have an easement over his own land.

(*b*) by the same person.

The question whether there has been an "actual enjoyment" of light is a question of fact depending on the circumstances of each case (*Smith* v. *Baxter*, [1900] 2 Ch. 138). Continuous user is not necessary (*Cooper* v. *Straker*, 40 Ch. D. 26). The owner of a building having windows with moveable shutters acquires the right if, during twenty years, he opens the shutters at any time he pleases (*ibid.*). Boarding over apertures for more than a year was such a discontinuance of user as prevented the acquisition of a right (*Smith* v. *Baxter*, *supra*). See *Hollins* v. *Verney* (13 Q. B. D. 314) and other cases, *post*, p. 15.

"Actual enjoyment."

"Interruption" in the section bears the same meaning as in sect. 4, and refers to adverse obstruction, not discontinuance of

Interruption.

2 & 3 Will. 4, c. 71, s. 3.

user (*Smith* v. *Baxter*, [1900] 2 Ch. 138; *Ladyman* v. *Grave*, 6 Ch. 768). A fluctuating interruption to light is not sufficient (*Presland* v. *Bingham*, 41 Ch. D. 268). A hoarding for the purpose of an interruption may be erected by a railway company (*Bonner* v. *G. W. Ry.*, 24 Ch. D. 1; see *Myers* v. *Catterson*, 43 Ch. D. 470; *Foster* v. *L. C. D. Ry.*, [1895] 1 Q. B. 711) or by a local authority on a Metropolitan Open Space (M. O. S. Act, 1881), the hoarding not being a "building" prohibited by the last-mentioned Act (*Paddington* v. *Att.-Gen.*, [1906] A. C. 1).

Payment of rent or verbal permission.

Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within this section (*Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630; see *Gardner* v. *Hodgson's Co.*, [1901] 2 Ch. 215). An actual enjoyment of light for twenty years, even under permission verbally given by the person having right to obstruct, may create an easement (*London* v. *Pewterers' Co.*, 2 M. & Rob. 409; see as to a verbal agreement, *Judge* v. *Lowe*, I. R. 7 C. L. 291; *Mallam* v. *Rose*, [1915] 2 Ch. 222). On the other hand, a writing signed by A, the owner of the dominant tenement, but not by B, the owner of the servient tenement, declaring that A would at B's request block up windows, and in the meantime pay B sixpence a year, was a sufficient "consent" to prevent an easement (*Bewley* v. *Atkinson*, 13 Ch. D. 283; see *Smith* v. *Colbourne*, [1914] 2 Ch. 533). So a letter signed by the occupier of the dominant tenement was a sufficient "consent" (*Hyman* v. *Van den Bergh*, [1907] 2 Ch. 531). But an inscription on a stone placed in the wall of the dominant tenement by its owner was not a sufficient agreement (*Ruscoe* v. *Grounsell*, 89 L. T. 426). In the case of a lessee claiming the right to light, a reservation in the lease of the right to obstruct was a sufficient "agreement" (*Haynes* v. *King*, [1893] 3 Ch. 439); *secus* an exception in the lease of any right restricting the free use of adjoining land (*Mitchell* v. *Cantrill*, 37 Ch. D. 56). An agreement to pay rent for windows overlooking property included a skylight (*Easton* v. *Isted*, [1903] 1 Ch. 405).

"Consent or agreement by writing."

(4) Custom of London.

By the custom of London (which is stated in the case of *Wynstanley* v. *Lee*, 2 Swanst. 339, 340; see *Perry* v. *Eames*, [1891] 1 Ch. 658), an occupier of a house has not an absolute property in light, but the adjoining owner may build to any height, unless precluded by writing between them. The custom is not repealed *merely by the length of the time* of enjoyment (2 Swanst. 341; see Privilegia Londini, p. 101, cited Mood. & Malk. 351; and see Godb. 183; Yelv. 215; 1 Bulstr. 115; Com. R. 273; 1 Burr. 248; 3 C. & P. 317; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97). This custom remains binding where light is claimed by prescription at common law. But where the claim is under the statute, this section controls the custom (*Perry* v. *Eames*, [1891] 1 Ch. 667; *Salters' Co.* v. *Jay*, 3 Q. B. 109; *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855).

Before-mentioned periods to be deemed those next before suit for claims to which such periods relate.

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted

shall have had or shall have notice thereof, and of the person making or authorizing the same to be made. 2 & 3 Will. 4, c. 71, s. 4.

(1) *Enjoyment required by the Section*...15.
(2) *Interruptions*...16.

(1) Enjoyment required by the section.

This section is nothing but an exposition of the proof required to establish the right (*Jones* v. *Price*, 3 Bing. N. C. 52). The enjoyment of the occupier which gives right under this statute is enjoyment for thirty, sixty, twenty, or forty years, according to the nature of the case, next before the commencement of some suit, and not before the act complained of (*Ward* v. *Robins*, 15 M. & W. 242; *Richards* v. *Fry*, 7 Ad. & Ell. 707; see *Wright* v. *Williams*, 1 M. & W. 98; *R.* v. *Calow*, 3 M. & S. 22). A plea of forty or twenty years' user, under the 2nd and 4th sections of this statute, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it (*Parker* v. *Mitchell*, 11 Ad. & Ell. 788).

Where a right of way was claimed by prescription at common law, it was necessary to show user for at least twenty years as of right; but not necessarily for the twenty years next before the commencement of the suit (*Darling* v. *Clue*, 4 F. & F. 329).

The period referred to in sect. 4 is not limited to the period next before the pending action, but may be the period next before any action in which the right is brought in question (*Cooper* v. *Hubbuck*, 12 C. B. (N.S.) 456). Until such an action is commenced, the right remains inchoate (*Hyman* v. *Van den Bergh*, [1908] 1 Ch. 171). In an action relating to light claimed under the statute, the Court refused in computing this period to exclude a time during which the light had been enjoyed by written consent (*Hyman* v. *Van den Bergh*, [1907] 2 Ch. 528; [1908] 1 Ch. 171). As to whether in such an action the Court can exclude from the period a time of unity of possession, see the dicta of Lord Hatherley, *Ladyman* v. *Grave*, 6 Ch. 768. In an action relating to a right of way claimed under the statute the Courts have held that a time of unity of possession cannot be excluded from the period (*Battishill* v. *Reed*, 18 C. B. 696; *Onley* v. *Gardiner*, 4 M. & W. 496).

Requisite evidence of user during statutory period.

It was said in earlier cases that some act of user must be shown to have been exercised in the year in which the action was brought (*Lowe* v. *Carpenter*, 6 Exch. 825; see *Ennor* v. *Barwell*, 2 Giff. 420); and also during the first year (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161). *Carr* v. *Foster* (3 Q. B. 581) seemed to intimate that the intermediate time was not so material (but see *De la Warr* v. *Miles*, 17 Ch. D. 593). The Court of Appeal, however, denied any distinction between non-user for a year at the beginning or end or in the middle of the statutory period. Proof of actual user in every year is not essential, but the absence of user for any year will be fatal, unless explained in such a way as to warrant the inference of continual actual enjoyment, notwithstanding such temporary non-user (*Hollins* v. *Verney*, 13 Q. B. D. 314, the case of a right of way. See, in the case of light, *Smith* v. *Baxter*, [1900] 2 Ch. 138). The Court of Appeal further laid down that no actual user can be sufficient to satisfy the statute, unless during the whole statutory term (whether user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised (*Hollins* v. *Verney*, 13 Q. B. D. 315; see *MacInroy* v. *Athole*, [1891] A. C. 633). If there be ten years' enjoyment of a right of way, and then a

2 & 3 Will. 4, c. 71, s. 4.

cessation under a temporary agreement for another ten years, this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under this statute (*Payne* v. *Shedden*, 1 M. & Rob. 383; see *Carr* v. *Foster*, 3 Q. B. 585).

(2) Interruption.

An easement was established under this Act which had only been enjoyed for nineteen years and a fraction, and then interrupted during the remainder of the twentieth year and down to the commencement of the action, the action, however, having been commenced within a year from the notice of the interruption (*Flight* v. *Thomas*, 8 Cl. & Fin. 231; see *Eaton* v. *Swansea Co.*, 17 Q. B. 272). But the inchoate right will not be protected before the expiration of the full twenty years (*Battersea* v. *Commrs. of Sewers*, [1895] 2 Ch. 708; see *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324). The interruption whch defeats a prescriptive right under the Prescription Act is an adverse obstruction, not a mere discontinuance of user by the claimant himself (*Carr* v. *Foster*, 3 Q. B. 581; see note to sect. 6, *post*). Mere intermission of user for more than a year, in the middle of the prescriptive period, is not necessarily an "interruption"; such an intermission may be explained, and it is for the jury to say whether there has notwithstanding been substantial enjoyment for the requisite period (*Ibid.*; see *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630; *Hollins* v. *Verney*, 13 Q. B. D. 314; *Smith* v. *Baxter*, [1900] 2 Ch. 138). An interruption from natural causes of the flow of a stream did not prevent prescription. "If such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment" (*Hall* v. *Swift*, 4 Bing. (N.C.) 381; see *Carr* v. *Foster*, 3 Q. B. 585, 586). The interruption may be caused by the act of a stranger, as well as by that of the person in whose land the easement is claimed (*Davies* v. *Williams*, 16 Q. B. 558). A fluctuating interruption was held not sufficient to prevent a right to light being acquired (*Presland* v. *Bingham*, 41 Ch. D. 268, where the onus of proof as to interruptions was considered).

An interruption in the enjoyment may cause the acquisition of a qualified easement instead of preventing the acquisition of any easement (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; see *Brook* v. *Archer* (1868), W. N. 5). Although, under this section, no interruption will be sufficient, unless acquiesced in for a year, yet an interruption for a shorter period may show that the enjoyment never was as of right, and thereby prevent a right being acquired under sect. 2 (*Eaton* v. *Swansea Co.*, 17 Q. B. 267; see *Brook* v. *Archer* (1868), W. N. 5).

Acquiescence in interruptions.

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from that promise before proceedings were taken, it was held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy (*Gale* v. *Abbott*, 10 W. R. 748). It was said by Kindersley, V.-C., that if the plaintiff had allowed twelve months to elapse without taking proceedings, even though he had continued to complain, that would have been a submission to the interruption within sect. 4 (*Ibid.*). It has, however, been held that, in order to negative submission to the interruption to light, it is not necessary to bring an action or actively remove the obstruction (*Glover* v. *Coleman*, L. R. 10 C. P. 108). Non-acquiescence in an interruption is a question of fact for a jury (*Bennison* v. *Cartwright*, 5 B. & S. 1). An interruption acquiesced in for four years before action barred the right (*Tilbury* v. *Silva*, 45 Ch. D. 98). A person asserting an interruption must prove that some notice other than the mere existence of a physical obstruction was given to the person interrupted of the person interrupting (*Seddon* v. *Bank of Bolton*, 19 Ch. D. 462).

As to evidence of interruptions to the right of common, see *Davies* v. *Williams*, 16 Q. B. 558; *Welcome* v. *Upton*, 6 M. & W. 536. Where the lord claimed to stop the user of a common, the fact that some of the tenants yielded was not an "interruption" so as to bar the rights of freeholders, who never acquiesced in the claim (*Warrick* v. *Queen's College*, 10 Eq. 105).

2 & 3 Will. 4, c. 71, s. 4.

5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In actions on the case the claimant may allege his right generally as before the Act.

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this Act may be alleged; and exceptions or other matters to be replied to specially.

Before this Act a prescription in a *que estate* must always have been laid in the person who was seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord (6 Rep. 60 a; Fortesc. 340). The practice, in a plea justifying under a right of common, was to show a seisin in fee of the land in respect of which the defendant claimed a right of common, to have been either in himself or in some other person under whom he claimed, and then to prescribe in the *que estate* by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial (*Grimstead* v. *Marlow*, 4 T. R. 718; 1 Wms. Saund. 346, n. (1)). If the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad (*Att.-Gen.* v. *Gauntlett*, 3 Y. & Jer. 93).

Pleading before 2 & 3 Will. 4, c. 71.

By the above section, the claimant might allege his right generally; and in pleading to actions of trespass, it was sufficient to allege enjoyment as of right by the occupiers of the dominant tenement

Pleading under 2 & 3 Will. 4, c. 71.

2 & 3 Will. 4, c. 71, s. 5.

during the proper period. In the cases mentioned in the Act enjoyment "as of right" must be alleged in those words (*Stamford* v. *Dunbar*, 13 M. & W. 827; *Holford* v. *Hankinson*, 5 Q. B. 584). For the meaning of "enjoyment as of right," see *Tickle* v. *Brown*, 4 Ad. & Ell. 369, and other cases quoted, *ante*, p. 9.

Evidence admissible under a general denial of enjoyment as of right.

Under a general denial of the enjoyment as of right, evidence of unity of possession was under this section admissible, inasmuch as such proof went to show that the enjoyment was not as of right (*Onley* v. *Gardiner*, 4 M. & W. 496; *Clayton* v. *Corby*, 2 Q. B. 813; *England* v. *Wall*, 10 M. & W. 699; *Clay* v. *Thackrah*, 9 C. & P. 47). Under such a general denial "the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was a user or enjoyment under a claim of right; the words of the 5th section 'not inconsistent with the simple fact of enjoyment,' being referable to the fact of enjoyment as before stated in the Act, viz., an enjoyment claimed and exercised as of right" (*Beasly* v. *Clark*, 2 Bing. (N.C.) 709). So, under a general denial, evidence might be given of asking leave within the period (*Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 614), or of an agreement commencing within the period (*Tickle* v. *Brown*, 4 Ad. & Ell. 383). As to whether a parol permission extending over the whole period could be shown, see *Kinloch* v. *Neville*, 6 M. & W. 806.

Matters to be replied specially.

It was said that where a defendant justified under an enjoyment for a statutory period if the plaintiff relied on a licence covering the whole period, it must be replied specially (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; see *Lowry* v. *Crothers*, I. R. 5 C. L. 98). Where a defendant pleaded an enjoyment for a statutory period, and the plaintiff relied on the existence of a life estate, &c. (see sect. 7), such life estate had to be replied specially (*Pye* v. *Mumford*, 11 Q. B. 666).

Pleading prescriptive rights under the Jud. Acts.

The above section and the decisions under it must now be read in connection with the rules of pleading established under the Judicature Acts, and so far as inconsistent therewith the section must be taken to have been repealed (Judicature Act, 1875, ss. 17, 21, 33). R. S. C., Ord. 19, provides (r. 4) that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies; and further (r. 15) that a party must raise by his pleading all matters which show the action or counterclaim not to be maintainable, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise; and further (r. 17), that in a defence or reply a general denial shall not be sufficient, but the party must deal specifically with each allegation of fact of which he does not admit the truth. Pleadings need not state inferences of law (*Hanmer* v. *Flight*, 24 W. R. 347).

The forms of pleading contained in the appendices to R. S. C. (see Ord. 19, r. 5)—which are not to be slavishly adhered to (*The Isis*, 8 P. D. 228), but illustrate the meaning of the Act (*Turquand* v. *Fearon*, 40 L. T. 545)—include a statement of claim in an action for obstruction of light (App. C. sect. 6, No. 10), which contains the simple allegation, "The plaintiff is the owner of a house in which are the following ancient lights, &c." Further, to the defence in an action for polluting water given in App. D. sect. 6, there is added the following note:—"If the defendant claims the right by prescription or otherwise to do what is complained of, he must say

so, and must state the grounds of his claim, *i.e.* whether by prescription, grant, or what." 2 & 3 Will. 4, c. 71, s. 5.

As to pleading a claim in various forms, see further the note, *post*, p. 23.

It would seem from Ord. 19, that the general allegations and denials which were sufficient within sect. 5 of the Prescription Act, 1832, are now insufficient. Accordingly, in an action to restrain the obstruction of an alleged private right of way, the plaintiff was held bound in pleading to state the title by which he claimed, and whether by grant or by prescriptive user (*Harris* v. *Jenkins*, 22 Ch. D. 483; *Farrell* v. *Coogan*, 12 L. R. Ir. 14; see *Pledge* v. *Pomfret*, [1905] W. N. 56). Where in trespass the defendants pleaded that the *locus in quo* was a highway, they were ordered to show the mode in which they claimed that it had become a highway, and to give particulars of dedication (*Spedding* v. *Fitzpatrick*, 38 Ch. D. 410).

Under the R. S. C., Ord. 19, r. 18, a joinder of issue operates as a denial of every material allegation of facts in the defence or reply, as the case may be. See also Ord. 23, r. 1; Ord. 27, r. 13. Where a party justifies the acts complained of by an allegation of a prescriptive right, it is doubtful whether a mere joinder of issue will include a denial of the allegation that the acts were done in exercise of the right (see Bullen & Leake, 5th ed. 1000).

Amendments.

According to the practice before the Judicature Acts, it was a rule that in cases of prescription the allegation must be proved as laid (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 313; see *Brook* v. *Willet*, 2 H. Bl. 224). It was not material that a party proved a larger right than he alleged (Cro. Eliz. 722; 1 Taunt. 142; *West* v. *Andrews*, 1 B. & C. 77; *Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Manifold* v. *Pennington*, 4 B. & Cr. 161; *Pigott* v. *Bayley*, 6 B. & C. 16); but if he alleged a larger right than he proved, he could not amend *Drewell* v. *Taylor*, 3 B. & Ad. 735; see *Ricketts* v. *Salway*, 2 B. & Ald. 363; *Beadsworth* v. *Torkington*, 1 Q. B. 782; *Brunton* v. *Hall*, *Ibid.*, 792). If the allegation of right was divisible, the plaintiff was entitled to a limited verdict for a divisible part of the right alleged, though he failed to prove the residue (*Giles* v. *Groves*, 12 Q. B. 721). Compare the difference between allegation and proof in *Farquhar* v. *Newbury*, [1909] 1 Ch. 12; *Att.-Gen.* v. *G. N. Ry.*, *ibid.* 775.

Since the Judicature Acts, a much wider liberty of amendment has been introduced. R. S. C., Ord. 28, r. 1, provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. And this wider liberty of amendment has been allowed in pleading prescriptive rights (*Budding* v. *Murdoch*, 1 Ch. D. 42; *Laird* v *Briggs*, 19 Ch. D. 22; *Bourke* v. *Alexandra Co.* (1877), W. N. 30). As to amending at the trial by pleading lost grant, see *Brown* v. *Dunstable*, [1899] 2 Ch. 387; *Gardner* v. *Hodgson's Co.*, [1900] 1 Ch. 601; *Smith* v. *Baxter*, [1900] 2 Ch. 147.

As to new assignement under the old practice, see *Cowling* v. *Higginson*, 4 M. & W. 245; *Lane* v. *Hone*, I. R. 6 C. L. 232; and the old rule, Ord. 23, r. 6.

Restricting the presumption to be allowed in support of claims herein provided for.

6. In the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim.

2 & 3 Will. 4, c. 71, s. 6.

This section forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed (*Bright* v. *Walker*, 1 C. M. & R. 222). Compare the refusal of the Court to recognise inchoate easements (*Battersea* v. *Commrs. of Sewers*, [1895] 2 Ch. 708; *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324). The meaning of this section seems to be that no inference in support of the claim shall be derived from the bare fact of enjoyment for less than the prescribed number of years; but when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant (*Hanmer* v. *Chance*, 4 D. J. & S. 626). Thus acquiescence on the part of the owner of a servient tenement over which an easement is in fact used, in the expenditure of money by the owner of the dominant tenement with a view to such user, might prevent the former from interfering with such user although the easement may not have been enjoyed for the full period (see *Rochdale Canal Co.* v. *King*, 2 Sim. (N.S.) 88; *Bankart* v. *Tennant*, 10 Eq. 141).

In a case under the 1st section, if proof be given of a right of enjoyment at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is a question for the jury whether at that time the right had ceased or was still substantially enjoyed. The inference from the facts proved on this point is not a presumption within the 6th section. Where a commoner has ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after, a jury were justified in finding a continued enjoyment of the right (*Carr* v. *Foster*, 3 Q. B. 581; see *Hall* v. *Swift*, 4 Bing (N.C.) 381; *Dare* v. *Heathcote*, 25 L. J. Ex. 245).

In the case of a profit *à prendre*, a lost grant might before the Act have been inferred from twenty years' user. Since the Act it seems that, having regard to sects. 1 and 6, the minimum period for which the user should be proved must in all methods of claim be thirty years.

Proviso for persons under disabilities.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

It is the intention of the Act that as against a party under disability an enjoyment of thirty years, or twenty years, shall be of no avail, but one of sixty or forty years shall confer an absolute title (*Wright* v. *Williams*, 1 M. & W. 77). This section in express terms excludes the time that the person capable of resisting the claim is *tenant for life*. During a tenancy for life the exercise of an easement will not affect the fee; in order to do that there must be enjoyment *against* an owner of the fee (*Bright* v. *Walker*, 1 C. M. & R. 222). A claim was defeated by proof of an outstanding life estate (*Hale* v. *Oldroyd*, 14 M. & W. 739; *Roberts* v. *James*, 89 L. T. 282). Under sects. 1, 4 and 7 of this Act an enjoyment as of

right for thirty years next before the commencement of an action may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such period intervened), the estate over which the right has been exercised was in the hands of a tenant for life (*Clayton* v. *Corby*, 2 Q. B. 813. A woman married since 1882 can resist a claim (*Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 268, applying the principle of *Lowe* v. *Fox*, 15 Q. B. D. 676, decided under sect. 7 of the Limitation Act, 1623, *post*, p. 266, and *Re Hastings; Hallett* v. *Hastings*, 35 Ch. D. 105).

2 & 3 Will. 4, c. 71, s. 7.

Cases where right is declared absolute.

The cases in which the right is declared by the statute to be absolute and indefeasible are as follows:—By the 1st section, where the right, profit or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any watercourse, or the use of any water, shall have been been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

What time to be excluded in computing the term of forty years appointed by this Act.

8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (*f*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*g*).

Omission of easement in 8th section.

(*f*) The question whether "easement" should in this section be substituted for "convenient" was treated by the Court of Appeal as open (*Laird* v. *Briggs*, 19 Ch. D. 26, 33).

(*g*) The 8th section applies expressly to the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold that it applies also to twenty years (*Palk* v. *Skinner*, 18 Q. B. 568). The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned (*Onley* v. *Gardiner*, 4 M. & W. 500). A tenancy for life is excluded from the period of forty years by the 8th section on condition that the reversioner shall bring his action within three years after its determination; a user of forty years confers a *prima*

2 & 3 Will. 4, c. 71, s. 8.

facie title, which is good, unless the reversioner in resisting the claim to an easement pursues his remedy within the three years (*Wright* v. *Williams*, 1 M. & W. 77).

The word "reversion" at the end of the section does not include remainder (*Symons* v. *Leaker*, 15 Q. B. D. 629; see *Laird* v. *Briggs*, 16 Ch. D. 440; 19 Ch. D. 22, where the distinction between a "reversion" and a "remainder" is discussed. See also Co. Litt. 22, 142 b; *Re Hunter and Hewlett*, [1907] 1 Ch. 46; and as to the estates which can now exist at law, see L. P. Act, 1925, s. 1, *post*).

Replication of life estate.

Where a replication to a plea of enjoyment of an easement for forty years, under this Act, sets up a life estate in order to bring the case within the 8th section of the Act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate (*Wright* v. *Williams*, 1 M. & W. 100).

Not to extend to Scotland.

9. This Act shall not extend to Scotland.

This Act has been extended to Ireland by 21 & 22 Vict. c. 42.

II.—Modes of claiming Incorporeal Rights apart from the Prescription Act, 1832.

A. *Whether the Prescription Act*, 1832, *has superseded the Common Law*...22.

B. *Of Prescription generally; and herein of Prescription at Common Law and by Lost Grant*...23.

C. *Of Custom*...34

D. *Of Grants, Express and Implied, of Incorporeal Rights; and herein of Licences in Relation to Real Estate*...40

A. *Whether the Prescription Act*, 1832, *has superseded the Common Law.*

Prescription Act has not superseded common law.

There is nothing in the Prescription Act, 1832, to interfere with a claim of a right of way or other easement by express grant (*Bright* v. *Walker*, 1 C. M. & R. 223; *Livett* v. *Wilson*, 3 Bing. 115; *Plant* v. *James*, 4 Ad. & Ell. 749, 765; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). Nor has that statute superseded the common law; so that a party may proceed either under the statute or according to the common law (*Holford* v. *Hankinson*, 5 Q. B. 584; *Gardner* v. *Hodgson's Co.*, [1903] A. C. 238). In *Onley* v. *Gardiner* (4 M. & W. 496), where the defendant failed in proving under the statute a right of way in consequence of unity of possession, the Court allowed a right of way immemorially to be pleaded by amendment (*Richards* v. *Fry*, 3 Nev. & P. 72; *Welcome* v. *Upton*, 5 M. & W. 403, 404; *Parker* v. *Mitchell*, 11 Ad. & Ell. 788; *Lowe* v. *Carpenter*, 6 Ex. 825). Rights of common were established by prescription at common law, independently of the statute (*Warrick* v. *Queen's College*, 6 Ch. 728).

The case of light is specially dealt with by sect. 3, and it has been suggested that by that section the earlier methods of claim were taken away or limited. (See Lord Westbury's judgment, *Tapling* v. *Jones*, 11 H. L. C. 290; and the remarks thereon of Farwell, L.J.; *Hyman* v. *Van den Bergh*, [1908] 1 Ch. 176; *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 863). In a case, however, where unity of possession was raised as an objection to the plaintiff's title

under the statute, he established his title independently of the statute by proof of enjoyment from time immemorial (*Aynsley* v. *Glover*, 10 Ch. 283); Mellish, L.J., remarking that the Prescription Act, 1832, had not taken away any of the modes of claiming easements which previously existed (*Ib.* 285; see *Dalton* v. *Angus*, 6 App. Cas. 814; *Smith* v. *Baxter*, [1900] 2 Ch. 146; *Gardner* v. *Hodgson's Co.*, [1903] A. C. 238). In *Norfolk* v. *Arbuthnot* (5 C. P. D. 392), and *Ecclesiastical Commrs.* v. *Kino* (14 Ch. D. 213), both the former modes of claiming light were treated as still existing. Prescription.

In the case of tithes, where a party pleads a modus existing from time immemorial, he may proceed just in the same way as he might have done before the Tithe Act, 1832, was passed (*Stamford* v. *Dunbar*, 13 M. & W. 822).

It is frequently advisable to plead together in the same case alternative claims of (1) prescription by statute, (2) prescription at common law, and (3) lost grant. For if on the evidence the enjoyment could not be brought down to the commencement of action, prescription by statute could not be relied upon. Again, if the enjoyment were shown to have commenced within the period of legal memory, prescription at common law could not be relied upon. See Bullen & Leake, Pleadings. The three alternative claims were pleaded together in *Bailey* v. *Stevens*, 12 C. B. (N.S.) 91; *Norfolk* v. *Arbuthnot*, 4 C. P. D. 293. See as to pleading lost grant, *post*, p. 26. Pleading.

In stating a claim under the statute it may be also advisable to plead prescription both for the longer and shorter periods mentioned in sects. 1 and 2 (*Stamford* v. *Dunbar*, 13 M. & W. 827); the reason being to meet a possible difficulty arising from failure of proof by reason of interruption, &c. (see *Welcome* v. *Upton*, 5 M. & W. 398; 6 M. & W. 536; *Hollins* v. *Verney*, 13 Q. B. D. 304, and cases quoted in the judgment).

B. *Prescription generally; and herein of Prescription at Common Law, and by Lost Grant.*

Prescription (referred to in the above Act as a ground on which the claims mentioned in sects. 1 and 2 can be made) is a title taking its substance of use and time allowed by law. *Præscriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis.* To prescription two things are incidents inseparable, viz., possession or usage and time. Possession must have three qualities, it must be long, continual, and peaceable. (Co. Litt. 113 a & b). According to the common law, all prescription presupposes a grant (*Gardner* v. *Hodgson's Co.*, [1903] A. C. 239; *Goodman* v. *Saltash*, 7 App. Cas. 654). And where the above incidents are found, the Court will if possible presume a grant of the right in question. For where there has been long-continued possession in assertion of a right, the right should be presumed to have had a legal origin if such a legal origin was possible. And the Court should presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title (*Philipps* v. *Halliday*, [1891] A. C. 231; *Clippens* v. *Edinburgh*, [1904] A. C. 69). The rule with regard to prescription is, that every prescription is good, if by any possibility it can be supposed to have had a legal commencement (*Pelham* v. *Pickersgill*, 1 T. R. 667). For supposing this, the Court has "a great power of imagination" (*Neaverson* v. *Peterborough Council* [1902] 1 Ch. 573. But see *Lyell* v. *Hothfield*, [1914] 3 K. B. 911). But for such things as can have no lawful beginning, nor be created by grant, reservation or deed, no prescription is good Prescription generally. Presupposes grant.

Prescription.

(*Dalton* v. *Angus*, 6 A. C. 795; *Goodman* v. *Saltash*, 7 A. C. 655; *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 198; cf. *Att.-Gen.* v. *Horner*, [1913] 2 Ch. 140). As to presuming a legal origin in support of a claim to prescriptive rights, see further, *Tilbury* v. *Silva*, 45 Ch. D. 98; *Simpson* v. *Godmanchester*, [1896] 1 Ch. 218; *Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 698; *Att.-Gen.* v. *Copeland*, [1902] 1 K. B. 690; *Foster* v. *Warblington*, [1906] 1 K. B. 679.

The common law doctrine of prescription was adopted for the convenience of the community (see *Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 569; *Dalton* v. *Angus*, 6 A. C. 818); and rests upon acquiescence (*Sturges* v. *Bridgman*, 11 Ch. D. 863; *Dalton* v. *Angus*, 6 A. C. 773).

Three methods of claiming prescriptive rights.

The three legal methods in which prescriptive rights can be claimed are: (1) prescription at common law; (2) claims based on lost grant; and (3) prescription under the Prescription Act, 1832. The most important distinction between these methods relates to the period during which evidence of acts of user must be given. This distinction is to a certain extent historical, and historically speaking the method which came earliest into use was prescription at common law.

Prescription at common law

As regards prescription at common law, Littleton laid down (sect. 170) that time out of mind and title by prescription were all one in law. And the time prescribed by law is time whereof there is no memory of man to the contrary (Co. Litt. 114 b). There was originally no fixed period of prescription, but by several statutes periods were limited for the bringing of actions for the recovery of real estate; and in particular by the Statute of Westminster (3 Edw. I. c. 39) provision was made for protecting the possession of real estate when as old as the reign of Richard I. The Courts applied this analogy to claims to incorporeal hereditaments based on prescription (*Angus* v. *Dalton*, 3 Q. B. D. 103; *Bryant* v. *Foot*, L. R. 2 Q. B. 180), and fixed the term of legal memory at 1189, the first year of the reign of Richard I.; see *Chapman* v. *Smith*, 2 Ves. Sen. 511. According to the rule first adopted, they required the evidence of enjoyment to be carried back to that year (*Linn Regis* v. *Taylor*, 3 Lev. 160; see recital in Prescription Act, 1832, p. 1, *supra*). As time went on this became impossible, and according to the rule next adopted the evidence was sufficient if carried back as far as living memory would go (*Angus* v. *Dalton*, 3 Q. B. D. 104). Later on a third rule followed the analogy of the statute, 21 Jac. 1, c. 16, which in the case of real estate limited the time for bringing possessory actions to twenty years; and the Courts laid down that if evidence could be given of twenty years' enjoyment, the prescriptive right would be presumed to have existed from 1189 (*Angus* v. *Dalton*, 3 Q. B. D. 105; see notes to *Yard* v. *Ford*, 2 Wms. Saund. 503; *Bealey* v. *Shaw*, 6 East, 214). In effect, they presumed a grant of the right executed in or before that year.

Claims based on lost grant.

It was found in practice that a claim by prescription at common law could often be defeated; *e.g.*, by showing that the user originated in an existing deed executed since 1189 (*Welcome* v. *Upton*, 5 M. & W. 398), or by showing that a building for which the right to light was claimed was erected since 1189 (*Norfolk* v. *Arbuthnot*, 5 C. P. D. 393), or by showing unity of ownership since 1189 (*Mounsey* v. *Ismay*, 3 H. & C. 486; 34 L. J. Ex. 55). To meet this difficulty of proof, the Courts adopted a new device, and held that evidence of user for twenty years was sufficient to raise the presumption of a lost grant executed at some date since 1189 (*Angus* v. *Dalton*, 3 Q. B. D. 105). And juries were directed to find the execution of such a deed although known to be a fiction. These difficulties gave rise to the Prescription Act, 1832 (*Angus* v. *Dalton*,

3 Q. B. D. 105; *Bryant* v. *Foot*, L. R. 2 Q. B. 181; *Mounsey* v. *Ismay*, 34 L. J. Ex. 55), which provided that a claim to rights which had been enjoyed for certain specified periods before action should not be defeated merely by showing that the enjoyment began at any time prior to such period but since 1189.

Prescription under the statute.

As to prescription under the statute, see the notes to the several sections set out above. The remainder of the present note relates primarily to prescription at common law and lost grant.

Doctrine of presuming lost grant.

The doctrine of lost grant was thus stated by Parke, B. (*Bright* v. *Walker*, 1 C. M. & R. 217): "For a long series of years prior to the passing of the Act 2 & 3 Will. 4, c. 71, judges have been in the habit, for the furtherance of justice, and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the Statute of Limitations (21 Jac. 1, c. 16). Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but (2 Stark. on Ev. 669) a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation. And though in theory it was mere presumptive evidence, in practice and effect it was a bar. The Act 2 & 3 Will. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury" (see *Holcroft* v. *Heel*, 1 Bos. & P. 400; *Campbell* v. *Wilson*, 3 East, 294; *Read* v. *Brookman*, 3 T. R. 591; *Brown* v. *Dunstable*, [1899] 2 Ch. 387). In the older cases uninterrupted enjoyment of an easement for twenty years was treated sometimes as a bar to an action on the case, sometimes as evidence from which the jury were directed by the Court to presume a grant, licence or agreement (*Yard* v. *Ford*, 2 Wms. Saund. 503; *Cross* v. *Lewis*, 2 B. & C. 689; see *Livett* v. *Wilson*, 3 Bing. 118). It was said that the lost grant doctrine was ancillary to common law prescription, and only applicable where common law prescription could not be applied (*Bryant* v. *Lefever*, 4 C. P. D. 177; *Dalton* v. *Angus*, 6 App. Cas. 816).

Present extent of doctrine.

Since the Prescription Act, 1832, the doctrine has been resorted to as an alternative not only to prescription at common law, but also to prescription under the Act (*Simpson* v. *Godmanchester*, [1897] A. C. 696; and see *Gardner* v. *Hodgson's Co.*, [1903] A. C. 229; *Neaverson* v. *Peterborough Council*, [1902] 1 Ch. 557). The Court has presumed lost grants in the nature of an agreement substituting one way for another (*Hulbert* v. *Dale*, [1909] 2 Ch. 570), or of an agreement as to paying a quit rent (*Bomford* v. *Neville*, [1904] 1 I. R. 474; *Foley* v. *Dudley*, [1910] 1 K. B. 317). It may presume not only a grant from an individual, but an award (*East Stonehouse Council* v. *Willoughby*, [1902] 2 K. B. 332), or a faculty from the Ordinary (*Philipps* v. *Halliday*, [1891] A. C. 228), or a regulation of a Port Authority (*Att.-Gen.* v. *Wright*, [1897] 2 Q. B. 318), or a grant from the Crown (*Somersetshire* v. *Bridgwater*, 89 L. T. 732, where the right of a corporation to discharge sewage into a tidal river was thus supported). So a grant from the Crown of a lost charter may be presumed (*Goodtitle* v. *Baldwin*, 11 East, 490; *Att.-Gen.* v. *Horner*, 14 Q. B. D. 263; *Rivers* v. *Adams*, 3 Ex. D. 365, and compare the cases as to lost grants by the Crown, *post*, p. 145). Where the right was capable of being granted but the enjoyment is shown to have had in fact an invalid origin, a subsequent lost grant may possibly be presumed (*Philipps* v. *Halliday*, [1891] A. C. 236).

Rebutting presumption.

As to rebutting this presumption by giving evidence that no grant was in fact made, the better opinion seems to be that such evidence cannot be given. (See the opinion of Lord Blackburn, 6 App. Cas. 812; Lindley, J., *ibid.* 765; Thesiger, L.J., 4 Q. B. D. 172; Cotton, L.J., *ibid.*, 187. See *contra*, Cockburn, C.J., in *Angus*

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v. *Dalton*, 3 Q. B. D. 130; Brett, L.J., in *Angus* v. *Dalton*, 4 Q. B. D. 201; and compare the opinion of Bowen, J., *Dalton* v. *Angus*, 6 App. Cas. 783).

Pleading lost grant.

According to modern practice, a lost grant, if relied upon, should be pleaded (*Smith* v. *Baxter*, [1900] 2 Ch. 147); but claims based on lost grant have been added by amendment at the trial (*Brown* v. *Dunstable*, [1899] 2 Ch. 380, 387; *Gardner* v. *Hodgson's Co.*, [1900] 1 Ch. 601). Formerly, the names of the parties to, and the date of, the supposed grant had to be stated (*Hendy* v. *Stephenson*, 10 East, 55; see *Livett* v. *Wilson*, 3 Bing. 115; *Doe* v. *Reed* 5 B. & Ald. 232); but on averment that the deed had been lost profert was excused (*Read* v. *Brookman*, 3 T. R. 151). The statement of date and parties is no longer necessary (see the pleadings in *Norfolk* v. *Arbuthnot*, 4 C. P. D. 293; *Brown* v. *Dunstable*, [1899] 2 Ch. 380). But a statement whether the supposed grant was before or after a private Act was required (*Palmer* v. *Guadagni*, [1906] W. N. 165).

Nature of rights claimable by prescription.

As regards the nature of the rights which can be claimed by prescription, these rights are of two sorts, either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of particular land, and only exercisable by those who are seised of the land. The first is termed a prescription in the person, and the rights are called prescriptive rights in gross. The second is called a prescription in a *que estate*, which means a right or privilege claimed by prescription as annexed to and going along with particular land (Co. Litt. 113 b, 121 a; 3 Gwill. 1291; *Austin* v. *Amhurst*, 7 Ch. D. 692; *Constable* v. *Nicholson*, 14 C. B. (N.S.) 230; 32 L. J. C. P. 240).

Every prescription presupposing a grant (p. 23, *sup.*), prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like (Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs (B); Com. Dig. Prescription (C.); *Ib.* Franchises (A.1)). A prescription to have a free warren in a manor and in the demesnes thereof is good (*R.* v. *Talbot*, Cro. Car. 311; Jones, 320; as to franchises, see Cruise's Dig. tit. XXVII.; 2 Bl. Comm. 37—40).

Prescription must be certain and reasonable.

A prescription ought to be certain; a prescription which was pleaded for a right every year, and at all times of the year, to turn cattle into a certain close, is too vague (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161). Again, a claim to carry from a close so much clay as might at any time be required for making bricks at a brick kiln in every year, and at all times of the year, was held bad (*Clayton* v. *Corby*, 5 Q. B. 415; see *Att.-Gen.* v. *Mathias*, 4 K. & J. 592). And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor (Com. Dig. Prescription (E. 4)). But it may be reasonable, although unusual or inconvenient, as for a way over a churchyard, or through a church (2 Roll. Abr. 265, l. 40). There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected (*Dyce* v. *Hay*, 1 Macq. H. L. C. 305).

Profits *à prendre* and easements.

The most important classes of rights which can be claimed by prescription are profits *à prendre* (as to which see *ante*, pp. 3, 4) and easements (as to which see *ante*, p. 5). Profits *à prendre* may exist as rights in gross (*Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687); and be acquired in gross by prescription (*Johnson* v. *Barnes*, L. R. 8 C. P. 527). As regards easements, it seems that in a wide sense an easement in gross (in the nature of a right to discharge

sewage into a tidal river or sea) might be acquired by the corporation of a town (on behalf of the inhabitants), the right being based on a lost grant from the Crown (*Somersetshire* v. *Bridgwater*, 81 L. T. 732) or possibly on prescription at common law (*Foster* v. *Warblington*, [1906] 1 K. B. 664). But in the strict sense of the word there cannot be an easement in gross (*Rangeley* v. *Midland Ry. Co.*, 3 Ch. 311; see *ante*, p. 5). As rights annexed to land, both profits *à prendre* and easements may be prescribed for. But such a profit *à prendre* cannot be without stint (*Harris* v. *Chesterfield*, [1911] A. C. 623). **Prescription.**

Besides profits *à prendre* and easements, there are a number of miscellaneous rights claimable by prescription which may be referred to here. Thus there may be prescriptive burdens. A corporation, or an individual, may be bound by prescription to repair a highway (Co. Rep. XIII. 435) or a bridge (*R.* v. *Lincoln*, 8 Ad. & Ell. 65; *Hertfordshire Council* v. *New River Co.*, [1904] 2 Ch. 521). As to presumptions in such a case, see *Simpson* v. *Att.-Gen.*, [1904] A. C. 491; and *Esher* v. *Marks*, 86 L. T. 222, where liability to repair a highway was established on the ground of a licence presumed to have been granted by the Crown. Again, the owner of one close may be bound by prescription to maintain a fence between his close and an adjoining close (*Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274; and see *Coaker* v. *Willcocks*, [1911] 2 K. B. 124). And the owner of land fronting the sea may be similarly bound to maintain a sea-wall for the protection of an adjoining owner (*Hudson* v. *Tabor*, 2 Q. B. D. 292; *R.* v. *Essex*, 14 Q. B. D. 561; 11 App. Cas. 449; *L. & N. W. Ry.* v. *Fobbing Levels*, 66 L. J. Q. B. 127). As to the duty of a riparian proprietor on a tidal river in this respect, see *Nitro-Phosphate Co.* v. *London and S. Katharine's Dock Co.*, 9 Ch. D. 503; *Burt* v. *Victoria Co.*, 47 L. T. 378. As to repair of the banks of a non-navigable river, see *Long* v. *Gowlett*, [1923] 2 Ch. 177. Prescriptive burdens.

A claim to visitation fees may be supported by prescription (*Shepherd* v. *Payne*, 16 C. B. (N.S.) 132; 33 L. J. C. P. 158); also a claim to marriage fees (*Bryant* v. *Foot*, L. R. 3 Q. B. 497). Fees.

The right to hold a fair or market may be acquired by grant and by prescription (2 Inst. 220). A market held immemorially in certain places within a manor may be presumed to have been granted to be held in any convenient place within the manor (*De Rutzen* v. *Lloyd*, 5 Ad. & E. 456). So from immemorial enjoyment it was presumed that a market was granted to be held at any place in a parish to which the grantee could have access (*Gingell* v. *Stepney*, [1908] 1 K. B. 115, 144); and streets were presumed to have been dedicated to the public subject to the market (*Ibid.*; *Att.-Gen.* v. *Horner*, 11 A. C. 66). A market and a fair may be held on the same day in the same manor (*Newcastle* v. *Worksop Council*, [1902] 2 Ch. 145). Where a royal charter granted a market on two days of the week, and a usage to hold the market also on additional days was proved, the Court refused to presume a lost grant of the market for the additional days (*Att.-Gen.* v. *Horner*, 14 Q. B. D. 245, and see *S. C.*, [1913] 2 Ch. 140). The grant of a market does not imply a right in the grantee to prevent persons selling marketable articles on market days in their own houses within the limits of the franchise (*Macclesfield* v. *Chapman*, 12 M. & W. 18; *Penryn* v. *Best*, 3 Ex. D. 292). But such a right may be acquired by prescription (*Ibid.*; *Fearon* v. *Mitchell*, L. R. 7 Q. B. 696; *Moseley* v. *Walker*, 7 B. & C. 40; *Macclesfield* v. *Pedley*, 4 B. & Ad. 404). A right to market tolls was held to have been acquired by prescription in *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521. The lord of the manor, to whom a grant of a market is made, has a right to remove the market-place from Markets.

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one situation to another within the precincts of his grant (*Curwen* v. *Salkeld*, 3 East, 538; see *De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456; *London* v. *Lowe*, 42 L. T. 16). As to the enlargement of a market, see *Att.-Gen.* v. *Cambridge*, L. R. 6 H. L. 303; *Att.-Gen.* v. *Horner*, 14 Q. B. D. 245. Where an old market franchise has been increased in strength and character by statute, the old franchise is gone, and the statute is alone to be looked to (*Abergavenny* v. *Straker*, 42 Ch. D. 89; see *Birmingham* v. *Foster*, [1894] W. N. 43; *Hailsham* v. *Tolman*, [1915] 2 Ch. 1). A statutory market will be protected by injunction even where the statute provides a particular remedy (*Stevens* v. *Chown*, [1901] 1 Ch. 894).

A market may be disturbed by establishing a new market, either within or without the limits of the franchise (*Dorchester* v. *Ensor*, L. R. 4 Ex. 341). If a new market is held on the same day as an old market, it is presumed to be a disturbance of the old market, but if on a different day actual damage must be shown (*Ib.*; *Elwes* v. *Payne*, 12 Ch. D. 472; *Yard* v. *Ford*, 2 Wms. Saund. 500). A market may also be disturbed by establishing a rival place of sale, though not technically a market (*London* v. *Lowe*, 42 L. T. 16; *Goldsmid* v. *G. E. Ry. Co.*, 25 Ch. D. 541; 9 App. Cas. 927; *Abergavenny* v. *Straker*, 42 Ch. D. 83; *Wilcox* v. *Steel*, [1904] 1 Ch. 212); and the rival place of sale may be outside the limits of the franchise (*S. CC.*). But as an ordinary rule, the sale of a man's own goods in the ordinary course of business, in his own shop, outside the limits of the franchise, is not a disturbance (*Manchester* v. *Lyons*, 22 Ch. D. 307; *Haynes* v. *Ford*, [1911] 2 Ch. 237. See *Lambert* v. *Rowe*, [1914] 1 K. B. 38). Where the grantee of a market from the Crown suffered another to erect a market in his neighbourhood, and to use it for twenty-three years without interruption, such user was a bar to an action on the case for disturbance (*Holcroft* v. *Heel*, 1 Bos. & P. 400; see 2 Wms. Saund. 502, n.; and *Campbell* v. *Wilson*, 3 East, 294). See, however, *London* v. *Lowe* (42 L. T. 16), where acts of disturbance were held not justified, although they had continued for more than half a century. The Markets and Fairs Clauses Act, 1847, consolidates the provisions usually contained in Acts for regulating markets and fairs. As to the meaning of "fair," see *Collins* v. *Cooper*, 68 L. T. 450, and *Walker* v. *Murphy*, [1915] 1 Ch. 71, where horse-races and a temperance festival with roundabouts and shows were held not to be a "fair" within the meaning of a local Act. (See as to a custom to hold races *Mounsey* v. *Ismay*, 1 H. & C. 729). And as to markets generally, see Pease and Chitty on Markets.

Stallage.

There is a distinction between market tolls which are paid for the use of a market, and stallage which is paid for the occupation of lands within the market (*London* v. *St. Sepulchre*, L. R. 7 Q. B. 313; *R.* v. *Casswell*, *Id.* 382; *Yarmouth* v. *Groom*, 1 H. & C. 102). The test is, has a man any occupation beyond what the general public has? (*R.* v. *Bedford*, 45 L. T. 616, 621). Stallage tolls are rateable, but market tolls are not (*S. CC.*; and see *Percy* v. *Ashford Union*, 34 L. T. 579). As to occupiers of stands within a market being entitled to franchise, see *Hall* v. *Metcalfe*, [1892] 1 Q. B. 208. Payments made to the owner of the soil for stalls on fair days were held to be stallage, not fair tolls (*Newcastle* v. *Worksop Council*, [1902] 2 Ch. 145). An exemption from stallage for the inhabitants of a town can be only by way of custom, not by grant or prescription (*Lockwood* v. *Wood*, 6 Q. B. 50).

Tolls.

Toll-traverse is defined to be a sum demanded for passing over the private soil of another (Com. Dig. tit. Toll (A.); see *Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 692), or a duty which a man pays for

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passing over the soil of another in a way not a high street (Vin. Abr. tit. Toll (A.), or for a passage over the private ferry, bridge, &c. of another (1 Sid. 454). Toll-traverse may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription (2 Wils. 296; see *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157; *New Windsor* v. *Taylor*, [1899] A. C. 41). One kind of toll-traverse is said to arise where the owner of the soil dedicates it to the use of the public as a road, but reserves toll at the time of dedication (*Brett* v. *Beales*, Moody & Malkin, 428). It seems that a subject cannot without a grant from the Crown or a statute dedicate a road to the public subject to a toll (*Austerberry* v. *Oldham*, 29 Ch. D. 750). And it is essential that the reservation of the toll should be contemporaneous with the dedication (*Att-Gen.* v. *Simpson*, [1901] 2 Ch. 693, see *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521). Where the soil of a highway and tolls claimed for the use of it were before the time of legal memory in the same hands though severed since, it was presumed that the soil was originally dedicated to the public in consideration of the tolls, and the toll-traverse was supported (*Pelham* v. *Pickersgill*, 1 T. R. 660; *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 567).

Toll-thorough is a toll for passing over the public highway. And where a prescription against public right is claimed a consideration must be proved (*Nottingham* v. *Lambert*, Willes, 111; *Brett* v. *Beales*, 10 B. & C. 508; *Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 692; 1 T. R. 660). See further as to the distinction between toll-thorough and toll-traverse, *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157.

A right of distress is incident to every toll (Bac. Abr. Distress, F. pl. 6), but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, without proving a contract by the defendant; and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way (*Newport* v. *Saunders*, 3 B. & Ad. 411). The exemption from toll may also be claimed by prescription or by the King's grant (4 Inst. 252; 1 H. Bl. 206; *London* v. *Linn Regis*, 4 T. R. 130; 1 Bos. & P. 512; 7 Br. P. C. 126; *Truro* v. *Reynolds*, 8 Bing. 275; *Middleton* v. *Lambert*, 1 Ad. & Ell. 401). The citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls (F. N. B. 226, I.; 1 H. Bl. 206; Com. Dig. Toll (G. 1). As to whether inhabitants of a place may prescribe to be quit of toll, see *Baker* v. *Brereman*, Cro. Car. 418; recognised, 6 Q. B. 63. Port or anchorage tolls may be claimed by prescription (*Foreman* v. *Whitstable*, L. R. 4 H. L. 266).

What cannot be claimed by prescription.

No prescriptive right can be acquired to justify a public nuisance (*Att.-Gen.* v. *Barnsley* (1874), W. N. 37; see *Brown* v. *Russell*, L. R. 3 Q. B. 251; *Mumford* v. *Oxford, &c., Ry. Co.*, 1 H. & N. 34; *Mott* v. *Shoolbred*, 20 Eq. 24; *Butterworth* v. *West Riding*, [1909] A. C. 57). Nor can a claim be made by prescription to anything which could not have had a lawful beginning (*Goodman* v. *Saltash*, 7 App. Cas. 648). But it is not necessary that the thing should be legal through all the time of prescription (*Millington* v. *Griffiths*, 30 L. T. 65, 68; see *Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 268). The *jus spatiandi* cannot be prescribed for (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 198). Nor by prescription at common law can an easement for a term of years be acquired (*Wheaton* v. *Maple*, [1893] 3 Ch. 65). Nor can a profit *à prendre* without stint be prescribed for as annexed to land (*Harris* v. *Chesterfield*, [1911] A. C. 623). Land can-

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not be claimed by prescription (*Beauchamp* v. *Winn*, L. R. 6 H. L. 238; see Brooke Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch, 132). The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land (*Wilkinson* v. *Proud*, 11 M. & W. 33; see *Stoughton* v. *Leigh*, 1 Taunt. 402). What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by stat. 9 & 10 Vict. c. 62), felons' goods, and the like. These not being forfeited until the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title (Co. Litt. 114; 2 Bl. Comm. 265). A prescription for a right common to all the subjects of the realm cannot be supported (*Pell* v. *Towers*, Noy, 20; Br. Abr. Pres. pl. 71). One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases (*Aldred's Case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription (F. 4)).

Persons by whom prescriptive rights can be claimed.

As regards the persons by whom prescriptive rights can be claimed, inasmuch as (generally speaking) every prescription supposes a grant (*ante*, p. 23), and as every grant supposes a capable grantee, prescriptive rights must be claimed by defined persons. Accordingly neither profits *à prendre* nor easements can be prescribed for by "inhabitants" (*Fox* v. *Venables*, Cro. Eliz. 180; *Constable* v. *Nicholson*, 14 C. B. (N.S.) 230, 32 L. J. C. P. 240; *Chilton* v. *London*, 7 Ch. D. 735). Nor can profits *à prendre* be prescribed for by "owners and occupiers" of ancient tenements in a manor (*Tilbury* v. *Silva*, 45 Ch. D. 98); or in a parish (*Baylis* v. *Tyssen Amhurst*, 6 Ch. D. 500); nor by "occupiers" of lands or houses (*Davies* v. *Williams*, 16 Q. B. 551, 559; *Austin* v. *Amhurst*, 7 Ch. D. 689; *Knight* v. *King*, 20 L. T. 494); nor by "dwellers" in a manor (*Allgood* v. *Gibson*, 25 W. R. 60; 34 L. T. 583).

Persons against whom prescriptive rights can be claimed.

As regards the persons as against whom prescriptive rights can be claimed, the necessary grant supposing a capable grantor, this grantor must be an owner capable of disposing of the fee (*Wheaton* v. *Maple*, [1893] 3 Ch. 48; *Rochdale Canal Co.* v. *Ratcliff*, 18 Q. B. 315). And enjoyment as against an owner who cannot dispose of the fee is not sufficient (*Roberts* v. *James*, 89 L. T. 282; *Daniel* v. *North*, 11 East, 372).

Prescription against the Crown.

Formerly a prescription could not run against the King, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi* (2 Inst. 273; 2 Roll. 264, l. 40; Com. Dig. Prescription (F. 1); Broom's Maxims, p. 61, 6th ed.). This rule, however, was subject to various exceptions (see Co. Litt. 114 a and b, and Hargrave's note, 119 a). Liberties and franchises were excepted in the Crown Suits Act, 1769, limiting the claims of the Crown to sixty years (see *post*, note on the limitation of the rights of the Crown). By 32 Geo. 3, c. 58, the Crown is barred in informations for usurping corporate offices or franchises by the lapse of six years (see Bac. Abr. 7th ed., Prerogative (E. 6), 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 23; *R.* v. *Harris*, 11 Ad. & Ell. 518). By the Prescription Act, 1832, ss. 1, 2 (*ante*, pp. 1, 4), the Crown is placed upon the same footing with the subject as to the rights affected by those sections. *Secus*, as to the rights affected by sect. 3 (*Perry* v. *Eames*, [1891] 1 Ch. 658; *Wheaton* v. *Maple*, [1893] 3 Ch. 48).

General rules as to the

As regards the presumption of a grant. This presumption is necessary in all cases where a prescriptive right is claimed by prescrip-

tion at common law or by a lost grant (see *ante*, p. 23). A presumption is also necessary where profits *à prendre* or easements (other than light) are claimed under the Prescription Act, the claim being based on user for the shorter periods mentioned in sects. 1 and 2. As to whether the presumption is necessary as regards claims based on the longer periods mentioned in those sections, see *Staffordshire Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 260, 278; *Kilgour* v. *Gaddes*, [1904], 1 K. B. 457; *Tapling* v. *Jones*, 11 H. L. C. 290. The presumption is not necessary in the case of a claim to light under sect. 3 of the Act (*Tapling* v. *Jones*, *supra*).

presumption of a grant.

Where the claim is based on prescription at common law, the presumed grant must be an absolute one by an owner in fee to an owner in fee (*Wheaton* v. *Maple*, [1893] 3 Ch. 63; *Kilgour* v. *Gaddes*, [1904] 1 K. B. 466). It seems that the same rule applies where the claim is based on lost grant (*Bright* v. *Walker*, 1 Cr. M. & R. 211; *Wheaton* v. *Maple*, [1893] 3 Ch. 48; see, however, in England, *Bright* v. *Walker*, 1 Cr. M. & R. 201; *East Stonehouse Council* v. *Willoughby*, [1902] 2 K. B. 332; and in Ireland, *Timmons* v. *Hewitt*, 22 L. R. Ir. 627; *Hannah* v. *Pollock*, [1900] 2 I. R. 664). As to the character of the presumed grant where the claim is made under sect. 2 of the statute, see *supra*, p. 8.

Cases where Court has refused to presume grant.

In dealing with the presumption (where necessary) the Court has refused to presume a grant in the following cases, viz.:—

(1) Where the grant would have been contrary to a statute of a public nature. (*Neaverson* v. *Peterborough Council*, [1902] 1 Ch. 557; *Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 268; *Mill* v. *New Forest Commrs.*, 18 C. B. 60; *Goodtitle* v. *Baldwin*, 11 East, 488; see *Campbell* v. *Wilson*, 3 East, 294). As regards a statute of a private nature, a waiver may be presumed (*Goldsmid* v. *G. E. Ry. Co.*, 25 Ch. D. 511; 9 A. C. 927; *Att.-Gen.* v. *Grand Junction Co.*, [1909] 2 Ch. 516).

(2) Where it would have been inconsistent with a custom (*Winstanley* v. *Lee*, 2 Sw. 333; *Perry* v. *Eames*, [1891] 1 Ch. 667).

(3) Where the owner of the dominant tenement could not take by way of grant (*National Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J. Ex. 185). See the rule that prescriptive rights can only be claimed by defined persons because there must be a capable grantee, *ante*, p. 30.

(4) Where the owner of the servient tenement could not make a grant, *e.g.* on the ground of *ultra vires* (*Rochdale Canal Co.* v. *Ratcliffe*, 18 Q. B. 315; *Staffordshire Co.* v. *Birmingham Canal Co.*, L. R. 1 H. L. 287; *Att.-Gen.* v. *G. N. Ry.*, [1909] 1 Ch. 775), or on the ground of the deficiency of his estate, *e.g.* where he was a rector (*Barker* v. *Richardson*, 4 B. & Ald. 579), or a tenant for life (*Roberts* v. *James*, 89 L. T. 282), or a tenant for years (*Daniel* v. *North*, 11 East, 372), none of whom could make an absolute grant.

(5) Where the owner of the servient tenement was incapable of preventing the enjoyment (*Sturges* v. *Bridgman*, 11 Ch. D. 852; *Bryant* v. *Lefever*, 4 C. P. D. 173; *Chasemore* v. *Richards*, 7 H. L. C. 349, 370).

(6) Where the owner of the servient tenement had no knowledge (actual or presumptive) of the enjoyment (see *Ambler* v. *Gordon*, [1905] 1 K. B. 424). The mere knowledge of a tenant of the servient owner is not sufficient (*Daniel* v. *North*, 11 East, 372). But if the enjoyment has been for a long time, it may be presumed the landlord was aware of it (*Davies* v. *Stevens*, 7 C. & P. 570; *Simpson* v. *Att.-Gen.*, [1904] A. C. 507).

(7) Where the enjoyment was not as of right (*Hannah* v. *Pollock*, [1900] 2 I. R. 671), *e.g.* where it was *per vim* (*Eaton* v. *Swansea Waterworks* 17 Q. B. 267), or *clam* (*Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 557; *Partridge* v. *Scott*, 3 M. & W. 229), or *precario*

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(*Burrows* v. *Lang*, [1901] 2 Ch. 502; but see *Lewis* v. *Meredith*, [1913] 1 Ch. 571). or where there was unity of possession (*Battishill* v. *Reed*, 18 C. B. 706; *Outram* v. *Maude*, 17 Ch. D. 405; *Damper* v. *Bassett*, [1901] 2 Ch. 354).

Enjoyment under a mistake may be enjoyment as of right (*De La Warr* v. *Miles*, 17 Ch. D. 535; *Dawson* v. *MacGroggan*, [1903] 1 I. R. 92; see contra; *Rivers* v. *Adams*, 3 Ex. D. 361; *Campbell* v. *Wilson*, 3 East, 301; *Chamber Co.* v. *Hopwood*, 32 Ch. D. 549.

(8) Where the enjoyment was capable of other explanation (*Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 698; *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 199; *Gardner* v. *Hodgson's Co.*, [1901] 2 Ch. 216; [1903] A. C. 240), *e.g.* as being an extension of rights expressly granted by a document in evidence (*Att.-Gen.* v. *Horner*, 14 Q. B. D. 258; *Sheringham* v. *Holsey*, [1904] W. N. 83). The doctrine of lost grant applies only where the enjoyment cannot otherwise reasonably be accounted for (*Lyell* v. *Hothfield*, [1914] 3 K. B. 911). See *Penryn* v. *Best*, 3 Ex. D. 297, 299. And compare *R.* v. *Hudson*, Strange, 909; *Labrador Co.* v. *R.*, [1893] A. C. 104; and *Wheaton* v. *Maple*, [1893] 3 Ch. 69, where it was said that prescription at common law is not maintainable where we know the whole truth. A claim to a prescriptive right may be defeated by showing the origin of the user, and that it is not in accordance with the right claimed (*Commrs. of Sewers* v. *Glasse*, 19 Eq. 155; see *Neill* v. *Devonshire*, 8 App. Cas. 135).

Effect of ancient grant.

An ancient grant without date did not necessarily defeat a claim to a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury (*Addington* v. *Clode*, 2 Bl. Rep. 989); but if the ancient grant is clearly not antecedent to the time of legal memory it will disprove immemorial prescription (*Welcome* v. *Upton*, 5 M. & W. 398; see *R. v. Westmark*, 2 M. & Rob. 305). Where a bishop, having free warren by prescription over the demesne and tenanted lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the Crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was held that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the court considered to be at least doubtful), it could not affect it over the other lands of the manor (*Carnarvon* v. *Villebois*, 13 M. & W. 313).

Statutes in relation to prescription and custom.

A man cannot prescribe, or allege a custom, against a statute of a public nature, because it is the highest matter of record in law, unless the custom or prescription be saved or preserved by another Act (Co. Litt. 115; see *Noble* v. *Durell*, 2 T. R. 271; *Goodtitle* v. *Baldwin*, 11 East, 488; *Butterworth* v. *West Riding*, [1909] A. C. 57). Lord Coke makes a difference between statutes in the negative and in the affirmative; for a statute in the affirmative without any negative, express or implied, does not take away the common law; likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as he may against a common law (Harg. Co. Litt. 115 a, n. (15)). But the benefit of a statute of a private nature may be waived, and the waiver may be presumed (*Goldsmid* v. *G. E. Ry. Co.*, 25 Ch. D. 511; 9 App. Cas. 927; *Att.-Gen.* v. *Grand Junction Co.*, [1909] 2 Ch. 516). An ancient custom may be destroyed by the express provisions of a statute or by positive language inconsistent with the existence of the custom (*Merchant Taylors' Co.* v. *Truscott*, 11 Exch. 855; *Salters' Co.* v. *Jay*, 3 Q. B. 109). But where a statute making an act illegal comes into force while a prescription is running, the prescription, after the proper period, may be an answer to one suing as an individual (*Millington* v. *Griffiths*, 30 L. T. 65). Where a statute has "embraced and confirmed" a right which had previously

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existed by custom or prescription, that right becomes thenceforward a statutory right. The lower title by custom or prescription is merged in and extinguished by the higher title derived from the statute (*New Windsor* v. *Taylor* [1899] A. C. 49). A permanent right to take tolls based on prescription was held to have merged in and been extinguished by statutes temporary in their operation (*Ib.*). As to the effect of statutes in confirming customs, see *London* v. *Cox*, L. R. 2 H. L. 257; *Wake* v. *Hall*, 8 A. C. 198. Easements are sometimes extinguished by the express words of a statute, *e.g.* the Inclosure Acts, 1801 and 1845 (see *Turner* v. *Crush*, 4 App. Cas. 221), or by necessary implication from a statute (*Yarmouth* v. *Simmons*, 10 Ch. D. 518).

How prescriptive rights may be destroyed.

By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations (32 Hen. 8, c. 2) it is enacted that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such seisin or possession had been within threescore years next before such prescription made (2 Bl. Comm. 263, 264). And the remedy for such rights, so far as it depended upon real actions, was further abridged by the abolition of real actions (R. P. Lim. Act, 1833, s. 36, *post*). It was said by Lord Redesdale that where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged (*Norbury* v. *Meade*, 3 Bligh, 245). But in *Neill* v. *Devonshire* (8 App. Cas. 135), it was said that an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be abandoned.

A title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of common and the land charged therewith in respect of an estate equally high and perdurable in both (Co. Litt. 114 b). A unity of possession merely suspends; there must be a unity of ownership to destroy a prescriptive right (*Canham* v. *Fisk*, 2 Cr. & Jerv. 126). Thus, if a person having a right of common by prescription takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right (Co. Litt. 113 b). Easements are extinguished by the union of seisin of the dominant and servient tenements in the same person (*James* v. *Plant*, 4 Ad. & El. 749). They are also extinguished when the purpose for which they were created no longer exists (*National Manure Co.* v. *Donald*, 4 H. & N. 8). A prescriptive right may be lost by the destruction of the subject-matter (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed (Hob. 39; 4 Rep. 86 a, 87 a). Alterations in the dominant tenement will sometimes extinguish an easement (*Allan* v. *Gomme*, 11 Ad. & El. 772). The release of an easement may be implied from abandonment or non-user (*Cook* v. *Bath*, 6 Eq. 177). It was said that a release of a right of way, or of a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights (*Moore* v. *Rawson*, 3 B. & C. 339). But "it is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material" (*R.* v.

Prescription.

Chorley, 12 Q. B. 519: see *Crossley* v. *Lightowler*, 2 Ch. 482; *Ecclesiastical Commrs.* v. *Kino*, 14 Ch. D. 213; *James* v. *Stevenson*, [1893] A. C. 162; *Swan* v. *Sinclair*, [1925] A. C. 227). The right to hold Courts for the determination of civil suits, granted by the King's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years (*R.* v. *Havering*, 5 B. & Ald. 691; *R.* v. *Hastings*, *Id.* 692, n.). An unlicensed change of days for holding fairs may forfeit the charter (*Newcastle* v. *Worksop Council*, [1902] 2 Ch. 145; where see as to losing the right to fair tolls).

C. *Custom.*

Custom is also referred to in the above Act as a ground on which the claims mentioned in sects. 1 and 2 can be made. Customs (as distinguished from usages, p. 40, *post*) may be copyhold or non-copyhold. This note deals mainly with the latter, and copyhold and customary tenure were abolished as from January 1, 1926, by the Law of Property Act, 1922, Part V.

Non-copyhold Customs.

Nature of custom: it differs from prescription.

The nature of custom and its difference from prescription was thus expressed by Tindal, C.J.:—"A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of law, and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a *custom* for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84 [qu. 3 Lev. 160]; and yet a *grant* of such an easement to fishermen within the district *eo nomine* might well be held to be void" (*Lockwood* v. *Wood*, 6 Q. B. 64, 65; see *Goodman* v. *Saltash*, 7 App. Cas. 654; *Clarkson* v. *Woodhouse*, 5 T. R. 414).

The difference between custom and prescription, said Farwell, J., in *Mercer* v. *Denne*, [1904] 2 Ch. 556 (referring to claims to incorporeal hereditaments), "is only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation. See Co. Litt. 113 b, where it is laid down that prescription is personal while custom is local, alleged in no person but laid within some place." The difference between custom and prescription lies in the mode of claim. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there. Or if he prescribes in the *que estate*, it must be under cover of the tenant in fee (*Bean* v. *Bloom*, 2 Bl. R. 928; *S. C.*, 3 Wils. 456; *Sharp* v. *Lowther*, Cas. temp. Hard. 293; *Linn Regis* v. *Taylor*, 3 Lev. 160). In other words, a prescriptive right must be claimed by a defined person. While a customary right can be claimed by undefined persons or a fluctuating class, such as "inhabitants": the claim in the latter case being made in respect of some district, but not in respect of any defined dominant tenement within that district.

Nature of rights claim

The Prescription Act deals with profits *à prendre* and easements, and mentions custom in connection with each of these subject-

matters. As regards profits *à prendre* claimed on the ground of non-copyhold custom, the general rule is that a profit *à prendre* in another's soil cannot be claimed by custom (*Blewitt* v. *Tregonning*, 3 Ad. & E. 534; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 163). For if it could, the claim by custom being for an indefinite number of people, the subject of the profit *à prendre* would be liable to be entirely destroyed (*Race* v. *Ward*, 4 E. & B. 705; *Bland* v. *Lipscombe*, *ibid.*, 713). And there could be no release of such a right (*Goodman* v. *Saltash*, 7 App. Cas. 655; *Att.-Gen.* v. *Mathias*, 4 K. & J. 591). Thus the Courts refused to admit a claim by custom to profits *à prendre* for "inhabitants" (*Chilton* v. *London*, 7 Ch. D. 735; *Mitcham Conservators* v. *Banks*, 76 J. P. 413). In trespass for taking stones, &c., from the seashore, defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of highways to take such stones. Such a custom was held bad, being a profit *à prendre in alieno solo*; and the overseers and inhabitants, not being a corporation, were not capable of taking by grant, and therefore could not claim by prescription (*Constable* v. *Nicholson*, 14 C. B. (N.S.) 230; *Pitts* v. *Kingsbridge Board*, 19 W. R. 884; *Hough* v. *Clark*, 23 T. L. R. 682). A claim, however, by "inhabitants" of tenements in a borough to the privilege of oyster dredging within a fishery which had been acquired by prescription by the borough corporation was supported by presuming a grant to the corporation subject to a trust (in the nature of a charitable trust) in favour of the inhabitants; *Goodman* v. *Saltash*, 7 App. Cas. 633; see the charitable trusts held to exist in *Att.-Gen.* v. *Meyrick*, [1893] A. C. 1; *Wilson* v. *Barnes*, 38 Ch. D. 507. Compare the right of fishing vested in a corporation in trust for its members (*Re Free Fishermen of Faversham*, 36 Ch. D. 329); the case of a manor (including the right of sporting) vested in trustees for individual copyholders (*Hutchinson* v. *Morritt*, 3 Y. & C. 547); and the case where a vestry had during a long period let the grazing on a highway, and a lawful origin was found by presuming a grant to a trustee for the parish (*Haigh* v. *West*, [1893], 2 Q. B. 19; see *Eliot* v. *Bristol*, 71 L. T. 659). A Crown grant to the inhabitants of a parish to take profits *à prendre* out of a royal manor is valid, the effect being to incorporate the inhabitants for the purpose (*Willingale* v. *Maitland*, 3 Eq. 103). Such a grant may be presumed from user: but not if the presumption is inconsistent with the past and existing state of things and there is no trace of such a corporation having existed (*Rivers* v. *Adams*, 3 Ex. D. 361). In the case of such a grant an action is maintainable only by the inhabitants as a corporation (*Chilton* v. *London*, 7 Ch. D. 735).

able by non-copyhold customs.

Rule that profits *à prendre* in another's soil cannot be claimed by custom.

Exceptions to the rule that a profit *à prendre* in another's soil cannot be claimed by custom occur in (1) certain mining customs as to tin mining in Cornwall (*Rogers* v. *Brenton*, 10 Q. B. 26; see *Att.-Gen.* v. *Mathias*, 4 K. & J. 591) and lead mining in Derbyshire (*Wake* v. *Hall*, 8 App. Cas. 198; *Wake* v. *Redfern*, 43 L. T. 123; *Ex p. Young*, *ib.* 725), and in (2) copyhold customs entitling copyholders to rights of common in the waste of a manor; as to which see *post*, p. 44.

Exceptions to rule.

Rights in the nature of easements may be claimed by a fluctuating class of persons (such as the "inhabitants" of a parish) on the ground of non-copyhold custom (*Brocklebank* v. *Thompson*, [1903] 2 Ch. 348). Thus a right of way may be so claimed (*Grimstead* v. *Marlow*, 4 T. R. 713). The "inhabitants" of a town cannot by that name and description prescribe for an easement *in alieno solo*; where such a claim has been allowed, it will be found to have been invariably rested on the ground of custom, and not of prescription (*Fox* v.

Rights in nature of easements.

Custom.

Venables, Cro. Eliz. 180; *Day* v. *Savadge*, Hob. 85, 5th edit.; *Gateward's case*, 6 Rep. 59 b; *S. C.*, as *Smith* v. *Gateward*, Cro. Jac. 152; *Baker* v. *Brereman*, Cro. Car. 418; *Fitch* v. *Rawling*, 2 H. Bl. 393; see *Att.-Gen.* v. *Acton*, 22 Ch. D. 228).

Instances of non-copyhold customs.

The following are instances of non-copyhold customs under which rights in the nature of easements have been established: A custom for the inhabitants of a township to enter on land within the township and take water from a spring there (*Race* v. *Ward*, 4 E. & B. 702; 24 L. J. Q. B. 153; *Harrop* v. *Hirst*, L. R. 4 Ex. 43; *Smith* v. *Archibald*, 5 A. C. 512; *Goodday* v. *Mitchell*, Cro. Eliz. 441. See as to enforcing such a custom, *Stoke Council* v. *Price*, [1899] 2 Ch. 277). A custom for tin-bounders inhabiting Cornwall to use for the purpose of mining the water in their district (*Gaved* v. *Martyn*, 19 C. B. (N.S.) 732; see *Ivimey* v. *Stocker*, 1 Ch. 409; *Bastard* v. *Smith*, 2 M. & Rob. 129); or for the same purpose to discharge rubbish into a stream (*Carlyon* v. *Lovering*, 1 H. & N. 781). A custom for the inhabitants of a parish to have a churchway over land within the parish forming the demesne of a manor (*Brocklebank* v. *Thompson*, [1903] 2 Ch. 344). A custom for parishioners to perambulate parish boundaries (*Taylor* v. *Devey*, 7 Ad. & Ell. 409; *Grant* v. *Kearney*, 12 Price, 773). A custom for the inhabitants of a town to use for recreation a promenade in the town (*Abercromby* v. *Fermoy*, [1900] 1 I. R. 302; see *Dyce* v. *Hay*, 1 Macq. 305). A custom for the inhabitants of a single parish to enter on land in the parish and dance there, or play any lawful game, or enjoy any lawful recreation at any time in the year, is good (*Hall* v. *Nottingham*, L. R. 1 Ex. D. 1; *Warrick* v. *Queen's College*, 10 Eq. 129). Such a custom cannot be claimed for the inhabitants of several parishes (*Edwards* v. *Jenkins*, [1896] 1 Ch. 313). A custom for the inhabitants of a parish to train horses at all seasonable times of the year on land within the parish might be good; but not where the training ground was outside the parish (*Sowerby* v. *Coleman*, L. R. 2 Ex. 99). A custom, however, for the freemen of a city to hold horse-races on a certain day in the year outside the city was held good (*Mounsey* v. *Ismay*, 1 H. & C. 729; 32 L. J. Ex. 94). A custom for any liege subject of the Queen, being a victualler, to enter, during a fair, within a certain borough, on land within the borough, and for the convenient carrying on of his trade to erect there booths, paying reasonable compensation to the owner of the soil, was good (*Elwood* v. *Bullock*, 6 Q. B. 383; *Tyson* v. *Smith*, 9 Ad. & Ell. 406). A custom for the inhabitants of a seaside town to place chairs on the shore was held not proved (*Ramsgate* v. *Debling*, 22 T. L. R. 369). A custom for the fishermen in a seaside parish to dry their nets on land within the parish, at all times seasonable for fishing, was good (*Mercer* v. *Denne*, [1905] 2 Ch. 538). A custom for the fishermen of a particular locality to deposit oysters on the foreshore might be good (*Truro* v. *Rowe*, [1901] 2 K. B. 870); but was not supported by evidence ([1902] 2 K. B. 709). A custom for navigators frequenting a particular part of the coast to fix moorings there might be good (*Att.-Gen.* v. *Wright*, [1897] 2 Q. B. 321).

Non-copyhold custom can only apply to limited class, and limited district.

Non-copyhold customs conferring rights in the nature of easements can only be claimed for a limited class of persons, not the public generally (*Coventry* v. *Wills*, 12 W. R. 128; *Bourke* v. *Davis*, 44 Ch. D. 120; *Dungarvan* v. *Mansfield*, [1897] 1 I. R. 420; *De Morgan* v. *Metropolitan Board*, 5 Q. B. D. 155), and must be claimed for some definite district known to the law (Co. Litt. 110 b.; *Edwards* v. *Jenkins*, [1896] 1 Ch. 313; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 353). It has been said that there cannot be a custom in one place to do something in another (*R.* v. *Ecclesfield*, 1 B. & Ald. 360; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 354; but see *Mounsey* v. *Ismay*, 1 H. & C. 729). Land added by accretion to other land

becomes subject to customs affecting the latter (*Mercer* v. *Denne*, [1904] 2 Ch. 560).

Construed strictly.

Customs are not to be enlarged beyond the usage, but must be construed strictly (*Rogers* v. *Brenton*, 10 Q. B. 57; *Arthur* v. *Bokenham*, 11 Mod. 160; Fitzgib. 243).

Relation of custom to the common law.

Custom, said Jessel, M.R., referring to non-copyhold custom, is local common law. It is common law because it is not statute law. It is local law because it is the law of a particular place as distinguished from the general common law (*Hammerton* v. *Honey*, 24 W. R. 603). As to the relation of custom to statute, see *ante*, p. 32. As to its relation to the common law, it is of the very essence of a custom that it should vary from the common law (*Horton* v. *Beckman*, 6 T. R. 764; *Lockwood* v. *Wood*, 6 Q. B. 64; *Johnson* v. *Clark*, [1908] 1 Ch. 311).

What customs are valid.

But to give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial and continued without interruption (*Tyson* v. *Smith*, 9 Ad. & Ell. 421, *Mercer* v. *Denne*, [1904] 2 Ch. 551); rules which relate to the evidence of a custom (*Hammerton* v. *Honey*, *supra*).

Rules of evidence.

A custom must be certain.

A custom accordingly must be certain (*Baylis* v. *Tyssen Amhurst*, 6 Ch. D. 509; *Champneys* v. *Buchan*, 4 Drew. 116). A custom is not uncertain because it is not invariable in every part. Thus, the number of persons entitled to enjoy it will vary (*Mercer* v. *Denne*, [1904] 2 Ch. 552). So a custom to play games is not uncertain if it be extended to new games (*ibid.* 553); or a custom to dry nets, if it be extended to a new process of drying (*Mercer* v. *Denne*, [1905] 2 Ch. 581). For general customs may be extended to new things which are within the reason of those customs (*London* v. *Vanacre*, 12 Mod. 270). Nor is a custom uncertain because its area varies by accretions or recessions of the sea (*Mercer* v. *Denne*, [1905] 2 Ch. 584). Compare with the above rule as to certainty, the certainty required where profits *à prendre* were claimed by copyholders on the ground of custom (*Peppin* v. *Shakespear*, 6 T. R. 743; *Wilson* v. *Willes*, 7 East, 121); or by freeholders on the ground of prescription (*Clayton* v. *Corby*, 5 Q. B. 415; *Att.-Gen.* v. *Matthias*, 4 K. & J. 592).

Reasonable.

Again, a custom must be reasonable. Customs, especially where they derogate from the general rights of property, must be construed strictly, and above all things they must be reasonable (*Rogers* v. *Brenton*, 10 Q. B. 57). This rule has been explained as meaning in effect that to be valid a custom must be consistent with the general principles underlying the common law (*Johnson* v. *Clark*, [1908] 1 Ch. 311). A custom which is for the advantage of an industry or trade may be good, although it bears hardly on the individual. While, on the other hand, a custom which is for the advantage of the individual only, and is prejudicial to the public or a class of the public, is bad. For the common law in principle imposes obligations on the individual for the benefit of the public, and not on the public for the benefit of the individual (*ibid.*).

"It belongs to the judges of the land to determine whether a custom is reasonable or not. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo ex certâ causâ rationabili usitata privat communem legem* (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or pre-

Custom.

judicial to the many, and beneficial only to some particular person is repugnant to the law of reason; for it could not have had a reasonable commencement; as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord (Year B. Trin. 2 H. 4, fol. 24, B. pl. 20). So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4 (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will (Litt. s. 212)." (*Per* Tindal, C.J., *Tyson* v. *Smith*, 9 Ad. & Ell. 421.) The Judges accordingly as trained lawyers determine whether a custom is reasonable (*Johnson* v. *Clark*, [1908] 1 Ch. 311, 316; *Tyson* v. *Smith*, *supra*; compare *Bradburn* v. *Foley*, 3 C. P. D. 135; *Re Walkers & Co.*, [1904] 2 K. B. 159; cases of usage). The Judges will not admit mere usage to establish what they think unreasonable (*Hammerton* v. *Honey*, 24 W. R. 603). And if they think an alleged custom unreasonable they in effect hold that the usage though immemorial must have resulted from accident or negligence and not from any right conferred (*Salisbury* v. *Gladstone*, 9 H. L. C. 701). The time for ascertaining whether a custom is reasonable in its inception (*Mercer* v. *Denne*, [1904] 2 Ch. 557; *Mounsey* v. *Ismay*, 32 L. J. Ex. 96; *Johnson* v. *Clark*, [1908] 1 Ch. 306).

As instances of the rule as to reasonableness, a custom for the fishermen in a parish to dry their nets on land within the parish, was reasonable (*Mercer* v. *Denne*, [1904] 2 Ch. 552). But a custom for tin bounders in Cornwall to preserve their rights by mere annual renewals without working was unreasonable (*Rogers* v. *Brenton*, 10 Q. B. 57); as was a custom for any person to take rabbits on the waste of a manor (*Coote* v. *Ford*, 83 L. T. 482).

—immemorial;

Again, the custom must have commenced from time immemorial, *i.e.*, from the reign of Richard I. But this rule will not render a custom bad, unless the impossibility of its having existed in that reign be demonstrated (*Mercer* v. *Denne*, [1904] 2 Ch. 555). A custom to erect stalls for hiring servants at statute sessions was held bad, statute sessions having been introduced by the Statutes of Labourers, the first of which was in the reign of Edward III. (*Simpson* v. *Wells*, L. R. 7 Q. B. 214). A custom is usually proved by evidence extending over at least half a century (*Hammerton* v. *Honey*, 24 W. R. 604). But a regular usage for twenty years unexplained and uncontradicted may suffice to support an immemorial custom (*R.* v. *Jolliffe*, 2 B. & C. 54). And from such modern usage, unless the contrary appear, the immemorial existence of the right ought to be presumed (*Brocklebank* v. *Thompson*, [1903] 2 Ch. 350).

—continuous.

Lastly, a custom must have been continued without interruption (*Hammerton* v. *Honey*, 24 W. R. 603). But mere discontinuance of user will not amount to interruption (*Scales* v. *Key*, 11 Ad. & Ell. 823). There must be an interruption of the right as well as the possession (Co. Litt. 114 b; *Mercer* v. *Denne*, [1904] 2 Ch. 556). And there may be an intermittent customary right (*Mercer* v. *Denne*, [1905] 2 Ch. 571).

Enjoyment must be as of right.

As regards the nature of this continuous user. It was laid down by Willes, J., that in the case of custom, long enjoyment in order to establish a right must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills* v. *Colchester*, L. R. 2 C. P. 486; see *Montgomery* v. *Wallace James*, [1904] A. C. 82). Compare the rule as to the user on which prescriptive rights must be founded, *ante*, pp. 9, 10.

The Prescription Act mentions custom as well as prescription as a mode of claiming incorporeal hereditaments, both in the case of profits *à prendre* (sect. 1) and in the case of easements (sect. 2). Sect. 5, however, refers to "the tenement in respect whereof the right is claimed," while it will be remembered that a claim by custom is made in respect of some district, but not in respect of any defined dominant tenement within that district. Notwithstanding the above words in sect. 5, it was at first suggested that rights not annexed to a defined dominant tenement might still be claimed under the statute, as being within the equity of it (*Welcome* v. *Upton*, 5 M. & W. 404; 6 M. & W. 542; *Wickham* v. *Hawker*, 7 M. & W. 81; see 2 Wms. Saund. 515). The words in sect. 5, however, led the Courts to decide that such claims could not be made under the statute, either in the case of profits *à prendre* in gross (*Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687; 34 L. J. C. P. 309; *Foster* v. *Warblington*, [1906] 1 K. B. 664), or in the case of rights in the nature of easements based on custom (*Mounsey* v. *Ismay*, 3 H. & C. 486; 34 L. J. Ex. 52). These decisions were followed where a customary right for the fishermen of a district to dry their nets on the shore was attempted to be claimed under the statute (*Mercer* v. *Denne*, [1904] 2 Ch. 540, 555; see *Ramsgate* v. *Debling*, 22 T. L. R. 369). In the Court of Appeal, a different view of the statute was raised, but the point not decided ([1905] 2 Ch. 574, 586).

Method of claiming customary rights in the nature of incorporeal hereditaments.

Customary rights accordingly cannot be claimed under the statute. They are claimed by a method analogous to common law prescription, upon proof of immemorial enjoyment as of right (*Montgomery* v. *Wallace James*, [1904] A. C. 81).

Custom being local law cannot be got rid of except by statute (*Hammerton* v. *Honey*, 25 W. R. 604; see *Scales* v. *Key*, 11 Ad. & Ell. 822). Customary rights can be extinguished by the express words of a statute (*Salters' Co.* v. *Truscott*, 11 Exch. 855); or through being embraced and confirmed by a statute, in which case they become statutory rights (*New Windsor* v. *Taylor*, [1899] A. C. 49; see *Wake* v. *Hall*, 8 App. Cas. 195).

Extinguishment of customary rights.

Besides the above customs which establish the right to certain incorporeal hereditaments, other customs should be mentioned which are connected with the tenure of land; *e.g.* the customs of gavelkind and borough-English, abolished by sect. 45 of the Administration of Estates Act, 1925, *post*, *q.v.* In the case of lands of burgage tenure, a custom for a married woman to dispose thereof with her husband's consent, but without separate examination, was held unreasonable and bad (*Johnson* v. *Clark*, [1908] 1 Ch. 303). Again, there were customs connected with copyhold tenure. Thus a custom binding the copyhold tenants of a manor to repair their tenements was good (*Blackmore* v. *White*, [1899] 1 Q. B. 293). In *Derry* v. *Sanders*, [1919] 1 K. B. 223, it was held that long user of a right of way raised a presumption that a custom existed whereby a right of way could be acquired over land in a manor as appurtenant to other land in the manor, but that the right was extinguished on enfranchisement without a reservation of it. (Copyhold and customary tenures were abolished by the Law of Property Act, 1922, Part V.) Many other instances of copyhold customs will be found in the note on Rights of Common, *post*.

Customs connected with tenure of land.

Copyhold customs.

Again, in a wide sense of the word custom there are a number of miscellaneous rights which are mentioned in the books as customary rights. As, for instance, a custom obliging landowners to maintain sea frontages (*L. & N. W. Ry. Co.* v. *Fobbing*, 66 L. J. Q. B. 27). (See as to lands enfranchised by the Law of Property Act, 1922, Part V., Sched. XII. (6) of that Act, and sect. 10, Class A (vi.) of the Land Charges Act, 1925, *post*.) A custom rendering a parish or

Miscellaneous customs.

Custom.

township liable to repair highways within it (*R.* v. *Ecclesfield*, 1 B. & Ald. 360) or exempting it from contributing to repair highways without it (*R.* v. *Barnardswick*, 4 Q. B. 499; *R.* v. *Rollett*, L. R. 10 Q. B. 469). A custom as to marriage fees (*Bryant* v. *Foot*, L. R. 2 Q. B. 161, 171, 178), or the appointment of churchwardens (*Bremner* v. *Hall*, L. R. 1 C. P. 748; *R.* v. *Green*, 30 L. T. 255), or as to payment of church rates (*R.* v. *Dalby*, 3 Q. B. 602), or as to paying to a corporation duties on imported coal (*Jenkins* v. *Harvey*, 1 C. M. & R. 877). A custom binding the parson as owner of great tithes to keep a bull and boar for the use of parishioners is mentioned in *Lanchbury* v. *Bode*, [1898] 2 Ch. 120.

Usages.

All the customs referred to above must be distinguished from usages which are imported into mercantile contracts or into contracts between landlord and tenant. Such usages need not be immemorial (*Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 386). But they must be reasonable (*Gibbon* v. *Pease*, [1905] 1 K. B. 810) and certain (*Re Walkers & Co.*, [1904] 2 K. B. 159). Their reasonableness is a question of law for the Court, not of fact for the jury (*Bradburn* v. *Foley*, 3 C. P. D. 135, compare *Re Walkers & Co.*, [1904] 2 K. B. 159). It seems that mercantile usage cannot prevail against positive law (*Goodwin* v. *Robartes*, L. R. 10 Ex. 357). Modern usages between landlord and tenant were discussed in *Bradburn* v. *Foley*, *supra*; *Tucker* v. *Linger*, 8 A. C. 508. A modern usage as to cutting timber was considered in construing a will and as between persons claiming under the will rendered that not waste which would have been waste between others (*Dashwood* v. *Magniac*, [1891] 3 Ch. 350). As to the above modern usages, see further *Wigglesworth* v. *Dallison*, 1 Sm. L. C.

D. *Of Grants, Express and Implied, of Incorporeal Rights; and herein of Licences in Relation to Real Estate.*

The title to incorporeal rights may arise by grant, whether express or implied.

As regards implied grants of easements, see the decisions in the case of ways, p. 79, *post*; water, p. 94, *post*; and light, p. 120, *post*.

Creation by express grant.

As regards express grants, sect. 62 of the Conveyancing Act, 1881 (repealed and not re-enacted by the Law of Property Act, 1925), provided that easements might be granted by way of use; and by sect. 51, sub-sect. 2 of the latter Act, *post*, the word "grant" is not necessary to convey land or to create any interest therein. Any words which show the intention to give an easement which is by law grantable are sufficient to effect that purpose (*North British Ry.* v. *Park Yard*, [1898] A. C. 646). Thus a covenant may operate as a grant of an easement (*Northam* v. *Hurly*, 1 Ell. & Bl. 665).

Estate of grantor in the land:

With respect to the estate in the servient tenement which the grantor of the easement must possess at the date of the express grant, it has been held that an easement could not be granted by an executor who had no estate but only a power of sale (*Re Barrow-in-Furness & Rawlinson*, [1903] 1 Ch. 339), or by one who had only a right of entry under a building agreement (*Quicke* v. *Chapman*, [1903] 1 Ch. 659), or by an owner in fee who had previously contracted to sell the servient tenement (*Beddington* v. *Atlee*, 35 Ch. D. 317). And where at the time of the express grant of the easement, the grantor had only a term of years in the servient tenement, the grant did not bind the subsequently acquired fee (*Booth* v. *Alcock*, 8 Ch. 663).

of grantee.

With respect to the estate in the dominant tenement which the grantee of the easement must possess at the date of the express grant, it was said that no easement could be granted to one who at that date has no interest in the dominant tenement (*Rymer* v. *McIlroy*, [1897] 1 Ch. 532, 535; see *North British Ry.* v. *Park Yard*, [1898] A. C.

643). But where at that date A was yearly tenant of the dominant tenement, a grant of an easement "to A his heirs and assigns" enured for the benefit of the fee which A subsequently acquired (*Rymer* v. *McIlroy, supra*). **Grants.**

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right or hereditament (see *ante*, p. 6), and stands upon the same footing as rights of common, rents, advowsons, &c. It lay not in livery, but in grant (*Hewlins* v. *Shippam*, 5 B. & C. 229; see *Hastings* v. *N. E. Ry.*, [1898] 2 Ch. 674; see now the Law of Property Act, 1925, s. 51, *post*.) According to the older cases at common law a deed was necessary to create either a freehold interest in an incorporeal right (*Hewlins* v. *Shippam, supra; Blanchard* v. *Blanchard*, 1 Ad. & E. 536), or a leasehold interest (*Somerset* v. *Fogwell*, 5 B. & C. 875, a case of a several fishery; *Bird* v. *Higginson*, 6 Ad. & E. 824, a right of sporting; *Wood* v. *Leadbitter*, 13 M. & W. 843). In accordance with this doctrine, it was held at common law that an agreement, otherwise than by deed, for an incorporeal right, was merely a parol licence revocable at will, though valuable consideration had been given or expense incurred (*Fentiman* v. *Smith*, 8 East, 107; *Cocker* v. *Cowper*, 1 C. M. & R. 418; *Bryan* v. *Whistler*, 8 B. & C. 298; *Adams* v. *Andrews*, 15 Q. B. 284; see *R.* v. *Hornden-on-the-Hill*, 4 M. & S. 565; *Thomas* v. *Fredericks*, 10 Q. B. 775; *Smart* v. *Jones*, 33 L. J. C. P. 154. But see now *Hurst* v. *Picture Theatres*, [1915] 1 K. B. 1). Necessity of a deed to pass incorporeal rights. Effect of an agreement not under seal; older cases at common law;

It has, however, been laid down more recently that an agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and for the purpose of creating a lawful user is as good as a deed (*Dalton* v. *Angus*, 6 App. Cas. 765, 782; see *May* v. *Belleville*, [1905] 2 Ch. 605). And see the earlier cases in equity, where it was held that a parol licence for an easement was irrevocable where expense had been incurred, and there had been acquiescence (*Devonshire* v. *Eglin*, 14 Beav. 530; *Moreland* v. *Richardson*, 22 Beav. 596; *Mold* v. *Wheatcroft*, 27 Beav. 510; *Laird* v. *Birkenhead Co.*, Joh. 500; *Newby* v. *Harrison*, 1 J. & H. 393; *Bankart* v. *Tennant*, 10 Eq. 141; *Carr* v. *Benson*, 3 Ch. 524). The decision in *Walsh* v. *Lonsdale* (21 Ch. D. 9) may have altered the earlier law in relation to agreements as to sporting rights (*Lowe* v. *Adams*, [1901] 2 Ch. 600). Such rights passed in Ireland under an agreement not sealed (*Radcliff* v. *Hayes*, [1907] 1 I. R. 101). A verbal agreement for an easement may be enforced where there has been part performance (*McManus* v. *Cooke*, 35 Ch. D. 681; cf. *Grand Hotel* v. *White*, 84 L. J. Ch. 938). In a case, however, where there was no writing and no part performance, sect. 4 of the Statute of Frauds prevented the recovery of damages for breach of a verbal agreement giving the right to shoot over land and take away game, such right being treated as real estate (*Webber* v. *Lee*, 9 Q. B. D. 315). recent cases

Easements may be created by statute, *e.g.*, support (*L. N. W. Ry.* v. *Evans*, [1893] 1 Ch. 16). As to light see *Boyce* v. *Paddington*, [1903] 1 Ch. 115. As to right of way, see *post*, p. 81. Under the L. C. C. Acts alone no railway company could purchase an easement (*Re Barrow-in-Furness* and *Rawlinson*, [1903] 1 Ch. 350); but in special cases rights in the nature of statutory easements can be acquired (*Hill* v. *Midland Co.*, 21 Ch. D. 143; *G. W. Ry.* v. *Swindon Co.*, 22 Ch. D. 707; 9 A. C. 802). Creation by statute.

Licences in relation to Real Estate.

As regards licences generally in relation to real estate: "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful Nature of a licence.

Licences.

which, without it, would have been unlawful" (*Thomas* v. *Sorrell*, Vaughan, 351). A licence authorising the commission of an act illegal by statute was held void (*Edwick* v. *Hawkes*, 18 Ch. D. 199). A personal licence, as to enter a house to seize goods, is not assignable (*Re Davis, Ex parte Rawlins*, 22 Q. B. D. 193; see *Ackroyd* v. *Smith*, 10 C. B. 164). A personal licence of pleasure cannot be exercised with or by servants; *secus*, in the case of a licence of profit (*Norfolk* v. *Wiseman*, cited 7 M. & W. 77). As to the legal nature of the rights conferred by a railway passenger's ticket, see *Butler* v. *Manchester S. & L. Ry. Co.*, 21 Q. B. D. 207.

Grant of licence: express;

A licence to be binding on a third party must be by deed, as in the case of a licence to use a common (*Hoskins* v. *Robins*, 2 Wms. Saund. 728, and n. 12; Shep. Touch. 330; *Monk* v. *Butler*, Cro. Jac. 574; see *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Ramsey* v. *Rawson*, 1 Vent. 18—25); or a licence to a former tenant to enter to remove chattels after a new tenant is in possession (*Roffey* v. *Henderson*, 17 Q. B. 574). But as against the licensor a parol licence is an excuse for a trespass until countermanded (*Hewlins* v. *Shippam*, 5 B. & C. 232; *Cornish* v. *Stubbs*, L. R. 5 C. P. 339). A parol agreement which is void under sect. 4 of the Statute of Frauds may operate as a licence (*Carrington* v. *Roots*, 2 M. & W. 257; *Crosby* v. *Wadsworth*, 6 East, 602; compare *Webber* v. *Lee*, 9 Q. B. D. 315). As to parol licence by the Crown, see *Harper* v. *Charlesworth*, 4 B. & C. 590.

implied.

Where a party places goods of another upon his own close, he gives the owner an implied licence to enter for the purpose of recaption (*Patrick* v. *Colerick*, 3 M. & W. 483; *Wood* v. *Leadbitter*, 13 M. & W. 853); but no such licence will be implied to a purchaser of goods to enter the premises of the vendor to take them (*Williams* v. *Morris*, 8 M. & W. 488; see *Wood* v. *Manley*, 11 Ad. & Ell. 34).

Revocation of licences; executed licences to do acts on land of licensor,

As regards the revocation of licences, a mere licence which is not coupled with a grant, and which has not been executed, was revocable whether under seal or not (*Wood* v. *Leadbitter*, 13 M. & W. 845). But since the Judicature Acts *Wood* v. *Leadbitter*, is no longer law (*Hurst* v. *Picture Theatres*, [1915] 1 K. B. 1). Even where the licence had been executed and expense incurred by the licensee, according to the older cases at common law a parol licence to do an act on the land of the licensor was revocable (*R.* v. *Hornden-on-the-Hill*, 4 M. & S. 565; see *Plimmer* v. *Wellington*, 9 App. Cas. 699; *Islington* v. *Hornsey*, [1900] 1 Ch. 695: it should be observed, however, that under such circumstances there might be a contract for breach of which, if the licence were revoked, damages might be recovered, see *Kerrison* v. *Smith*, [1897] 2 Q B. 445). In equity a licence to do acts on the land of the licensor might, where expense had been incurred by the licensee, be held irrevocable (*Devonshire* v. *Eglin*, 14 Beav. 530, and other cases quoted *ante*, p. 41; *Plimmer* v. *Wellington*, 9 App. Cas. 699; *Civil Service Association* v. *Whiteman*, 68 L. J. Ch. 484; compare *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Edwards* v. *Summerton*, [1899] W. N. 120; and as to the Crown, *Att.-Gen. to Prince of Wales* v. *Collom*, [1916] 2 K. B. 193.

on land of licensee;

As regards acts on the land of the licensee, licences for these acts were, in the older common law cases, distinguished from licences for acts on the land of the licensor (see notes to *Coryton* v. *Lithebye*, 2 Wms. Saund. 363). And where a parol licence for acts of the former nature had been given which involved expenditure by the licensee, and the work had been executed, it was held that the licensor could not revoke the licence, and require the *status quo ante* to be restored; at least, not without tendering the expenditure

(*Winter* v. *Brockwell*, 8 East, 308; *Liggins* v. *Inge*, 7 Bing. 682; *Blood* v. *Kellar*, 11 Ir. C. L. R. 124; *Davies* v. *Marshall*, 31 L. J. C. P. 61; but see *Aldin* v. *Latimer*, [1894] 2 Ch. 437).

licence coupled with a grant;

Again, where a parol licence was coupled with a grant of something capable of being granted by parol, it was irrevocable (*Wood* v. *Leadbitter*, 13 M. & W. 845). So a licence to dig for tin and to dispose of the tin was irrevocable as carrying an interest in the ore (*Doe* v. *Wood*, 2 B. & Ald. 738; see *Northam* v. *Bowden*, 11 Exch. 70; *Jones* v. *Tankerville*, [1909] W. N. 171). So, also, where there was an agreement in writing to let, for one year, a shooting, with the right to the game shot, and the letting was continued by parol for some years, the right was not a licence revocable at will, although it was validly determined by a month's notice terminating at the end of a year (*Lowe* v. *Adams*, [1901] 2 Ch. 598; *Radcliff* v. *Hayes*, [1907] 1 I. R. 101; compare *Wilson* v. *Tavener*, [1901] 1 Ch. 578; and see the cases as to profits *à prendre*, *ante*, p. 3. Where by the conditions of sale of goods the buyer was to be allowed to enter to take them, the licence could not, after sale, be revoked, but could be executed even by force (*Wood* v. *Manley*, 11 Ad. & Ell. 34; see *Wood* v. *Leadbitter*, 13 M. & W. 853).

mode of revocation.

The locking a gate is sufficient notice of revocation of a parol licence to pass through it (*Hyde* v. *Graham*, 1 H. & C. 593; see *Russell* v. *Harford*, 2 Eq. 507). A parol licence for an easement over land is revoked by the transfer of the land to a third person (*Wallis* v. *Harrison*, 4 M. & W. 538; see *Roffey* v. *Henderson*, 17 Q. B. 574; *Coleman* v. *Foster*, 1 H. & N. 37).

The licensee under a revocable licence is entitled to reasonable notice of revocation (*Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400; *Aldin* v. *Latimer*, [1894] 2 Ch. 448). As to what is a reasonable notice, see *Wilson* v. *Tavener*, [1901] 1 Ch. 578; compare *Lowe* v. *Adams*, [1901] 2 Ch. 598.

Remedies: damages;

In some cases of revocation, even where a licence has been rightfully revoked, damages may be recovered by the licensee on the ground of breach of contract (*Kerrison* v. *Smith*, [1897] 2 Q. B. 445; see *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400). Where a licence to post bills was disregarded by a lessee of the grantor the latter was held liable in damages (*King* v. *Allen & Sons*, [1916] 2 A. C. 54). But the Statute of Frauds may prevent the recovery of damages (*Webber* v. *Lee*, 9 Q. B. D. 315; compare *Carrington* v. *Roots*, 2 M. & W. 257).

injunction.

Where previously to the execution of a lease and as part of the consideration therefor an agreement not under seal for the exercise by the tenant of sporting rights was entered into, the tenant obtained an injunction restraining interference by the landlord with the sporting rights until a grant thereof under seal had been executed (*Frogley* v. *Lovelace*, Johns. 333).

III.—Rights of Common.

(1) *Meaning of Common; Claims thereto by Custom and by Prescription; the*...44.
(2) *Common of Pasture*...45.
(3) *Common of Turbary*...49.
(4) *Common of Estovers*...50.
(5) *Common of Piscary; and herein of Rights of Fishing Generally*...51.
(6) *Customs to take Sand, Gravel, &c.*...54.

Rights of Common.

(7) *Rights of the Commoners in the Waste*...55.
(8) *Rights of Lord in the Waste*...55.
(9) *Inclosure of Commons*...57.
(10) *Conveyance of Common Rights*...57.
(11) *Extinguishment of Common Rights*...58.
(12) *Remedies for Disturbance of Common Rights*...59.

(1) Several species of common.

Common is a right which one or more persons claim of taking some part of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which continues good, although there be no instrument in writing that proves the original agreement (4 Rep. 37 a; 2 Inst. 65; Vent. 387; Bac. Abr. Common). The rights of common most frequently met with are the rights of tenants of a manor in the waste. By Part V. of the Law of Property Act, 1922, copyhold and customary tenures were abolished as from January 1, 1926 (that date being substituted for January 1, 1925, by 15 Geo. 5, c. 4). By Sched. 12 (1) (d) the land enfranchised by the Act is not to be subject to borough-English, gavelkind, or any other customary mode of descent, or to any custom relating to dower, or freebench, or tenancy by the curtesy, or to any other custom whatsoever. But para. (4) of the same Schedule provides that an enfranchisement by virtue of the Act shall not deprive a tenant of any commonable right to which he is entitled in respect of the enfranchised land, but where any such right exists in respect of any land on January 1, 1926, it shall continue attached to the land notwithstanding that the land has become freehold. See as to public rights of access to commons, Law of Property Act, 1925, ss. 193 and 194, *post*.

Claims to common by custom.

Rights of common in the waste might be claimed by copyhold tenants of a manor by custom (*Gateward's Case*, 6 Rep. 59; *Bean* v. *Bloom*, 2 Bl. R. 926; *S. C.*, 3 Wils. 456). They could not prescribe in their own names by reason of the want of permanence. Nor could they in their lord's name, for he could not claim common in his own land. They were therefore allowed to claim it by custom (*per* Lord Denman, *Rogers* v. *Brenton*, 10 Q. B. 61; see *Warrick* v. *Queen's College*, 10 Eq. 122).

Claims to common by prescription.

In the case of freehold tenants of a manor, rights of common in the waste may be claimed by prescription (*Warrick* v. *Queen's College*, 6 Ch. 716). Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the Court will presume that the inhabitants claimed through the freehold tenants, and will try to find a legal origin for those rights (*Warrick* v. *Queen's College*, 6 Ch. 716). In the case of persons who were not themselves either copyhold or freehold tenants of the manor, common could not be claimed on the ground of either custom or prescription by "dwellers" in a manor (*Allgood* v. *Gibson*, 25 W. R. 60; 34 L. T. 883); or by "occupiers" of copyhold lands (*Austin* v. *Amhurst*, 7 Ch. D. 689; *Knight* v. *King*, 20 L. T. 494). See further, as to claims to common when based on prescription, the cases quoted *ante*, pp. 2, 26; and when based on custom, the cases, p. 35. For cases where trusts of commonable rights for the benefit of occupiers were held to have been created, see *Att.-Gen.* v. *Meyrick*, [1893] A. C. 1; *Simcoe* v. *Pethick*, [1898] 2 Q. B. 555.

Rights of common have been frequently dealt with by statute (see note on Inclosure Acts, *post*, p. 57), and have been created by Crown grant (see *Chilton* v. *London*, 7 Ch. D. 735). Where the

Crown dedicated land as permanent common but named no commoner, common of pasturage was not created (*Sydney* v. *Att.-Gen. for New South Wales*, [1894] A. C. 444). **Rights of Common.**

Common has been divided into five sorts (Co. Litt. 122 a), viz.: 1st, *Common of pasture*, which is a right that one man has in common with others to feed his beasts in another man's land. 2ndly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house (see *Valentine* v. *Penny*, Noy, 145; *Wilson* v. *Willes*, 7 East, 121; 3 Lev. 165). 3rdly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (see *Arundel* v. *Steere*, Cro. Jac. 25; 5 Rep. 25 a; 4 Rep. 87 a; Cro. Eliz. 820; Plowd. 381). 4thly, *Common of piscary*, or a right of taking fish in pond, pool, or river, the soil whereof belongs to another. And 5thly, a liberty which in some manors the tenants have, of taking sand, gravel, stone, &c., in the lord's soil (Bac. Abr. Common, (A.)). All claims of this kind, in order to be valid, must be made with some limitation and restriction (*Clayton* v. *Corby*, 5 Q. B. 419). Different kinds of common.

(2)

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant, or in gross (Selw. N. P. Common, s. 2). Common of pasture.

Common of pasture appendant is a right belonging to freehold tenants holding arable lands parcel of a manor. It is a right to put commonable beasts upon the lord's waste. Commonable beasts are horses and oxen to plough the land, and cows and sheep to manure it (Co. Litt. 122 a; 2 Bl. Com. 33; *Tyrringham's Case*, 4 Rep. 36 a; 2 Inst. 85). As to this right Parke, B., in the Exchequer Chamber, laid down that, although there are some books which state that common appendant is of common right, and that common appendant is the common law right of every free tenant in the lord's wastes (see *Mellor* v. *Spateman*, 1 Wms. Saund. 346 d, 6th ed.; *Bennett* v. *Reeve*, Willes, 227; Com. Dig. Comm. B.), it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right at common law, incident to the grant. The right therefore is not a common right of all tenants, but belongs only to each grantee, before the stat. *Quia Emptores*, of arable land by virtue of his individual grant and as incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent, being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits and depends on the will of the grantor (*Dunraven* v. *Llewellyn*, 15 Q. B. 810, 811). As to this decision see Williams' Real Prop., App. F., 628, 17th ed., and *Warrick* v. *Queen's College*, 10 Eq. 123. Common of pasture appendant could not, it seems, be claimed by copyholders. Common appendant.

Common appendant can only be claimed in the lord's wastes (2 Inst. 85; 1 Roll. 396; 4 Rep. 37), for the claimant's own commonable cattle levant and couchant upon the land (*ibid.*; Burr. 320). A right of common for cattle "*levant and couchant*," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining (*Whitelock* v. *Hutchinson*, 2 M. & Rob. 205; 5 T. R. 46; *Bennett* v. *Reeve*, Willes, 227; *Benson* v. *Chester*, 8 T. R. 396; Meaning of levant and couchant.

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Willis v. *Ward*, 2 Chit. 297). In other words the right is governed by the number of cattle which the commoner has the means of housing and providing for in the winter (*Dyce* v. *Hay*, 1 Macq. H. L. C. 313). Levant and couchant expresses a measure of the number of cattle that may be put in, and does not necessarily refer to cattle actually fed upon the particular land (*Johnson* v. *Barnes*, L. R. 7 C. P. 592). It is rather the measure of capacity of the land than a condition to be actually complied with (*Robertson* v. *Hartopp*, 43 Ch. D. 517; see *Carr* v. *Lambert*, L. R. 1 Exch. 168).

This species of common must have existed from time immemorial (1 Roll. Abr. 396), and only arises in the case of grants of arable land (*Warwick* v. *Queen's College*, 6 Ch. 730). It might formerly be claimed as appendant to a cottage, because by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), it was requisite for a cottage to have four acres of land attached to it (*Emerson* v. *Selby*, 1 Salk. 169; 2 Lord Raym. 1015). Common appendant is so necessarily incident to the land, that it cannot be severed from it, and, therefore, however often the land may be divided, every parcel of it is entitled to common appendant (*Bennett* v. *Reeve*, Willes, 240). Common of pasture appendant is extinguished by the erection of permanent buildings on the land in respect of which it is claimed, but not by the conversion of arable land into pasture (*Warrick* v. *Queen's College*, 6 Ch. 730; *Robertson* v. *Hartopp*, 43 Ch. D. 517).

Common appurtenant.

Common of pasture appurtenant, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant or prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land (4 Rep. 37 a). And it may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399); but not for geese, where they had no connection with the land (*Morley* v. *Clifford*, 20 Ch. D. 753). A claim to a right of common under sect. 1 of the Prescription Act, 1832, must be grounded on acts acquiesced in or consented to by the owner of the land and showing a claim to a right of common of pasture, not a claim to the ownership of the soil (*Lyell* v. *Hothfield*, [1914] 3 K. B. 911, distinguishing *De la Warr* v. *Miles*, 17 Ch. D. 585, and *Dawson* v. *MacGroggan*, [1903] 1 Ir. 92, on this ground). A fold course is a right of common appurtenant of pasture for sheep (*Robinson* v. *Duleep Singh*, 11 Ch. D. 798). Common appurtenant for a fractional part of a cow was claimed in *Nicholls* v. *Chapman* (5 H. & N. 643). In the case of common appurtenant there must be some connection between the occupation of the lands in respect of which the right is enjoyed, and the right itself, which connection must limit the right (*Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 500). A copyholder could not lawfully claim common appurtenant without stint in respect of his copyhold tenement; but such common must be limited to the cattle levant and couchant on the tenement to which it is annexed, or the number must be ascertained by the Court rolls, or in some other manner (*Morley* v. *Clifford*, 20 Ch. D. 753; see *Benson* v. *Chester*, 8 T. R. 396; *Scholes* v. *Hargraves*, 5 T. R. 46). A person may claim common appurtenant for a certain number of cattle, in which case the cattle of a stranger may be put upon the common, as no injury can arise to the owner of the soil as the number is ascertained (Bac. Abr. 96; *Richard* v. *Squibb*, 1 Ld. Raym. 726; see *Stevens* v. *Austin*, 2 Mod. 185; *Thornel* v. *Lassels*, Cro. Jac. 27). The principle furnished by *Potter* v. *North* (1 Wms. Saund. 635; *Hoskins* v. *Robins*, 2 Wms. Saund. 726), as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved, by the

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grant, and to see whether the act be in derogation of the latter (*Jones* v. *Richard*, 6 Ad. & Ell. 530; see 5 *Ibid.* 413). If the common appurtenant be for an uncertain number of cattle, it is limited to the claimant's own commonable cattle levant and couchant upon his lands see (*Manchester* v. *Vale*, 1 Wms. Saund. 28, ed. 1871; and see further, as to common appurtenant for cattle levant and couchant, *Bowen* v. *Jenkins*, 6 Ad. & Ell. 911). A right of common appurtenant for cattle levant and couchant is not extinguished or suspended by reason of a change in the condition of the tenement, if the tenement might still easily be turned to the purpose of feeding cattle (*Carr* v. *Lambert*, L. R. 1 Exch. 168). After the extinction of a prescriptive right of common by a unity of possession of the waste with the land in respect of which the right is claimed, proof that the successive tenants of such lands for above fifty years under different lords had actually enjoyed the right of common is evidence for presuming a new grant from the lord (*Cowlam* v. *Slack*, 15 East, 108). As to the evidence in support of a claim to common appurtenant, see *Commrs. of Sewers* v. *Glasse*, 19 Eq. 150; and as to the proper mode of pleading a prescriptive right to common appurtenant, see *Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 500.

Apportionment of common.

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but it is otherwise as to common appurtenant and other kinds of common, as common of estovers or piscary. But both common appendant and common appurtenant will be apportioned on alienation of part of the land to which the common is appendant or appurtenant (Co. Litt. 122 a, 164 a; *Tyrringham's Case*, 4 Rep. 36; *Wild's Case*, 8 Rep. 78; *O'Hare* v. *Fahy*, 10 Ir. C. L. R. 318).

The rent-charges under the Acts for the commutation of tithes in England and Wales, in respect of the tithes of common appendant or appurtenant, are to be charged on the allotments thereafter to be made in respect of the lands to which the right of common is attached (Tithe Act, 1839, s. 14).

Common in gross.

Common in gross is such a right of common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor (Co. Litt. 122 a; 2 Bl. Comm. 34). Common appurtenant for a certain number of cattle may be converted into common in gross (*Drury* v. *Kent*, Cro. Jac. 14; *Bunn* v. *Channen*, 5 Taunt. 244). So a common appurtenant to a manor may be granted in gross (1 Roll. Abr. 402, pl. 3; *Day* v. *Spooner*, Cro. Car. 432; Sir W. Jones, 375; 2 Wms. Saund. 727, n.). A right of common in gross *sans nombre*, in the latitude in which it was formerly understood, cannot exist (*Mellor* v. *Spateman*, 1 Wms. Saund. 622; 1 Ld. Raym. 407; *Bennett* v. *Reeve*, Willes, 232; *Benson* v. *Chester*, 8 T. R. 396), and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put on a particular number of cattle (*Bennett* v. *Reeve*, Willes, 232).

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre* (*Mellor* v. *Spateman*, 1 Wms. Saund. 629; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Where all freemen inhabiting an ancient borough claimed right of common, and 5 & 6 Will. 4, c. 76, extended the limits of the borough, the right of common was reserved to those who resided within the old limits (*Beadsworth* v. *Torkington*, 1 Q. B. 782; *Hulls* v. *Estcourt*, 2

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New Rep. 131). See a plea of common by a burgess under a grant to a corporation, *Parry* v. *Thomas*, 5 Exch. 37.

The Tithe Act, 1839, s. 13, provides the mode in which Lammas lands and a right of common in gross are to be charged with rent-charges, in lieu of tithes under the Acts for the commutation of tithes.

Common because of vicinage.

Common because of vicinage or neighbourhood, is not strictly a right of common. It happens where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is confined to two townships (*Commrs. of Sewers* v. *Glasse*, 19 Eq. 160), and if you have three vills, each of which has a common, A, B and C, and vill B lies between A and C, B may intercommon with A or C, but A cannot intercommon with C (*ibid.*). It is only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits (*Musgrove* v. *Cave*, Willes, 322; *Wells* v. *Pearcy*, 1 Bing. (N.C.) 556; *Gullett* v. *Lopes*, 13 East, 348). And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray thither of themselves, the law winks at the trespass (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 33). Where an individual claimed a right to participate in this kind of common it was said that although it may be claimed by prescription, it is rather matter of immemorial custom. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that it is necessary therefore for the pleadings to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years' user under the Prescription Act, 1832 (*Pritchard* v. *Powell*, 10 Q. B. 603; see *Hetherington* v. *Vane*, 4 B. & Ald. 428; and as to pleading, see *Morewood* v. *Wood*, 14 East, 327). Reputation may be given in evidence in support of the immemorial right of such common so pleaded (*Pritchard* v. *Powell*, *supra*). Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence separating the downs (*Heath* v. *Elliot*, 4 Bing. (N.C.) 388). This common cannot be claimed by usage between the close of an individual and a common (*Clarke* v. *Tinker*, 10 Q. B. 604). Nor can it be claimed by custom in respect of a private estate over which no other right of common is shown (*Jones* v. *Robin*, 10 Q. B. 620).

To establish a right of common *pur cause de vicinage* an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed (*Clarke* v. *Tinker*, 10 Q. B. 604).

Where the commons of two towns adjoin, and a right of common by reason of vicinage exists, and in one town there are fifty acres of common and in the other town one hundred acres of common, the commoners in the first town cannot put more cattle upon the entire common than the common of fifty acres will feed (*Corbet's Case*, 7 Rep. 5 a; *Commrs. of Sewers* v. *Glasse*, 19 Eq. 161). Where common *pur cause de vicinage* exists one commoner cannot take the law into his own hands and distrain another commoner's cattle for a surcharge (*Cape* v. *Scott*,, L. R. 9 Q. B. 269).

An end may be put to this species of common by inclosure (*Tyrring-*

ham's Case, 4 Rep. 36 b, 38 b, 39 a; *Corbet's Case*, 7 Rep. 5 a). Where one common is inclosed leaving open a passage for a highway, so that cattle could stray from one to the other by means of the highway, the common by vicinage still continues (*Gullett* v. *Lopes*, 13 East, 348). In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there, by inclosing his own land (2 Wils. 269). When there is a common *pur cause de vicinage* between two wastes, and one of them is under a private Act conveyed to allottees, for the purpose of being inclosed, and the commissioners extinguish all rights of common on such one waste, these proceedings do not of themselves put an end to the common *pur cause de vicinage* (*Clarke* v. *Tinker*, 10 Q. B. 604; *Wells* v. *Peacey*, 1 Bing. (N.R.) 556). **Rights of Common.**

Apart from common of pasture there should be mentioned certain rights of pasture which may be prescribed for. Thus a party may prescribe to take the sole and several herbage (Co. Litt. 122; *Hoskins* v. *Robins*, 2 Wms. Saund. 726; *Potter* v. *North*, 1 Vent. 385; *Welcome* v. *Upton*, 6 M. & W. 543; see *North* v. *Cox*, 1 Lev. 253; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the North of England, although some have thought the owners of them are tenants in common of the soil (*Welcome* v. *Upton*, 6 M. & W. 541, 542; *R.* v. *Whixley*, 1 T. R. 137). The grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself (Co. Litt. 4 b). A cattle-gate is not a more extensive right than the above, and does not include the right to the soil (*Rigg* v. *Lonsdale*, 1 H. & N. 923, 936; see *Robinson* v. *Wray*, L. R. 1 C. P. 490). A person may prescribe to have the sole and several pasture, vesture or herbage, in exclusion of the owner of the soil, for a *limited time in every year* (Fitz. Prescription, 51; Co. Litt. 122 a; 2 Roll. Abr. 267 (L.) pl. 6; Winch's Rep. 5; Hutt. 45; *Johnson* v. *Barnes*, L. R. 8 C. P. 527); or for the whole year (*Hoskins* v. *Robins*, 2 Wms. Saund. 726; *S. C.*, 2 Lev. 2; Pollexf. 13; 1 Mod. 74). But a man cannot prescribe to have *common eo nomine* for the *whole* year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing (Co. Litt. 122 a; 1 Roll. Abr. 396 (A.), pl. 1, 2; 2 Roll. Abr. 267, pl. 3; 2 Lev. 268; 1 Ventr. 395). However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year (Yelv. 129; 1 Brownl. 187; Cro. Jac. 208, 257). So it is said the lord may be restrained, together with the commoners, from using a common at all during a part of the year (1 Roll. Abr. 405, 406); and that the commoners may have common in exclusion of the lord for part of a year (2 Roll. Abr. 267 (L.), pl. 1; 1 Wms. Saund. 353, n. (2)), or in part of the common (*De la Warr* v. *Miles*, 17 Ch. D. 587). The claim in right of a freehold estate and the lands which formerly belonged to the manor farm, of a separate right of feeding and folding an unlimited number of sheep, is not a claim of a right of common, but of something in the nature of a separate right of feeding and folding (Keilway, 198 a; *Punsany and Leader's Case*, 1 Leon. 11), which may have arisen out of an exception made by the lord upon granting the lands, or it may have been created by an Act of Parliament (*Ivatt* v. *Mann*, 3 M. & G. 699). What rights of pasture may be prescribed for.

(3) Common of turbary.

Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale (*Valentine* v. *Penny*, Noy, 145; see *Hayward* v. *Cannington*, 1 Lev. 231; 1 Sid. 354). An

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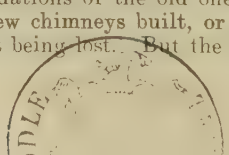
ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or at the most, for the house which supplies the place of that house (*Warrick* v. *Queen's College*, 6 Ch. 730). In an action of trespass the user of this right of common was held to extend to all parts of a common fit for the production of fuel, but not to a rock (*Peardon* v. *Underhill*, 16 Q. B. 120). A custom for all the customary tenants of a manor, having gardens, to dig turf for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad, as being indefinite and destructive of the common (*Wilson* v. *Willes*, 7 East, 121, recognised in *Salisbury* v. *Gladsone*, 9 H. L. C. 692; see *Peppin* v. *Shakespear*, 6 T. R. 748). Common of turbary, appurtenant to a house, will pass by grant or demise of such house with the appurtenances (*Solme* v. *Bullock*, 3 Lev. 165; *Dobbyn* v. *Somers*, 13 Ir. C. L. R. 293). There is nothing in law to prevent a party dealing with his own land and demising it, from annexing to the land or granting to the lessee a right to take turbary upon other lands of the landlord, to be consumed upon houses to be subsequently built upon the premises (*Hill* v. *Barry*, Hay & J. 688; *Duggan* v. *Carey*, 8 Ir. C. L. R. 210). The right of turbary is apportionable (*Hargrove* v. *Congleton*, 12 Ir. C. L. R. 368). As to trusts of turbary right for benefit of occupiers, see *Att.-Gen.* v. *Meyrick*, [1893] A. C. 1; *Simcoe* v. *Pethick*, [1898] 2 Q. B. 555.

(4) Common of estovers.

Common of estovers, or *estouviers*, that is, necessaries (from estover, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. The Saxon word bote is used by us as synonymous to the French estovers; and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; which latter is sometimes called fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing hedges or fences, as pales, stiles, and gates, to secure inclosures. These botes or estovers must be reasonable ones: and such any tenant or lessee, except a strict tenant at will, may take off the land let or demised to him without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary (Co. Litt. 41; 2 Bl. Comm. 35). Every tenant for life or years has a liberty of this kind of common right in the lands which he holds unless restrained, which is usual by particular covenants or exceptions (2 Bl. Comm. 282). The rule is founded on the obligation upon tenants of making necessary repairs (*De Salis* v. *Crossan*, 1 Ball & B. 188). Where no wood exists, and where part of the premises demised are bog, from which no other beneficial use can arise, a tenant is in Ireland entitled to use such bog for the purposes of fuel (*Howley* v. *Jebb*, 8 Ir. C. L. R. 435). A person having common of estovers in a certain wood of another, by view and delivery of the owner's bailiff, by taking estovers without such view and delivery is a trespasser, though he takes less than he was entitled to (5 Rep. 25 a).

Common of estovers can only be claimed by prescription for an ancient house (F. N. B. 180; 4 Co. 86; see, however, *Arundel* v. *Steer*, Cro. Jac. 25); but if it be pulled down and another built, either in the same or another place, the prescription will not be lost (*Costard & Wingfield's Case*, Godb. 97; *Cowper* v. *Andrews*, Hob. 39; *Att.-Gen.* v. *Reynolds*, [1911] 2 K. B. 888, where a *dictum* in *Costard & Wingfield's Case*, that the new house must be built on the foundations of the old one, was impugned). Rooms may be altered or new chimneys built, or additions made to the house, without the right being lost. But the estovers cannot be used in the parts newly



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added (*Luttrell's Case*, 4 Rep. 87 a). A person having common of estovers is not entitled to estovers out of timber which the owner of the soil has cut down in part of the wood, but he must take his estovers out of the residue (*Basset* v. *Maynard*, Cro. Eliz. 820; *Dowglass* v. *Kendal*, Cro. Jac. 256). A person having common of estovers appurtenant to a house cannot grant the estovers to another, reserving the house to himself, nor grant the house to another, reserving the estovers to himself (Plowd. 381). The estovers taken must be reasonable, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore they must be expended (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54); and cannot be sold to be used elsewhere (11 H. 6, 11 b; *Pembroke's Case*, Clayt. 47). Where a tenant abuses his right of estovers, an injunction will be granted (*Courtown* v. *Ward*, 1 Sch. & Lef. 8; see *Wilson* v. *Bragg*, 8 Bac. Abr. 428, Waste (*O*)).

Apart from common of estovers the right to estovers may be appurtenant to a messuage by prescription or grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers. This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits *in alieno solo* is bad (*Gateward's Case*, 6 Rep. 59; *Bean* v. *Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead* v. *Marlowe*, 4 T. R. 717; *Selby* v. *Robinson*, 2 T. R. 758; *Hoskins* v. *Robins*, 1 Vent. 123—163; 2 Saund. 320). And special rights in respect of wood may be acquired by prescription. Thus the owner of a house established by prescription the right to take for use in the house all thorns growing upon another's land (*Dowglass* v. *Kendal*, Cro. Jac. 256). But, if claimed as appurtenant to land, such a right must have connection with the enjoyment of the land. And where a right to cut all the wood on another's land and to dispose of it as the claimant pleased was claimed as appurtenant, the claim was bad (*Bailey* v. *Stevens*, 12 C. B. (N.S.) 91; 31 L. J. C. P. 226).

As analogous to estovers there should be mentioned the rights of commoners to cut furze, etc. (*Smith* v. *Brownlow*, 9 Eq. 241; *Warrick* v. *Queen's College*, 6 Ch. 716; also the right of the inhabitants of a parish to lop for fuel the branches of trees growing on the waste, which right may exist by virtue of a Crown grant (*Willingale* v. *Maitland*, 3 Eq. 103; *Rivers* v. *Adams*, 3 Ex. D. 361; *Chilton* v. *London*, 7 Ch. D. 735).

(5) Common of piscary.

A *common of fishery* is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common (Salk. 637); and trespass will not lie for an injury to it. Common of fishery might be claimed by copyhold tenants by custom (*Tilbury* v. *Silva*, 45 Ch. D. 115; and see *Payne* v. *Ecclesiastical Commrs.*, 30 Times L. R. 167). The right cannot be claimed by "inhabitants" (*Bland* v. *Lipscombe*, 24 L. J. Q. B. 155 n.; *Lloyd* v. *Jones*, 6 C. B. 81); nor by "dwellers" in a manor (*Allgood* v. *Gibson*, 34 L. T. 883); the ground being that, independently of manorial rights, a fishery *in alieno solo*, which is a profit *a prendre*, must be claimed not by custom but by prescription (*Bland* v. *Lipscombe*, *supra*); and a large and indefinite class cannot prescribe (*Tilbury* v. *Silva*, *supra*).

Different kinds of fishery.

As to the various kinds of fisheries, the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free," used as in "free warren"; and a right in common

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with others usually called common of fishery, sometimes "free," used as in "free port" (*per* Willes, J., *Malcolmson* v. *O'Dea*, 10 H. L. C. 593). A grant of a "free fishery" is *primâ facie* a grant of non-exclusive fishery (*Bloomfield* v. *Johnston*, I. R. 8 C. L. 68). A "common fishery," as distinguished from a "common of fishery," means a fishery extending to all mankind, as in the sea (*Benett* v. *Costar*, 8 Taunt. 186).

Several fishery.

A several fishery is when a person has an exclusive right of fishery either in his own soil or in the soil of another (1 Selw. N. P. 751, 13th ed.) within particular limits (3 Salk. 360; 2 Salk. 637; see Co. Litt. 122 a, n. 7; *R.* v. *Ellis*, 1 M. & S. 652). Such a right is, strictly speaking, the proper subject of a grant, but not of an exception or reservation (*Doe* v. *Loch*, 2 Ad. & El. 743; *Wickham* v. *Hawker*, 7 M. & W. 76; *Corker* v. *Payne*, 18 W. R. 436; see *Hamilton* v. *Musgrave*, 19 W. R. 443; *Grove* v. *Portal*, [1902] 1 Ch. 727). The word "several" is not necessary to create such a right (*Hanbury* v. *Jenkins*, [1901] 2 Ch. 401). A grant of the exclusive right of fishing includes the right to take away fish (*Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96).

A several fishery cannot be appurtenant to a several pasture (*Edgar* v. *Fishery Commissioners*, 23 L. T. 732). But a several fishery may be appurtenant to a manor (*Rogers* v. *Allen*, 1 Camp. 309). And in such a case will remain in gross if the lands of the manor are conveyed away (*Neill* v. *Devonshire*, 8 App. Cas. 153, 169; *Devonshire* v. *Pattinson*, 20 Q. B. D. 263), unless the intention to transfer the fishery appear in the conveyance (*Tilbury* v. *Silva*, 45 Ch. D. 98). A perfect paper title to a several fishery may not be absolutely conclusive if there be evidence of user by others inconsistent therewith (*Blount* v. *Layard*, [1891] 2 Ch. 681, n.; *Neill* v. *Devonshire*, *supra*; *Smith* v. *Andrews*, [1891] 2 Ch. 678). A several fishery may have annexed to it a right of way (*Hanbury* v. *Jenkins*, [1901] 2 Ch. 401), and such a fishery, whether in tidal or non-tidal waters, may exist independently of riparian ownership, and that whether the owner of the fishery be the owner of the soil of the river (*Neill* v. *Devonshire*, 8 App. Cas. 153; *Devonshire* v. *Pattinson*, *supra*; *Smith* v. *Andrews*, [1891] 2 Ch. 697; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401), or not (*Att.-Gen.* v. *Emerson*, [1891] A. C. 654; *Miller* v. *Little*, 4 L. R. Ir. 302; *Foster* v. *Wright*, 4 C. P. D. 449). The owner of a several fishery is entitled (as an incident to the right) to do all things necessary for exercising the right (*Caldwell* v. *Kilkelly*, [1905] 1 I. R. 434), and may take away fish (*Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96). A several fishery may be followed where the water gradually shifts its course (*Foster* v. *Wright*, 4 C. P. D. 438; see *Miller* v. *Little*, 4 L. R. Ir. 302; *Hindson* v. *Ashby*, [1896] 2 Ch. 1); but not where it leaves the old course and commences to follow a new course which was always distinguishable from the old (*Carlisle* v. *Graham*, L. R. 4 Ex. 361). As to whether the right to a several fishery can be lost by abandonment, see *Neill* v. *Devonshire*, 8 App Cas. 154, 170.

A claim to a fishery in gross is not within the Prescription Act (*Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687; 34 L. J. C. P. 309).

Distinction between fisheries in non-tidal, and tidal, waters:

In addition to the above distinction between common of fishery and a several fishery, it is important to bear in mind the distinction between (1) non-tidal waters (which include that part of a river in which the water is not salt, and in ordinary tides is unaffected by tidal influence, *Reece* v. *Miller*, 8 Q. B. D. 626); and (2) tidal waters.

non-tidal waters;

In the case of a non-tidal river the presumption is that each riparian owner is entitled to a several fishery in the river in front

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of his land *ad medium filum* (*Blount* v. *Layard*, [1891] 2 Ch. 689, n. *Zetland* v. *Glover*, L. R. 2 H. L. Sc. 70; see *Beauman* v. *Kinsella*, 8 Ir. Ch. 291). This is so even in the case of a navigable non-tidal river or "king's stream" (*ibid.*); or of a river flowing through a manor (*Lamb* v. *Newbiggin*, 1 C. & K. 549). The Crown is not entitled as of common right to the soil or waters of an inland non-tidal lake, and no public right of fishing can exist in such waters (*Johnston* v. *O'Neill*, [1911] A. C. 552). But the several fishery of a riparian owner may extend over the whole stream (*Blount* v. *Layard*, [1891] 2 Ch. 688). As to fishery in a lake, see *Bristow* v. *Cormican*, 3 App. Cas. 641; *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732; *Johnson* v. *Bloomfield*, I. R. 8 C. L. 68; *Blackett* v. *Clayton*, quoted [1897] 2 Ch. 564. In non-tidal waters, an individual may acquire a title by prescription to a several fishery (Co. Litt. 122 a; Ventr. 391; see 2 Saund. 326; *Peers* v. *Lacy*, 4 Mod. 362); which when prescribed for as annexed to land cannot be without stint (*Harris* v. *Chesterfield*, [1911] A. C. 623). An individual can also acquire a prescriptive title to a fishing weir (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657; see *Barker* v. *Faulkner*, [1898] W. N. 69; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401). As to fishing from a canal tow-path, see *Staffordshire, &c., Navigation* v. *Bradley*, [1912] 1 Ch. 91. The owner of a several fishery in non-tidal waters can obtain an injunction restraining pollution (*Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96), or the abstraction of water (*Pirie* v. *Kintore*, [1906] A. C. 478; but see *Fraser* v. *Fear*, 107 L. T. 423). It is doubtful whether the Crown can grant an exclusive right of fishing in a non-tidal river flowing over the soil of a subject (*Devonshire* v. *Pattinson*, 20 Q. B. D. 263). The public cannot have a right to fish in non-tidal waters founded on custom, prescription, or lost grant (*Smith* v. *Andrews*, [1891] 2 Ch. 699, and cases there quoted; *Blount* v. *Layard*, *ibid.*, 689, n.).

tidal waters.

In tidal waters (whether sea or river), the right of fishing is *prima facie* in the public (*Neill* v. *Devonshire*, 8 App. Cas. 177; *Malcolmson* v. *O'Dea*, 10 H. L. C. 618; cf. *Wyatt* v. *Att.-Gen. of Quebec*, [1911] A. C. 489). This public right includes the right to fish for shell fish (as oysters), as well as floating fish (*Bagot* v. *Orr*, 2 Bos. & P. 472; *Saltash* v. *Goodman*, 7 Q. B. D. 116); but not the right to appropriate foreshore for storing oysters (*Truro* v. *Rowe*, [1902] 2 K. B. 709). The right to create a several fishery in tidal waters existed in the Crown before Magna Charta, and a several fishery so created could lawfully afterwards be made the subject of a grant by the Crown to an individual (*Malcolmson* v. *O'Dea*, *supra*; see *Neill* v. *Devonshire*, 8 App. Cas. 135). And when the Crown acquired the right to such a fishery by merger since Magna Charta it could re-grant it (*Northumberland* v. *Houghton*, L. R. 5 Ex. 127). Long exclusive enjoyment alone may be ground for presuming the grant of such a fishery (*Edgar* v. *Fishery Commissioners*, 23 L. T. 732; *Mannall* v. *Fisher*, 5 C. B. (N.S.) 856; *Little* v. *Wingfield*, 8 Ir. C. L. R. 279; *Beaman* v. *Kinsella*, *ibid.*, 291). So a several fishery in tidal waters has been presumed to have been granted to a corporation subject to a trust (in the nature of a charitable trust) in favour of inhabitants, authorising them to dredge for oysters within a certain period annually (*Goodman* v. *Saltash*, 7 App. Cas. 633). A several fishery was held to have been granted to a corporation in trust for the members thereof (*Re Free Fishermen of Faversham*, 36 Ch. D. 329). An individual may claim a several fishery in an arm of the sea by prescription (*Orford* v. *Richardson*, 4 T. R. 437; see *Ward* v. *Cresswell*, Willes, 265; *Crichton* v. *Collery*, 19 W. R. 107; *R.* v. *Downing*, 11 Cox, C. C.

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584). A several fishery in the sea was held to be vested in the lord of the manor who also had the soil of the foreshore vested in him (*Foster* v. *Warblington*, [1906] 1 K. B. 659). A grant of foreshore would not of itself convey the right to a several fishery over it (*Att.-Gen.* v. *Emerson*, [1891] A. C. 654). There may be a several fishery for oysters, the right to take floating fish remaining in the public (*Rogers* v. *Allen*, 1 Camp. 23); and, independently of a several fishery, there may be a right to have on the foreshore oyster beds or oyster layings (*Foster* v. *Warblington*, [1906] 1 K. B. 680). The owner of a several fishery over the foreshore, whether owner of the soil or not, can restrain the reclamation of part of the foreshore (*Bridges* v. *Hinton*, 11 L. T. 653).

Ownership of soil in relation to fishing.

As to the relation of the ownership of a fishery to the ownership of the soil of the bed, it is settled that the owner of a several fishery must be presumed to be the owner of the soil, whether the fishery is in tidal waters (*Att.-Gen.* v. *Emerson*, [1891] A. C. 649); or in a non-tidal river (*Holford* v. *Bailey*, 13 Q. B. 426; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *Palmer* v. *Thames Conservators*, [1902] 1 Ch. 163); or in a lake (*Marshall* v. *Ulleswater Co.*, 3 B. & S. 732). The ownership is a limited one, in support and for the purposes of the fishery (*Hindson* v. *Ashby*, [1896] 2 Ch. 19). The terms of the grant of the fishery may rebut this presumption (*Somerset* v. *Fogwell*, 5 B. & C. 886; see *Bloomfield* v. *Johnson*, I. R. 8 C. L. 95, 106; *Att.-Gen.* v. *Emerson*, [1891] A. C. 655). In the case of a grant of a "free fishery," *i.e.*, a non-exclusive right, the presumption is that the soil does not pass (*Bloomfield* v. *Johnson*, *supra*). Where the waste of a manor is bounded by a river, and there is evidence of the exercise of rights of common (*e.g.*, fishing) over the bed, the bed *ad medium filum* forms part of the waste (*Tilbury* v. *Silva*, 45 Ch. D. 110). But it is not part of the waste, where the commoners' rights do not extend beyond the water's edge, and the bed is enjoyed as a separate tenement (*Ecroyd* v. *Coulthard*, [1898] 2 Ch. 368). For the ordinary rules as to the ownership of the soil below water, see *post*, p. 106. And as to when the rights of lords of manors depend upon the ownership of the soil, see *Grand Union Canal Co.* v. *Ashby*, 6 H. & N. 394; *Clarke* v. *Mercer*, 1 F. & F. 492.

As to weirs, see *Weld* v. *Hornby*, 7 East, 195; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *Barker* v. *Faulkner*, [1898] W. N. 69.

As to the relief in equity in the case of common of fishery, see *post*, p. 60.

(6) Customs to take sand, gravel, &c.

Customs have been established entitling copyholders for the use of their tenements to take from the waste of the manor sand, gravel (*Peppin* v. *Shakespear*, 6 T. R. 748; *Duberley* v. *Page*, 2 T. R. 391), coal (*Portland* v. *Hill*, 2 Eq. 765), loam (*Robertson* v. *Hartopp*, 43 Ch. D. 514), and stone (*Heath* v. *Deane*, [1905] 2 Ch. 86). Compare the customs established for copyholders to take clay, &c., without limit from their copyhold tenements (*Salisbury* v. *Gladstone*, 9 H. L. C. 692; *Hanmer* v. *Chance*, 4 D. J. & S. 626; see now Law of Property Act, 1922, Part V. and Sched. 12 (1) (d) and (4)).

In connection with the above customs giving copyholders mineral rights in the lord's waste there should be mentioned the customs as to the lord's own rights. Thus a custom for the lord of a manor to enter on the waste and to dig through the same for the purpose of working the quarries below was held good (*Rogers* v. *Taylor*, 1 H. & N. 706; 26 L. J. Ex. 203). So, also, the custom for the lord to enter on copyhold tenements for the purpose of mining proved to exist in the Isle of Man (*Ballacorkish Co.* v. *Harrison*, L. R. 5 P. C. 49). An alleged custom for the lord of a manor to work mines

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under any parcel of the manor so as to let down the surface, without making compensation, was held bad (*Hilton* v. *Granville*, 5 Q. B. 701; Cr. & Ph. 283; a decision criticised unfavourably in *Blackett* v. *Bradley*, 1 B. & S. 140; and in *Buccleuch* v. *Wakefield*, L. R. 4 H. L. 410; but approved in *Bell* v. *Love*, 10 Q. B. D. 561; 9 App. Cas. 286; see *Hayles* v. *Pease*, [1899] 1 Ch. 567; *Bishop Auckland* v. *Butterknowle*, [1904] 2 Ch. 419; [1906] A. C. 305). A similar custom where the lord was required to pay compensation would be good (*Aspden* v. *Seddon*, 1 Ex. D. 510). And possibly a similar custom where it was confined to the waste (*Gill* v. *Dickinson*, 5 Q. B. D. 159).

As to taking materials for repairing highways from wastes or commons, see Highway Act, 1835, s. 51; Commons Act, 1876, s. 20; *Rylatt* v. *Marfleet*, 14 M. & W. 233; *Hayes Conservators* v. *Bromley Council*, [1897] 1 Q. B. 321.

(7) Interest of the commoner.

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; *Harcourt's Case*). Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there (12 H. 8, 2 a; *per* Brooke, J., 2 Leon. 202; Gobd. 182, pl. 258; *Anon.*, Bridg. 10; *Samborn* v. *Harilo*, 2 Bul. 116; *Currill* v. *Pack*, 1 Sid. 251). See as to an obligation to maintain fences to keep out sheep, and as to impounding cattle damage feasant, *Coaker* v. *Willcocks*, [1911] 2 K. B. 124. But in special cases there may be special rights. Thus there may be a custom for commoners to take rabbits on the waste (*Coote* v. *Ford*, 83 L. T. 482). Again in the case of forests, there may exist either by custom or prescription a right of common of pannage; in other words, a right exercisable in common with others by an owner of land who keeps pigs to take his pigs into the forest to eat acorns fallen on the ground (*Chilton* v. *London*, 7 Ch. D. 562). So, again, a prescriptive right of cutting in a forest litter for the use of a copyhold tenement in an adjoining manor was established by the owner of that tenement as being exercisable by him in common with others (*De La Warr* v. *Miles*, 17 Ch. D. 535). And see the special prescriptive rights of pasture referred to, *ante*, p. 49, and the special prescriptive rights of cutting wood referred to at p. 51.

Prescriptive rights over the waste.

(8) Presumption that waste land belongs to lord of manor.

Prima facie the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; evidence that the public have been used to throw rubbish on waste land is rather evidence that it belongs to the lord (*Doe* v. *Williams*, 7 C. & P. 332). A right to the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like (*Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554; *Barnes* v. *Mawson*, 1 M. & S. 77; *Richards* v. *Peake*, 2 B. & C. 918). The lord may take gravel and loam from the waste, provided he does not infringe the commoners' rights (*Hall* v. *Byron*, 4 Ch. D. 667; see *Bateson* v. *Green*, 5 T. R 411; *Folkard* v. *Hemmitt*, 5 T. R. 417; *Hilton* v. *Granville*, 5 Q. B. 730). The *onus* of showing that such rights are interfered with lies on the commoner (*Hall* v. *Byron*, 4 Ch. D. 680; *Robertson* v. *Hartopp*, 43 Ch. D. 501). The tenants of demesne lands may have *quasi* rights of pasturage over the waste (*Musgrave* v. *Inclosure Commrs.*, L. R. 9 Q. B. 175).

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Grants by the lord.

The lord might, with the consent of the homage, grant part of the soil for building, if he had immemorially exercised such right (*Folkard* v. *Hemmett*, 5 T. R. 417). In like manner there might be a valid custom for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners (*Boulcott* v. *Winmill*, 2 Camp. 261; see *Northwich* v. *Stanway*, 3 Bos. & P. 346; *Lascelles* v. *Onslow*, 2 Q. B. D. 433), even where a sufficiency of common was not left (*Ramsey* v. *Cruddas*, [1893] 1 Q. B. 228). The consent of the majority of the homage was sufficient (*Ibid.*). But without a custom for the purpose, the lord could not make a new grant of copyhold (*R.* v. *Hornchurch*, 2 B. & Ald. 189; *R.* v. *Wilby*, 2 M. & S. 504). A custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law (*Badger* v. *Ford*, 3 B. & Ald. 153). A custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the *onus* of proving that a sufficiency is left lies on the lord (*Arlett* v. *Ellis*, 7 B. & C. 346; see *Rogers* v. *Wynne*, 7 D. & R. 521; *Betts* v. *Thompson*, 6 Ch. 732; *Robertson* v. *Hartopp*, 43 Ch. D. 501). It seems that the lord may license training of horses on the waste so long as it does not injure the right of pasture (*Coote* v. *Ford*, 83 L. T. 483).

Presumption as to encroachments on the waste.

Where a copyholder encroached on the waste, Fry, J., laid down that the encroachment became (at any rate where the lord might by custom grant the waste as copyhold) a copyhold accretion to the previous holding (*Att.-Gen.* v. *Tomline*, 5 Ch. D. 750; see *Doe* v. *Tidbury*, 14 C. B. 324, and the judgment of Campbell, C.J., *Andrews* v. *Hailes*, 2 E. & B. 353; 22 L. J. Q. B. 409; compare *Whitmore* v. *Humphries*, 7 C. P. 1, where the encroachment on the waste was made by a lessee holding adjoining waste under a lease from the lord; and see the presumption as to a tenant's encroachment stated in the note to sect. 2 of the R. P. Lim. Act, 1833, *post*). In the C. A. it was doubted whether under any circumstances an encroachment could become copyhold (*Att.-Gen.* v. *Tomline*, 15 Ch. D. 160).

Right to approve.

By the Statute of Merton (20 Hen. 3, c. 4), and by subsequent statutes (29 Geo. 2, c. 36, and 31 Geo. 2, c. 41), the lord of a manor may inclose so much of the common as he pleases, for tillage, or wood ground, provided he leaves common sufficient for those entitled to rights of common. But the consent of the Board of Agriculture and Fisheries is now necessary (56 & 57 Vict. c. 57). This inclosure, when justifiable, is called in law "*approving*," an ancient expression signifying the same as "*improving*" (2 Bl. Com. 34). The statutory right to approve applies as against common appurtenant of pasture (*Robinson* v. *Duleep Singh*, 11 Ch. D. 798); but there can be no approvement against tenants of a manor who have a right to dig gravel on the waste, and to take estovers (*Duberley* v. *Page*, 2 T. R. 391; *Grant* v. *Gunner*, 1 Taunt. 435; *Shakespear* v. *Peppin*, 6 T. R. 741). The statute does not authorise the lord to approve as against common of turbary or estovers; but such a right may exist by custom (*Lascelles* v. *Onslow*, 2 Q. B. D. 451; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; *Bateson* v. *Green*, 5 T. R. 411; *Place* v. *Jackson*, 4 D. & R. 318; 2 Atk. 189). There can be no inclosure under 29 Geo. 2, c. 36, as against persons entitled to the underwood on the waste (*Nicholls* v. *Mitford*, 20 Ch. D. 380). A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not restrain the lord's right to approve (*Duberley* v. *Page*, 2 T. R. 392, n.).

An owner *pur autre vie* of a common may approve under the statute (*Patrick* v. *Stubbs*, 9 M. & W. 830). A person seized in fee of part of the waste, although not lord, may approve without con-

sent of the homage, provided he leaves a sufficiency of common for the tenants (*Glover* v. *Lane*, 3 T. R. 445). **Rights of Common.**

Where a lord approves, there lies upon him (apart from a custom to a different effect, *Ramsey* v. *Cruddas*, [1893] 1 Q. B. 228) the *onus* of showing that sufficient waste is left for the commoners (*Betts* v. *Thompson*, 6 Ch. 732). The question of sufficiency depends, not on the average number of sheep commoners have in fact turned out, but on the number they are entitled to turn out (*Robertson* v. *Hartopp*, 43 Ch. D. 484, see p. 518, where the C. A. treat as doubtful the decisions in *Lake* v. *Plaxton*, 10 Exch. 196; and *Lascelles* v. *Onslow*, 2 Q. B. D. 433).

A lord cannot under 51 Geo. 3, c. 115, grant waste for a burial ground, discharged from a customary right of recreation (*Forbes* v. *Eccl. Commrs.*, 15 Eq. 5).

(9) Inclosure acts.

The greater part of the commons in England have been inclosed under local Acts of Parliament. The Inclosure (Consolidation) Act, 1801, consolidated provisions which had usually been inserted in Acts of inclosure, and facilitated the proofs usually required on the passing of such Acts. The 1 & 2 Geo. 4, c. 23, amended the law of inclosure. The 3 & 4 Will. 4, c. 87, remedied defects in titles to real property allotted under inclosure Acts. Further facilities for inclosure were given by stat. 6 & 7 Will. 4, c. 115; 3 & 4 Vict. c. 31. By the Inclosure Act, 1845, the superintendence of applications for inclosure, and the carrying the same into operation was entrusted to commissioners, whose powers and duties are now vested in the Board of Agriculture and Fisheries (52 & 53 Vict. c. 30; 3 Edw. 7, c. 31). The Act of 1845 has been amended by recent Acts, and these Acts are now collectively known as the Inclosure Acts, 1845 to 1882 (Short Titles Act, 1896). The rules for construing inclosure Acts as regards the right to support when the ownership of minerals and surface is severed are given in *Bishop Auckland* v. *Butterknowle*, [1904] 2 Ch. 419; [1906] A. C. 305. See as to boundaries under an award under a local Act for the regulation of a common, *Collis* v. *Amphlett*, [1920] A. C. 271. Inclosure commissioners.

Where, under an inclosure Act, the waste of a manor is directed to be allotted, the freehold of the unallotted land remains in the lord (*Packe* v. *Mee*, 9 W. R. 335). The legal estate in land allotted under an inclosure Act passed to the allottee (*Simcoe* v. *Pethick*, [1898] 2 Q. B. 555; see *Att.-Gen.* v. *Meyrick*, [1893] A. C. 1). Where by agreement between lord and copyholders, waste lands were allotted, the allotments taken by copyholders were freehold (*Paine* v. *Ryder*, 24 Beav. 151; *Doe* v. *Davidson*, 4 M. & S. 175). Under the Inclosure Act, 1845, gavelkind lands in Kent might be exchanged for lands in Middlesex held in common socage (*Minet* v. *Leman*, 7 D. M. & G. 340 (gavelkind tenure is abolished by sect, 45 of the Administration of Estates Act, 1925, *post*)). See further, as to inclosure, Cooke on Inclosures, 4th ed.

29 & 30 Vict. c. 122, amended and extended by 32 & 33 Vict. c. 107, provides for the improvement, protection and management of commons near the metropolis. See as to the validity of bye-laws regarding them, *Mitcham Conservators* v. *Cox*, [1911] 2 K. B. 854, and *Harris* v. *Harrison*, 111 L. T. 534.

(10) By what words a right of common will pass.

By the conveyance of the lands to which common either appendant or appurtenant is annexed, the right of common will pass (*Solme* v. *Bullock*, 3 Lev. 165; *Sacheverell* v. *Porter*, Cro. Car. 482; *Drury* v. *Kent*, Cro. Jac. 14). Where common has been extinguished by union of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was

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attached, and the words "appertaining" and "belonging" only are used, the right will not pass. But if the words "or therewith used or enjoyed" are inserted, they would be sufficient to revive the right (*Clements* v. *Lambert*, 1 Taunt. 205; *Morris* v. *Eggington*, 3 Taunt, 24; *Barlow* v. *Rhodes*, 1 C. & M. 448; *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058; *Baring* v. *Abingdon*, [1892] 2 Ch. 374). Now, by sect. 62 of L. P. Act, 1925 (*post*), re-enacting sect. 6 of Conv. Act, 1881, a conveyance of land includes all commons appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as, part or parcel of or appurtenant to the land.

The effect of an enfranchisement being to extinguish all rights annexed to the copyholder's estate as such, the right of common did not pass by the word "appurtenances" in the deed of enfranchisement (Moore, 667; Cro. Jac. 253; 2 Ld. Raym. 1225; Salk. 170, 364); but must be created by express grant (Moore, 667; Cro. Eliz. 570; see *Doidge* v. *Carpenter*, 6 M. & S. 49). General words in a conveyance by the lord were held not to re-create rights of common (*Hall* v. *Byron*, 4 Ch. D. 667). And where a lord granted demesne lands together with all commons, &c., the words did not create a right of common (*Baring* v. *Abingdon*, [1892] 2 Ch. 374). On the other hand, where a copyhold tenement (to which common was appurtenant), having vested in the lord by forfeiture, was granted by him as copyhold with the appurtenances, it was entitled to common (*Badger* v. *Ford*, 3 B. & Ald. 153). And a copyholder, who had common in a waste *without* the manor of which his copyhold is parcel, did not lose it by enfranchisement (*Barwick* v. *Matthews*, 5 Taunt, 365). By Sched. 12 (4) of L. P. Act, 1922, an enfranchisement by virtue of that Act does not deprive a tenant of any commonable right.

Where upon an inclosure an allotment was awarded in lieu of commonable rights annexed to land (which were thereupon extinguished), a subsequent lease of the land with general words did not carry the allotment (*Williams* v. *Phillips*, 8 Q. B. D. 437).

(11) Extinguishment of common.

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or formerly by the enfranchisement of a copyhold. If the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole (*Rotherham* v. *Green*, Cro. Eliz. 593; 1 Show. 350; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the two tenements (*R.* v. *Hermitage*, Carth. 239; *Bradshaw* v. *Eyr*, Cro. Eliz. 570; 4 Rep. 38 a; see *Lloyd* v. *Powis*, 4 El. & Bl. 485; compare the quasi rights of pasturage in *Musgrave* v. *Inclosure Commrs.*, L. R. 9 Q. B. 175). Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished (1 Roll. Abr. 401). Where a right of common was annexed to a copyhold, and the lord granted the land to the copyholder and his heirs, with the appurtenances, the common was extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common was gone

(*Marsham* v. *Hunter*, Cro. Jac. 253; Gilb. Ten. 224). But there might be words amounting to a re-grant of common (*Doidge* v. *Carpenter*, 6 M. & S. 49; see *Baring* v. *Abingdon*, [1892] 2 Ch. 374). See now Sched. 12 (4) of L. P. Act, 1922, *supra*. Common is not extinguished on the release of seigniorial rights in the freeholds of a manor (*Baring* v. *Abingdon*, *supra*; *Broome* v. *Wenham*, 68 L. T. 651). Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law (*Styant* v. *Staker*, 2 Vern. 250; Comb. 127). Commonable rights were not extinguished by enfranchisement under the Copyhold Acts (Copyhold Acts, 1841, s. 81, 1852, s. 45, and 1894, s. 22). Nor were the lord's mineral rights or sporting rights affected (Copyhold Act, 1894, s. 23); and see as to enfranchisements under L. P. Act, 1922, Sched. 12 (5) of that Act. A right of common appurtenant for cattle levant and couchant may be extinguished by alteration in the dominant tenement (*Carr* v. *Lambert*, L. R. 1 Ex. 168), or by cesser of the product of the waste (*Scrutton* v. *Stone*, 9 Times L. R. 478).

(12) Remedies for disturbance of rights of common; by abatement;

One remedy for an injury to the right of common is abatement. It is, however, the policy of the law not to allow commoners to abate, except in a few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages. The cases where the law allows abatement by commoners are where the nuisance wholly, not only partially, excludes them from their rights (*Hope* v. *Osborne*, [1913] 2 Ch. 349). The acts of the lord must not be contrary to the nature of the common. For by the grant of it, the grantor gives everything which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a fence on land surrounding the common, to exclude from the common the commoner's cattle, the commoner may abate, because it is inconsistent with the grant (2 Roll. Abr. 145, (W.) pl. 2; *Cooper* v. *Marshall*, 1 Burr. 259; *Sadgrove* v. *Kirby*, 6 T. R. 485); but only so much of the erection as to make a way for his cattle (15 Hen. 7, 10 b, pl. 18; 29 Edw. 3, 6; 2 Inst. 88; *Mason* v. *Cæsar*, 2 Mod. 65; see 1 Wms. Saund. 651). So where a wall is erected upon the common itself, he may abate the whole erection, for it deprives him of his common, and forms no part of the soil, and by such abatement the commoner does not meddle with the soil (*Mason* v. *Cæsar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38). And yet, as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of an action for trespass, provided the lord has left a sufficiency of common (*Arlett* v. *Ellis*, 7 B. & C. 346; 9 B. & C. 671; see *Robertson* v. *Hartopp*, 43 Ch. D. 496).

A commoner may pull down a house wrongfully erected upon the common, if necessary for the exercise of his right, unless persons are in it at the time (*Perry* v. *Fitzhowe*, 8 Q. B. 757; *Jones* v. *Jones*, 1 H. & C. 1; see *Harvey* v. *Bridges*, 1 Exch. 261). And may do so even where persons are in the house at the time, after notice and request to the occupier to remove it (*Davies* v. *Williams*, 16 Q. B. 543; see *Lane* v. *Capsey*, [1891] 3 Ch. 411). If a stranger erect a building upon land belonging to another, the owner is justified in pulling down the building, although the intruder is at the time in the building (*Barking* v. *Read*, 19 L. J. Q. B. 291).

If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action (*Sadgrove* v. *Kirby*, 6 T. R. 483; 1 Bos. & P. 13). So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows (*Cooper* v. *Marshall*, 1

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Burr. 259; *S. C.*, 2 Wils. 51; 1 Roll. Abr. 405, pl. 3). Much less can a commoner kill the rabbits to prevent their increase to the prejudice of the common (*Hodson* v. *Grissell*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; 1 Lutw. 108; 2 Leon. 203; see 1 Wms. Saund. 651; *Robertson* v. *Hartopp*, 43 Ch. D. 501). As to a custom to take rabbits, see *Coote* v. *Ford*, 83 L. T. 482.

by distress; A commoner can distrain the cattle of a stranger (*Hall* v. *Harding*, 4 Burr. 2428); but he cannot distrain the cattle of another commoner, because they come on the commonable land by colour of right (*Hall* v. *Harding*, 4 Burr. 2426). This principle applies to common *pur cause de vicinage*, as well as to common appurtenant (*Cape* v. *Scott*, L. R. 9 Q. B. 269). But he can sue another commoner for torts interfering with his rights of common without proof of actual pecuniary damage (*King* v. *Brown & Co.*, [1913] 2 Ch. 416). As to the right of distress for a surcharge, see further 1 Wms. Saund. 630.

by action; According to the practice before the Jud. Acts of the Courts of common law the usual remedy for an injury to the right of common was an action for disturbance of the right, which might be maintained either against the lord or owner of the soil (*Hassard* v. *Cantrell*, Lutw. 101), or a stranger, or a commoner (1 Selw. N. P. 381, 13th ed.), or a company which had taken a common without first making compensation to the commoners (*Stoneham* v. *L. B. & S. C. R.*, L. R. 7 Q. B. 1). The plaintiff had to prove an injury; but the smallest injury was sufficient, as that of taking away manure dropped on the common (*Pindar* v. *Wadsworth*, 2 East, 154; see cases cited in *Marzetti* v. *Williams*, 1 B. & Ad. 426; *Blofield* v. *Payne*, 4 B. & Ad. 410; and *Beadsworth* v. *Torkington*, 1 Q. B. 782). Again, if one commoner surcharged the common (that is, put more cattle into the common than he was entitled), an injured commoner might sue for a surcharge, notwithstanding himself guilty of one (*Hobson* v. *Todd*, 4 T. R. 71; see *Bowen* v. *Jenkins*, 6 Ad. & Ell. 911; *Atkinson* v. *Teesdale*, 2 W. Bl. 817; *Cheesman* v. *Hardham*, 1 B. & Ald. 706). Such a plaintiff was not obliged to show that he was exercising his right of common at the time, but only that he could not enjoy his common so beneficially as he ought (*Wells* v. *Watling*, 2 W. Bl. 1233).

A commoner (being as such entitled to a profit *à prendre*) has such possessory right that he can maintain an action of trespass for infringement (*Fitzgerald* v. *Firbank*, [1897] 2 Ch. 101). Thus an action of trespass will lie by one commoner against another for making holes in the common, and for digging and taking turves in excess of the defendant's commonable rights (*Wilkinson* v. *Haygarth*, 16 L. J. Q. B. 103). Where burgesses were during part of the year entitled to the exclusive possession of the surface of Blackacre (which belonged in fee to A) and to depasture cattle thereon, A could during that time maintain trespass against B for digging in the subsoil, but not for riding on the surface (*Cox* v. *Glue*, 5 C. B. 533). As to pleading in an action of trespass against several claiming a right of common, see *Church* v. *Wright*, 15 C. B. (N.S.) 750; *Davies* v. *Williams*, 16 Q. B. 543.

actions in Chancery Division. As to proceedings in equity in relation to rights of common before the Jud. Acts, see *York* v. *Pilkington*, 1 Atk. 282; *Tenham* v. *Herbert*, 2 Atk. 483; *Whitchurch* v. *Hyde*, *Id.* 391; *Welby* v. *Rutland*, 6 Br. P. C. 575; 1 Br. C. C. 40, 572.

An action might be brought in the Chancery Division against the lord by one copyholder (if he sued on behalf of himself and the other copyholders, not otherwise) to have their rights of common ascertained (*Phillips* v. *Hudson*, 2 Ch. 243). An action for the purpose of establishing a right of common over the wastes of a manor might be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants (*Smith* v.

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Brownlow, 9 Eq. 241; *Robertson* v. *Hartopp*, 43 Ch. D. 484); and may be maintained by one freehold tenant of a manor on behalf of himself and all other freehold tenants (*Warrick* v. *Queen's College*, 6 Ch. 716; *Betts* v. *Thompson*, 6 Ch. 732). An action for the purpose of establishing a right of common over the wastes of a forest may be maintained by an owner and occupier of land within the forest on behalf of all the owners and occupiers (*Commrs. of Sewers* v. *Glasse*, 7 Ch. 456). The decree in such an action is given (19 Eq. 164). The defendants were the lord and two grantees of the waste, who were sued as representing other grantees. The decree was held binding on another grantee against whom a supplemental statement of claim was subsequently filed (*Commrs. of Sewers* v. *Gellatly*, 3 Ch. D. 610; see *Howard* v. *Maitland*, 11 Q. B. D. 695). Where it was alleged that the Crown had granted a profit *à prendre* to "inhabitants" of a parish, thereby constituting them a corporation, an individual cannot sue to establish the right; only the corporation (*Chilton* v. *London*, 7 Ch. D. 735). Questions as to the distribution of compensation between the owners of commonable rights have been dealt with by the Chancery Division in *Nash* v. *Combs*, 6 Eq. 51; *Fox* v. *Amhurst*, 20 Eq. 403; *Austin* v. *Amhurst*, 7 Ch. D. 689; *Weatherly* v. *Layton*, [1892] W. N. 165. But unless the parties are agreed in invoking the jurisdiction of the High Court, the action may fail (*Richards* v. *De Winton*, [1903], 1 Ch. 507; *Salmon* v. *Edwards* [1910] 1 Ch. 552).

Before the R. P. Lim. Act, 1833, the commoner was barred of his right of entry and ejectment, by having acquiesced in the inclosure of part of a common for more than twenty years, and his remedy was by writ of assize of common. The lord was not conclusively barred of his remedy to recover common lands which had been inclosed until the lapse of sixty years, within which time he might recover the lands by a real action (*Edwards* v. *M'Leay*, Cooper, C. C. 318; *Hawke* v. *Bacon*, 2 Taunt. 155; *Creach* v. *Wilmot*, *Id.* 159). Writs of assize have been abolished by R. P. Lim. Act, 1833, s. 36, *post*.

As to production of documents in a suit instituted to establish a right of common, see *Minet* v. *Morgan*, 11 Eq. 284; *Warrick* v. *Queen's College*, 3 Eq. 683. On an issue whether land was common land or subject to any commonable rights of the commoners of certain parishes, evidence of reputation was admitted (*Evans* v. *Merthyr Tydfil Council*, [1899] 1 Ch. 241).

As to the law of common in general, see Bac. Abr. Common; Com. Dig. Common; Cruise's Dig. tit. XXIII.; Elton on Commons; Williams on Commons.

IV.—Of Rights of Way, (A) Public and (B) Private.

A. *Public Rights of Way and Highways, and herein of Balks and Ditches.*

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Rights of Way.

A right of way may be either public or private. Ways common to all the king's subjects are called highways (1 Ventr. 189; 1 T. R. 570). Whether a way be a public or private way is a matter of fact, and depends much on common reputation (1 Ventr. 189; Hawk. P. C. b. 1, c. 76, s. 1). A public road is *prima facie* a road which leads from one public place to another (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 206). A road may be a highway, although it is circuitous (*R.* v. *Lloyd*, 1 Camp. 261). It may be a highway though it terminates in a common (*R.* v. *Wandsworth*, 1 B. & Ald. 63), and there may be a highway over a *cul de sac* (*Rugby Charity* v. *Merryweather*, 11 East, 375; *Bateman* v. *Bluck*, 18 Q. B. 870; *Campbell* v. *Lang*, 1 Macq. H. L. C. 451; *South* v. *East London Ry. Co.*, 16 Eq. 108; *Vernon* v. *S. James*, 16 Ch. D. 449). But in such a place it is very difficult to make out dedication by user (*Whitehouse* v. *Hugh*, [1906] 2 Ch. 285; *Att.-Gen.* v. *Sewell*, 88 L. J. K. B. 425). And it seems that such a dedication will not be presumed without evidence of the expenditure on the *cul de sac* of public money (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 207; *Bourke* v. *Davis*, 44 Ch. D. 122; *Att.-Gen.* v. *Richmond*, 89 L. T. 700). See *Woodyer* v. *Hadden* (5 Taunt. 125), where a court, which was no thoroughfare, was held not a highway. A footpath across a churchyard may be a "churchway," to which the right is in the parishioners, or else a common highway (*Batten* v. *Gedye*, 41 Ch. D. 515; compare *Farquhar* v. *Newbury*, [1908] 2 Ch. 589). There may be a faculty for such a path, see *Re St. John's, Cardiff*, [1898] P. 155. As to the distinction between a right for the public to use a footway on the ground of dedication, and a right for the inhabitants of a district to use a promenade on the ground of custom, see *Abercromby* v. *Fermoy*, [1900] 1 I. R. 302.

(1) What roads are highways.

Evidence of reputation.

On an issue, whether land is a highway, evidence of reputation is admissible, *e.g.* that at a meeting held to consider the repairing of a way, several, since dead, signed a paper, stating that the land was not a highway, there being at the time no litigation (*Barraclough* v. *Johnson*, 8 Ad. & Ell. 99; see *Nicholls* v. *Parker*, 14 East, 331, n. to *Outram* v. *Moorewood*). On such an issue a tithe map and award may be evidence (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 193), but not ordnance maps (*Ibid.*, 203, *Mercer* v. *Denne*, [1905] 2 Ch. 538). Evidence of reputation is not admissible to prove particular facts as to the boundaries of a highway (*R.* v. *Bliss*, 7 Ad. & El. 550; *R.* v. *Berger*, [1894] 1 Q. B. 823).

(2) Creation of highways.

Highways may be created—(1) by statute, (2) by dedication (*Cubitt* v. *Maxse*, L. R. 8 C. P. 714). The creation of a highway over a cemetery or churchyard may be authorised by faculty (*Re Bideford Parish*, [1900] P. 314). In the Channel Islands, a highway must be made out by grant or prescription (*Godfrey* v. *Sark*, [1902] A. C. 534).

By statute.

A highway may be created by statute (*R.* v. *French*, 4 Q. B. D. 507) *e.g.* the Public Health Act, 1875, s. 154; the Inclosure Acts; or the Settled Land Act, 1925, s. 56. When such a public right was created by a statute which also reserved private rights to the lord of the manor, the private reservation was subject to the public right (*Benfieldside Board* v. *Consett Co.*, L. R. 3 Exch. D. 54; see *L. & N. W. Ry.* v. *Evans*, [1893] 1 Ch. 28).

By dedication.

Where a highway is created by dedication, there must be both dedication by the owner and user by the public (*Cubitt* v. *Maxse*, L. R. 8 C. P. 715; *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 Ch. D. 327). Whether a highway has been dedicated so as to become repairable by the inhabitants is a question of fact (*Folkestone* v. *Brockman*, [1914] A. C. 338, and see *Cababé* v. *Walton-upon-*

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Thames, ibid., 102). Public user for a sufficient time (*e.g.* six years) is *prima facie* evidence on which dedication may be presumed (*R.* v. *Petrie*, 4 El. & B. 737). But the user must be open and as of right (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 202). User inferred to have been permissive was not sufficient ground for the presumption (*Ibid.*, 208). The effect of user may depend on the nature of the land; and on the owner being resident or not (*Chinnock* v. *Hartley Council*, 63 J. P. 327). A single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (*Poole* v. *Huskinson*, 11 M. & W. 830, adopted *Healey* v. *Batley*, 19 Eq. 388; *Vernon* v. *S. James*, 16 Ch. D. 456; *Mann* v. *Brodie*, 10 App. Cas. 386; see *Coats* v. *Herefordshire*, [1909] 2 Ch. 579). The common course to show that a licence only is intended, is to shut up the way one day in every year (*British Museum* v. *Finnis*, 5 C. & P. 460; *R.* v. *Broke*, 1 F. & F. 514). The presumption of dedication may be rebutted by proof of a bar having been placed across the street (*Roberts* v. *Karr*, 1 Camp. 262, n.; see *Lethbridge* v. *Winter*, *Id.* 263, n.). But a gate being kept across a way is not conclusive, as the way may have been granted to the public with the reservation of a gate to prevent cattle from straying (*Davies* v. *Stephens*, 7 C. & P. 570; *R.* v. *Bliss*, 2 Nev. & P. 464; see *Barry* v. *Lowry*, I. R. 11 C. L. 483; *Att.-Gen.* v. *Meyrick*, 79 J. P. 515). As to the effect of dealing with the land as private property, see *Friern Council* v. *Richardson*, 62 J. P. 547.

Dedication a question of intention.

Dedication is a question of intention. The mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication (*Simpson* v. *Att.Gen.*, [1904] A. C. 493; *Barraclough* v. *Johnson*, 8 Ad. & El. 99). The mere setting out of an intended road, even where the public have traversed it, is not an irrevocable dedication (*Hall* v. *Bootle*, 44 L. T. 873). But a dedication may be presumed from an uninterrupted user by the public during six years (*Rugby Charity* v. *Merryweather*, 11 East, 376; *R.* v. *Petrie*, 4 El. & B. 737; 24 L. J. Q. B. 167). See also *Webb* v. *Baldwin*, 75 J. P. 564. Where an owner lays out a private carriage-way alongside a public footway, he is presumed to have dedicated the whole surface as a public footway (*Att.-Gen.* v. *Esher Co.*, [1901] 2 Ch. 647); and see *Att.-Gen.* v. *Hemingway*, 81 J. P. 112. A public footway, however, which originated in an award was not converted by user into a public cartroad (*Sheringham* v. *Holsey*, [1904] W. N. 83).

Where highway can be dedicated.

Dedication may be proved of a space which includes a ditch, even though the ditch cannot be used for passage (*Chorley* v. *Nightingale*, [1906] 2 K. B. 618; [1907] 2 K. B. 637; see *Simcox* v. *Yardley*, 69 J. P. 66). As to the dedication as a highway of a non-tidal river, see *Simpson* v. *Att.-Gen.*, [1904] A. C. 476; [1901] 2 Ch. 671. From user the Court may presume the dedication to the public of a way over a disused tramway site (*Coats* v. *Herefordshire*, [1909] 2 Ch. 579); or over a bridge (*R.* v. *Southampton*, 17 Q. B. D. 424; 19 Q. B. D. 590; see *Surrey Canal Co.* v. *Hall*, 1 Man. & Gr. 382; *R.* v. *Wright*, 3 B. & Ad. 681; *Tyne Commrs.* v. *Imrie*, 81 L. T. 174). Or over a sea wall or embankment (*Greenwich* v. *Maudslay*, L. R. 5 Q. B. 397); or over a path along the sea coast (*Behrens* v. *Richards*, [1905] 2 Ch. 614; *Maddock* v. *Wallasey Board*, 55 L. J. Q. B. 267). From user of some paths of this nature, however, which is often permitted by the landowner's good nature, it is difficult to infer an intention to dedicate ([1905], 2 Ch. 619). See the words of Bowen, L.J., in *Blount* v. *Layard*, [1891] 2 Ch. 691 n. "Nothing worse can happen in a free country, than to force people to be churlish about their rights, for fear that their indulgence may be abused," adopted in *Simpson* v. *Att.-Gen.*, [1904] A. C. 492; *Brinckman* v.

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Matley, [1903] 2 Ch. 340; *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 200).

Jus spatiandi

The right for the public to walk round and inspect a public monument is not one which can be the subject-matter of grant or prescription (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 198, 199); nor would a network of tracks be held to be public roads (*Ibid.* 204). The use by the public of an open space by passing over it in every direction without any defined path was not evidence of the dedication of the whole space to the public (*Robinson* v. *Cowpen Board*, 63 L. J. Q. B. 235). Nor will dedication to the public be presumed in the case of a wood with tracks through it leading in different directions where people have wandered at pleasure (*Chapman* v. *Cripps*, 2 F. & F. 864; *Schwinge* v. *Dowell*, *ibid.* 845; *Eyre* v. *New Forest Board*, 8 T. L. R. 648). As to a footpath over a mountain, see *Macpherson* v. *Scottish Society*, 13 App. Cas. 744; and as to a road to a view point, *Moser* v. *Ambleside*, 89 J. P. 59. A presumption of dedication does not arise from user by purchasers of plots (*Kirby* v. *Paignton*, [1913] 1 Ch. 337).

Who can dedicate;

As regards the title of the person alleged to have dedicated. Continued user of a way by the public raises a presumption of dedication, and it is not incumbent on the public to show by what particular owner the dedication has been made; see as to the burden of proof *Att.-Gen.* v. *Watford*, [1912] 1 Ch. 417. But it is open to the owner of the soil to establish that owing to the condition of the title dedication was not possible (*Farquhar* v. *Newbury*, [1908] 2 Ch. 596; see *R.* v. *Petrie*, 4 El. & B. 737; 24 L. J. Q. B. 167; *R.* v. *Eastmark*, 11 Q. B. 877). It is settled that if there is dedication at all, it must be in perpetuity (*Dawes* v. *Hawkins*, 8 C. B. (N.S.) 858), *i.e.* it must be by an owner in fee. A fee farm grantee can dedicate

tenant for life;

(*Smith* v. *Wilson*, [1903] 2 I. R. 45). Where since 1810 the servient tenement had been held by successive tenants for life the Court refused in 1902 to presume dedication (*Roberts* v. *James*, 89 L. T. 282; *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 201; *Eyre* v. *New Forest*, 56 J. P. 517). But where in 1842 there was a tenant for life and remainderman in fee; and the remainderman, being in possession, laid out a new road, and such road had been used by the public ever since, the Court in 1908 presumed that the acts of the remainderman had been done with the approval of the tenant for life, and decided in favour of dedication (*Farquhar* v. *Newbury*, [1909] 1 Ch. 12). Under special statutory provisions (S. L. Act, 1925, s. 56) the tenant for life of settled land can dedicate.

tenant for years.

As regards a tenant for years, he cannot dedicate for his term (*Corsellis* v. *London*, [1907] 1 Ch. 704). A tenant for ninety-nine years cannot dedicate without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term (*R.* v. *Bliss*, 7 Ad. & Ell. 555; *Barraclough* v. *Johnson*, 8 Ad. & Ell. 104; *Pryor* v. *Pryor*, 26 L. T. 760). However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence (*R.* v. *Barr*, 4 Camp. 16; *Davies* v. *Stephens*, 7 C. & P. 570; *Simpson* v. *Att.-Gen.*, [1904] A. C. 507; see *Deeble* v. *Linehan*, 12 Ir. C. L. Rep. (N.S.) 1; *R.* v. *Hudson*, Str. 909). Notice to the steward is notice to the landlord (*R.* v. *Barr*, *supra*; *Doe* v. *Wilson*, 11 East, 56). Where evidence was given of user over nearly seventy years, but during the whole period the land had been on lease, the jury might presume from these acts a dedication at a time anterior to the lease (*Winterbottom* v. *Derby*, L. R. 2 Ex. 316; see *Wood* v. *Veal*, 5 B. & Ald. 454; *Barraclough* v.

Johnson, 8 Ad. & Ell. 104; *R.* v. *Lloyd*, 1 Camp. 260; *Baxter* v. *Taylor*, 4 B. & Ad. 72; *Bermondsey* v. *Brown*, 1 Eq. 204).

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Others.

Long user of a way across copyholds is evidence of dedication by both lord and copyholder (*Powers* v. *Bathurst*, 42 L. T. 123). The Crown may dedicate, *R.* v. *East Mark*, 11 Q. B. 877; *Turner* v. *Walsh*, 6 App. Cas. 636. Land acquired by a company for statutory objects may be dedicated by the company; but only if the public user be not inconsistent with those objects (*Grand Junction Co.* v. *Petty*, 21 Q. B. D. 273; *G. W. Ry. Co.* v. *Solihull Council*, 86 L. T. 852; *Att.-Gen.* v. *L. S. W. Ry.* 21 T. L. R. 220; *Taff Vale* v. *Pontypridd*, 93 L. T. 126; *Coats* v. *Herefordshire*, [1909] 2 Ch. 579; see *Re Gonty and Manchester Co.*, [1896] 2 Q. B. 439, the case of a private way). As to dedication of land under the administration of the Court, see *London C. C.* v. *Hughes*, 104 L. T. 685.

Limited dedication.

There may be a partial dedication of a highway to the public (*Stafford* v. *Coyney*, 7 B. & C. 257; see *Roberts* v. *Karr*, 1 Camp. 262; *R.* v. *Northamptonshire*, 2 M. & S. 262). Although the dedication of a way to the public may be *partial* or limited as to the sort of way (as to a horseway, &c.), yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor (*Fitzpatrick* v. *Robinson*, 1 Hudson & Brook, 585; see *Blundell* v. *Catterall*, 5 B. & Ald. 315; *Lade* v. *Shepherd*, 2 Str. 1004; *Barraclough* v. *Johnson*, 8 Ad. & Ell. 104). There can be no dedication of a way to the public for a limited time; if dedicated at all, it must be dedicated in perpetuity (*Dawes* v. *Hawkins*, 8 C. B. (N.S.) 848). Nor can there be a dedication to a *limited part* of the public, as to a parish (*Farquhar* v. *Newbury*, [1909] 1 Ch. 12; *Poole* v. *Huskinson*, 11 M. & W. 827; *Bermondsey* v. *Brown*, 1 Eq. 204). But parishioners may by custom have a churchway (*Brocklebank* v. *Thompson*, [1903] 2 Ch. 348). A subject cannot without a grant from the Crown or a statute dedicate a way to the public subject to a toll (*Austerberry* v. *Oldham*, 29 Ch. D. 750; *Att.-Gen.* v. *Simpson*, [1901], 2 Ch. 693). But a highway may be dedicated, subject to a pre-existing right of user by adjoining occupiers for depositing goods thereon (*Morant* v. *Chamberlin*, 6 H. & N. 541), or subject to a market (*Gingell* v. *Stepney* [1908] 1 K. B. 115). Where an erection or an excavation exists upon land, and the land is dedicated as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk (*Fisher* v. *Prowse*, 2 B. & S. 770; see *Robbins* v. *Jones*, 15 C. B. (N.S.) 221; *Horridge* v. *Makinson*, 84 L. J. K. B. 1294). There may in law be a dedication to the public of a footpath across a field, subject to the right of the owner of the soil to plough it up (*Mercer* v. *Woodgate*, L. R. 5 Q. B. 26; *Arnold* v. *Blaker*, L. R. 6 Q. B. 433; see *R.* v. *Leeke*, 5 B. & Ad. 469). In such a case the public have no right to deviate (*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96). Where part of a highway is dedicated as a carriage-way and part as a footway the urban authority cannot, under sect. 150 of the Public Health Act, 1875, alter the relative proportions (*Robertson* v. *Bristol*, [1900] 2 Q. B. 198).

(3) Nature of public rights over highway.

The *prima facie* right of the public is one of passage; but the reasonable and usual mode of using a highway as such includes other things (*Harrison* v. *Rutland*, [1893] 1 Q. B. 146). The public, however, have no right to remain on a highway for sporting (*R.* v. *Pratt*, 4 El & Bl. 860; see *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 168; *Fielden* v. *Cox*, 22 T. L. R. 411), or for interfering with sport (*Harrison* v. *Rutland*, [1893] 1 Q. B. 142), or for watching trials of racehorses on adjoining land (*Hickman* v. *Maisey*, [1900] 1 Q. B. 752). Nor can they depasture cattle on the highway (*Dovaston* v. *Payne*, 2 H. Bl. 527; *Stevens* v. *Whistler*, 11 East, 51; see *Luscombe* v. *G. W. Ry.*

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Co., [1899] 2 Q. B. 313). The owner of the soil may exercise all rights of ownership not inconsistent with the dedication to the public (*St. Mary, Newington* v. *Jacobs*, L. R. 7 Q. B. 47). As to deviation by the public, see *Arnold* v. *Holbrook*, L. R. 8 Q. B. 96; *Dawes* v. *Hawkins*, 8 C. B. (N.S.) 848. And as to the rights of using a highway possessed by occupiers of premises abutting thereon, see cases quoted, p. 75, *post*.

Fences by the side of a highway are *prima facie* the boundaries of the highway so as to raise a presumption that the public right of way extends over the whole space between the fences (*Offin* v. *Rochfort*, [1906] 1 Ch. 342); so far as that space can be used for passage (*Chorley* v. *Nightingale*, [1906] 2 K. B. 618; *Harvey* v. *Truro*, [1903] 2 Ch. 638, and see *Rowley* v. *Tottenham*, [1914] A. C. 95). But the mere existence of a fence is not conclusive. The presumption will not arise where there is reason for supposing that the fence was not put up as a boundary of the highway (*Offin* v. *Rochfort*, *supra*), *e.g.* where the road crosses uninclosed waste the fence may have been put up to separate adjoining closes from the waste (*Neeld* v. *Hendon Council*, 81 L. T. 410). See as to footpaths, *Ford* v. *Harrow*, 88 L. T. 394, and see generally, *R.* v. *U. K. Electric Telegraph Co.*, 2 B. & S. 647; 31 L. J. M. C. 166; *Turner* v. *Ringwood Board*, 9 Eq. 418; *Nicol* v. *Beaumont*, 50 L. T. 112; *Locke King* v. *Woking Council*, 77 L. T. 790. Evidence rebutting the above presumption was given in *Neeld* v. *Hendon Council*, 81 L. T. 405. The nature of the district, the width and level of the margins, and the regularity of the lines of fence must be considered (*Belmore* v. *Kent Council*, [1901] 1 Ch. 873). Where, by an inclosure award, a way was set out fifteen feet wide as a public bridlepath and footway and also as a private driftway, the public were held entitled to use the whole width for those purposes (*Pullin* v. *Deffel*, 64 L. T. 134). As to the application of the fifteen feet rule, see *Easton* v. *Richmond Board*, L. R. 7 Q. B. 69.

(4) Repair of public ways.

At common law, highways are repairable by the inhabitants of the parish (Glen on Highways, cap. 4). In the case of dedications before the Highway Act, 1835, the assent of the parish was not requisite (*R.* v. *Leeke*, 5 B. & Ad. 469; *Rishton* v. *Haslingden*, [1898] 1 Q. B. 301). In the case of dedications since the Act, parishes are not liable to repair the highway unless it is made to the satisfaction of the surveyor of the highways, and of two justices of the peace, who are to give a certificate to this effect, which certificate is to be enrolled (Highway Act, 1835, s. 23). After a lapse of time these formalities were presumed (*Leigh Council* v. *King*, [1901] 1 Q. B. 747). But this case was disapproved in H. L. (*Cababé* v. *Walton-upon-Thames*, [1914] A. C. 102).

Under recent statutory provisions, main roads are now repairable by the county council (Local Government Act, 1888, s. 11). And other highways (unless repairable by some person *ratione tenuræ*) by the district council (Local Government Act, 1894, s. 25; see *R.* v. *Shipley Council*, 61 J. P. 488, and as to taking over highways responsible *ratione tenuræ*, *Re Stamford and Warrington*, [1911] 1 Ch. 648). As to roads within urban districts, see Public Health Act, 1875, s. 144; *R.* v. *Poole*, 19 Q. B. D. 602; *R.* v. *Wakefield*, 20 Q. B. D. 810. A parish council may undertake the repair of a public footpath (Local Government Act, 1894, s. 13 (2)). Where there is no obligation to repair there can be (in the absence of special power) no right to repair (*Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518).

See further as to the repair of highways, *Dovaston* v. *Payne*, 2 Smith's L. C.; *R.* v. *Stoughton*, 2 Wms. Saund. 462, edit. 1871, and Glen on Highways.

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(5) Extinction of public ways.

Mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it (*Harvey* v. *Truro*, [1903] 2 Ch. 638; *Vooght* v. *Winch*, 2 B. & Ald. 662; *R.* v. *Montague*, 4 B. & C. 598). The public cannot release their right to a public highway by non-user (*Dawes* v. *Hawkins*, 8 C. B. (N.S.) 848; *Freeman* v. *Tottenham Ry. Co.*, 13 W. R. 335; *Hillary* v. *Waller*, 12 Ves. 265), or by acquiescence in an obstruction (*Pullin* v. *Deffel*, 64 L. T. 134). Consent by a highway authority to an obstruction is ineffectual (*Harvey* v. *Truro*, [1903] 2 Ch. 638). A highway may be destroyed by the sea (*R.* v. *Hornsea*, 23 L. J. M. C. 59), or by a landslip (*R.* v. *Greenhow*, 1 Q. B. D. 703); and a way ceases to be a public highway when the access to it at both ends has become impossible (*Bailey* v. *Jamieson*, 1 C. P. D. 329). A public right of way may be extinguished by statute, either by express words (*Wells* v. *London and Tilbury Ry. Co.*, 5 Ch. D. 126), or by implication (*Yarmouth* v. *Simmons*, 10 Ch. D. 518). The repeal of a statute which had extinguished a public right of way did not revive the right (*Gwynne* v. *Drewitt*, [1894] 2 Ch. 616). As to the substitution by statute of one highway for another see *E. Riding C. C.* v. *Selby Co.*, [1925] Ch. 841. A public right of way to a towing-path on the banks of a navigable tide river, is not destroyed by the river having been converted by statute into a floating harbour, although the user of the towing-path has been thereby increased (*R.* v. *Tippett*, 3 B. & Ald. 193). Where an inclosure Act directs that all ways not set out shall be deemed part of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction (*Simpson* v. *Scales*, 2 Bos. & P. 496; see *Thackrah* v. *Seymour*, 1 C. & M. 18). The 10th and 11th sections of the Inclosure Act, 1801, did not extinguish a right to take water from a well which the inhabitants of a parish had immemorially exercised upon common land which had been inclosed, although the ancient way to the well was extinguished under the inclosure (*Race* v. *Ward*, 7 El. & Bl. 384). The Railways Clauses Act, 1845, sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership (*Rangeley* v. *Midland Ry. Co.*, 3 Ch. 306). The mere construction of a railway across a public footpath will not extinguish it (*Cole* v. *Miles*, 60 L. T. 145). But the company are not bound to make a bridge or tunnel (*Dartford Council* v. *Bexley Heath Ry. Co.*, [1898] A. C. 210).

(6) Remedy for nuisances to public ways: by indictment, &c.,

In the case of public nuisance to a highway arising from nonfeasance in failing to repair it, no action will lie against an urban authority (*Cowley* v. *Newmarket*, [1892] A. C. 345; see *Sydney* v. *Bourke*, [1895] A. C. 433; *Thompson* v. *Brighton*, [1894] 1 Q. B. 332; *Lambert* v. *Lowestoft*, [1901] 1 Q. B. 590); and as against a person liable to repair *ratione tenuræ*, it was doubted whether an action for special damage for non-repair would lie (*Rundle* v. *Hearle*, [1898] 2 Q. B. 83). The remedy in the case of non-repair is by proceedings before justices (Highway Act, 1835, s. 94), or by indictment, which apparently lies against the inhabitants of a parish (Glen on Highways Bk. 1, ch. 5), but not against a parish council (*R.* v. *Shipley Council*, 61 J. P. 488). In the case of a public nuisance arising from misfeasance the remedy is by indictment, or by information at the suit of the Attorney-General. In the case of a private nuisance by misfeasance the remedy is by action. But where that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special damage, the individual may have his private remedy by action (*Soltau* v. *De Held*, 2 Sim. (N.S.) 143, 145; see *Wallasey Board* v. *Gracey*,

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36 Ch. D. 593; *Boyce* v. *Paddington*, [1903] 1 Ch. 114). An indictment does not lie for obstruction of a local right, such as a parish church way (*Brocklebank* v. *Thompson*, [1903] 2 Ch. 355); but does lie for obstruction of a highway (*R.* v. *Train*, 2 B. & S. 640; *R.* v. *U. K. Telegraph Co.*, 2 B. & S. 647, n.; *R.* v. *Longton Gas Co.*, 29 L. J. M. C. 118). Such an indictment cannot be compromised (*Windhill Board* v. *Vint*, 45 Ch. D. 351). Statutory penalties are imposed on persons committing specified nuisances on a highway by Highway Act, 1835, s. 72.

by action for damages,

A private person cannot sue for damage arising from the disturbance of a highway, unless he has sustained some special damage (Co. Litt. 56 a; 5 Rep. 73 a; *Rose* v. *Groves*, 5 M. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 1002; *Blagrave* v. *Bristol*, 1 H. & N. 369). Where the plaintiff proved no damage peculiar to himself, beyond delay in passing along the road, he could not maintain the action (*Winterbottom* v. *Derby*, L. R. 2 Ex. 316). So, an individual cannot maintain an action where the obstruction is temporary and the injury sustained by the plaintiff is only in common with others (*Ricket* v. *Metropolitan Ry. Co.*, L. R. 2 H. L. 175; overruling *Wilks* v. *Hungerford Co.*, 2 Bing. (N.C.) 281; *Metropolitan Board of Works* v. *M'Carthy*, L. R. 7 H. L. 243; *Biggs* v. *London*, 15 Eq. 376). But if the plaintiff can prove a particular damage to himself beyond the general damage to the public, and that such damage is direct and substantial, an action can be maintained (*Benjamin* v. *Storr*, L. R. 9 C. P. 400). In *Iveson* v. *Moore* (1 Lord Raym. 186), the preventing of colliers from coming to a colliery by obstructing a public highway, by which the benefit of the colliery was lost, enabled a man to maintain an action (see *Rose* v. *Miles*, 4 M. & S. 101; *Rose* v. *Groves*, 5 M. & G. 620; *Greasly* v. *Codling*, 2 Bing, 266). The occupier of premises abutting on a highway may recover damages on the ground of an unreasonable use of a highway by others which has either occasioned loss of custom to the plaintiff (*Fritz* v. *Hobson*, 14 Ch. D. 542), or rendered his dwelling uncomfortable (*Benjamin* v. *Storr*, L. R. 9 C. P. 400; see *Sadler* v. *G. W. Ry.*, [1896] A. C. 450). In a case of doubt the right of such an occupier himself to use the highway for loading and unloading goods at his premises must yield to the public right of passage (*Att.-Gen.* v. *Brighton Association*, [1900], 1 Ch. 276). Such right is not the occupier's private right, but an individual interest in a public right (*Chaplin* v. *Westminster*, [1901] 2 Ch. 329). As to the reasonable user of a highway by the occupiers of premises abutting thereon, see *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 721; *Barber* v. *Penley*, [1893] 2 Ch. 447. Where a public right of way is raised as a defence to an action of trespass, see as to pleadings and evidence, *Webber* v. *Sparkes*, 10 M. & W. 485; *Wood* v. *Wedgewood*, 1 C. B. 273; *Bracegirdle* v. *Peacock*, 8 Q. B. 174; *Offin* v. *Rochford Council*, [1906], 1 Ch. 342; and as to particulars, see *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410. In a case where this defence failed the Court granted nominal damages, but refused an injunction on the ground that the plaintiff was not injured (*Behrens* v. *Richards*, [1905], 2 Ch. 614).

by injunction,

The Attorney-General can obtain an injunction to restrain interference with a highway without showing actual injury (*Att.-Gen.* v. *Shrewsbury*, 21 Ch. D. 752; see *Att.-Gen.* v. *L. & N. W. Ry.*, [1900] 1 Q. B. 78). But without proof of special damage an individual alone cannot sue (see *London &c., Association* v. *London & India Docks Committee*, [1892] 3 Ch. 270). Where, however, an individual can prove special damage, he can sue for an injunction without making the Attorney-General a party (*Cook* v. *Bath*, 6 Eq. 177; *Barber* v. *Penley*, [1893] 2 Ch. 447; *Boyce* v. *Paddington*,

[1903] 1 Ch. 114). The remedy of a parishioner in respect of interference with a "churchway" is in the ecclesiastical court (*Batten* v. *Gedye*, 41 Ch. D. 507). The possessor of excavated land must keep it fenced off from any public place or right of way (*Att.-Gen.* v. *Roe*, [1915] 1 Ch. 235). **Rights of Way.**

The breaking up of the pavements of a town by an individual for the purpose of laying gas pipes, may be the subject of an indictment (*R.* v. *Longton Gas Co.*, 29 L. J. M. C. 118); but it will not be restrained by injunction as a public nuisance, the injury not being either irreparable or continuous (*Att.-Gen.* v. *Cambridge Co.*, 4 Ch. 71). Damages in a proper case may be awarded in substitution for an injunction (*Wedmore* v. *Bristol*, 11 W. R. 13), the jurisdiction of the Court under Lord Cairns' Act not being affected by its repeal (*Sayers* v. *Collyer*, 28 Ch. D. 103).

A private individual has no right to remove an obstruction to a highway, unless it is necessary in order that he may exercise his right of passage (*Bateman* v. *Bluck*, 18 Q. B. 870); or unless it causes a special injury to him (*Bagshaw* v. *Buxton Board*, 1 Ch. D. 224). As to removal by a highway authority, see *post*, p. 70. It is doubtful whether the right to abate exists in the case of nonfeasance (*Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518). In any case it would not justify a member of the public in re-erecting a bridge which had been allowed to decay (*ibid.*). by abatement.

(7) Public bodies and highways.

With respect to public bodies, some statutory provisions require to be mentioned. By Loc. Gov. Act, 1888, s. 11, sub-s. 6, main roads, except where an urban district council maintains them, are vested in the county council. As regards ordinary roads, which are not main roads, it is provided by P. H. Act, 1875, s. 149, that streets within an urban district shall vest in and be under the control of the local authority (now known as the urban district council); and to this authority are given the management powers of surveyors of highways (P. H. Act, 1875, ss. 144-148; Loc. Gov. Act, 1894, s. 21). Ordinary roads in a rural district are not vested in the local authority (now known as the rural district council); but to this authority have been given the management powers mentioned in sects. 144-148 of the P. H. Act, 1875 (Loc. Gov. Act, 1894, s. 25). As regards the metropolis, sect. 96 of the Metrop. Management Act, 1855, contains vesting provisions similar to sect. 149 of the P. H. Act, 1875 (see *Battersea* v. *County of London Co.*, [1899] 1 Ch. 474). Statutory provisions as to vesting and management.

The effect of these various vesting provisions (which seem to be substantially similar) has been much discussed. It has been held that sect. 149 of the P. H. Act, 1875, vests in the local authority property as distinguished from an easement (*Tunbridge Wells* v. *Baird*, [1896] A. C. 437; *Att.-Gen.* v. *Conduit Co.*, [1895] 1 Q. B. 311; *Westminster* v. *Johnson*, [1904] 2 K. B. 745). This means such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use (*Tunbridge Wells* v. *Baird*, [1896] A. C. 442; see *Sydney Council* v. *Young*, [1898] A. C. 459). That which is vested is what is called the "area of user"; all the stratum of air above the surface and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street vest in and belong to the local authority (*Finchley Electric Co.* v. *Finchley Council*, [1903] 1 Ch. 441; compare *Midland Ry. Co.* v. *Wright*, [1901] 1 Ch. 738; *Att.-Gen.* v. *Barker*, 83 L. T. 245). The local authority accordingly had no power to erect lavatories below the surface of a street (*Tunbridge Wells* v. *Baird*, *supra*; see now Public Health Acts Amendment Act, 1907, s. 47); or to compel Effect of vesting provisions.

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an electric company to remove wires two feet below the surface (*Battersea* v. *County of London Co.*, [1899] 1 Ch. 474); or to prevent the placing of electric wires over the street at a height not interfering with the proper user of the street as a street (*Finchley Electric Co.* v. *Finchley Council, supra*). *Secus* where the wire interferes with such user (*Wandsworth* v. *United Telephone Co.*, 13 Q. B. D. 904; compare *National Telephone Co.* v. *St. Peter Port*, [1900] A. C. 317). The property of the local authority was not enlarged by the fact that the street had been originally conveyed to turnpike trustees in fee (*Finchley Electric Co.* v. *Finchley Council, supra*), and the property ceased when the highway was stopped up or diverted (*Rolls* v. *St. George's Vestry*, 14 Ch. D. 785). It is a statutory determinable fee simple (*Foley* v. *Dudley*, [1910] 1 K. B. 317). In respect of their property in the area of user the local authority can sue for a trespass or a nuisance damaging their property (*Wednesbury* v. *Lodge Co.*, [1907] 1 K. B. 90; [1908] A. C. 326; *Foley* v. *Dudley, supra*; *Att.-Gen.* v. *Conduit Co.*, [1895] 1 Q. B. 311; *Sheringham Council* v. *Holsey*, [1904] W. N. 83; 20 T. L. R. 402).

Powers of district councils;

Further, by sect. 26 of Loc. Gov. Act, 1894, it is the duty of every district council to protect public rights of way and to prevent obstruction, and also to prevent encroachment on roadside wastes. For the purposes of the section the council may institute or defend legal proceedings and take other steps. (See as to county councils, Loc. Gov. Act, 1888, s. 11, sub-s. 1).

as to removing obstructions;

Under the above section, a district council is in the position of a private individual protecting his own property (*Murray* v. *Epsom Board*, [1897] 1 Ch. 40). It can remove obstructions (*Reynolds* v. *Presteign Council*, [1896] 1 Q. B. 609; see *Louth Council* v. *West*, 65 L. J. Q. B. 535; *Harris* v. *Northamptonshire Council*, 61 J. P. 599); and may contribute to the costs of an individual who has done so, and been sued (*R.* v. *Norfolk Council*, [1901] 2 K. B. 268).

as to legal proceedings.

The district council can defend actions in which a public right of way is brought in question (*Harvey* v. *Truro Council*, [1903] 2 Ch. 635; *Offin* v. *Rochford Council*, [1906] 1 Ch. 302), and in such proceedings has under the Public Authorities Protection Act, 1893, recovered costs as between solicitor and client (*Ibid.*; see *Greenwell* v. *Howell*, [1900] 1 Q. B. 535). The council can in certain cases maintain in its own name an action of trespass (see *Sheringham Council* v. *Holsey*, [1904] W. N. 83; 20 T. L. R. 402). But in general the council cannot without proof of special damage sue alone in its own name in respect of a public nuisance (*Wallasey Board* v. *Gracey*, 36 Ch. D. 593; *Tottenham* v. *Williamson*, [1896] 2 Q. B. 353); or sue alone in its own name to enforce bye-laws as to new streets (*Att.-Gen.* v. *Ashborne*, [1903] 1 Ch. 101; *Devonport* v. *Tozer*, [1903] 1 Ch. 759; *Att.-Gen.* v. *Gibb*, [1909] 2 Ch. 265). The council may, however, in a proper case act as relator. In an action by the Attorney-General at the relation of a district council, an injunction was granted to restrain acts rendered illegal by a public general statute, even where such statute provided a special remedy by way of penalty which had been recovered (*Att-Gen.* v. *Wimbledon Co.*, [1904] 2 Ch. 34; *Att.-Gen.* v. *Pontypridd*, [1908] 1 Ch. 388).

Parish authorities.

As regards parish authorities. Before the formation of parish councils under the Loc. Gov. Act, 1894, it was held that the vestry of a parish could not, except as relators, sue to restrain the obstruction of a public right of way (*Bermondsey* v. *Brown*, 1 Eq. 204). Since the Loc. Gov. Act, 1894, it has been held that a parish council which had property in the herbage growing on a private road could sue for trespass to the herbage (*Att.-Gen.* v. *Garner*, [1907] 2 K. B. 487). As to rights of way acquired by a parish council and actions in respect thereof, see Loc. Gov.

Act, 1894, s. 8, sub-s. 1 (g), and *Stoke Council* v. *Price*, [1899] 2 Ch. 277.

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The effect of statutory powers given to public bodies of interfering with a highway and the subsoil thereof was considered, as regards tramway poles, in *Escott* v. *Newport*, [1904] 2 K. B. 369; *Goldberg* v. *Liverpool*, 82 L. T. 362; as regards lamp-posts, in *Chaplin* v. *Westminster*, [1901] 2 Ch. 329; and as regards sanitary conveniences, in *Vernon* v. *St. James'*, 16 Ch. D. 449; *Westminster* v. *L. & N. W. Ry. Co.*, [1905] A. C. 427. As regards sanitary conveniences in London, see as to the effect of the vesting provisions in s. 44 of the P. H. (London) Act, 1891, *Westminster* v. *Johnson*, [1904] 2 K. B. 737; *L. & N. W. Ry. Co.* v. *Westminster*, [1904] 1 Ch. 765.

Statutory powers of interfering with highways.

(8) Ownership of soil of highway.

Subject to the above statutory provisions the rule is that the freehold of the highway is in the owner of the freehold of the soil, although the public may pass and repass at their pleasure (2 Inst. 705; *Lade* v. *Shepherd*, 2 Str. 1044). The owner of the soil is entitled to all profits, trees and mines upon or under the highway (1 Roll. Abr. 392; *Goodtitle* v. *Alker*, 1 Burr. 143). In the 82nd section of the Highway Act, 1835, there is a saving of mines to the owner of lands taken for widening narrow roads. The soil in turnpike roads does not vest in the trustees thereof, who have only the control of the highway, without a special clause for that purpose (*Davison* v. *Gill*, 1 East, 69; see also *R.* v. *Mersey Navigation*, 9 B. & C. 95; *R.* v. *Thomas*, *Id.* 114; *Salisbury* v. *G. N. Ry. Co.*, 5 C. B. (N.S.) 174). The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his cattle to depasture along the highway (*Dovaston* v. *Payne*, 2 H. Bl. 527; *Stevens* v. *Whistler*, 11 East, 51; see *Luscombe* v. *G. W. Ry.*, [1899] 2 Q. B. 313); or an action of ejectment for land over which there is a public right of way (*Goodtitle* v. *Alker*, 1 Burr. 133; *Doe* v. *Wilkinson*, 3 B. & C. 413; and see *Scales* v. *Pickering*, 4 Bing. 448; *Bevan* v. *London Cement Co.*, 67 L. T. 615). And the owner of the soil can obtain an injunction to restrain a stranger from laying down pipes under the highway (*Goodson* v. *Richardson*, 9 Ch. 221). The principle is carried so far that a man may be a trespasser on the highway when he is there not for passing but for different purposes, *e.g.* sporting (*R.* v. *Pratt*, 4 El. & Bl. 860); or for interfering with sport (*Harrison* v. *Rutland*, [1893] 1 Q. B. 142); or for watching trials of racehorses on adjoining land (*Hickman* v. *Maisey*, [1900] 1 Q. B. 752). The owner who dedicates his land as a highway parts with no other right than a right of passage, and may exercise all other rights not inconsistent with such dedication (*St. Mary, Newington* v. *Jacobs*, L. R. 7 Q. B. 47). Title to the soil of a highway (subject to the public right of passage) was acquired by letting the grazing for a long period (*Haigh* v. *West*, [1893] 2 Q. B. 19).

Where an inclosure Act provided for the allotment of land to the lord in compensation for all right of soil, the soil of a private road set out under the Act vested *ad medium filum* in the allottees of the adjacent land (*Neaverson* v. *Peterborough Council*, [1901] 1 Ch. 22). But there is no general presumption that the soil in roads set out under an Inclosure Act belongs to the adjoining owners (*R.* v. *Edmonton*, 1 M. & Rob. 24; *R.* v. *Wright*, 3 B. & Ad. 681; see *Haigh* v. *West*, *supra*). Where the herbage of a road becomes vested by the Inclosure (Consolidation) Act, 1801, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors (*R.* v. *Hatfield*, 4 Ad. & Ell. 156; see *Hooper* v. *Bourne*, 3 Q. B. D. 258). The soil

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in a road was held to remain in the lord of the manor, that portion of the soil only being taken from him for which he received compensation and which is allotted to others (*Poole* v. *Huskinson*, 11 M. & W. 827; see *R.* v. *East Mark*, 12 Jur. 332; *Neaverson* v. *Peterborough Council*, *supra*).

Where closes abutting on opposite sides of the highway belong to different owners, each owner is, according to presumption of law, entitled to the soil under the highway *usque ad medium filum viæ* (*Beckett* v. *Leeds*, 7 Ch. 424; *Leigh* v. *Jack*, 5 Ex. D. 270; *L. & N. W. Ry.* v. *Westminster*, [1902] 1 Ch. 279). Accordingly, such closes may be "adjoining or contiguous" within the meaning of a lease (*Haynes* v. *King*, [1893] 3 Ch. 439). As to the meaning of "adjoining" in covenants, see further *White* v. *Harrow*, 86 L. T. 4; *Ind, Coope & Co.* v. *Hamblin*, 84 L. T. 168; *Vale* v. *Moorgate*, 80 L. T. 487; and in a statute *Re Bateman and Parker*, [1899] 1 Ch. 599). The above-mentioned presumption exists only in the absence of evidence of ownership (*Beckett* v. *Leeds*, 7 Ch. 421). The presumption applies equally to a private as to a public road (*Holmes* v. *Bellingham*, 7 C. B. (N.S.) 329; *Smith* v. *Howden*, 14 C. B. (N.S.) 398).

When soil of highway passes by conveyance.

In the case of the conveyance of land adjoining a highway, the soil of the highway, *ad medium filum viæ*, passes by the conveyance. The rule applies even where the land is set forth by admeasurement and referred to in a plan, which includes no portion of the highway (*Berridge* v. *Ward*, 10 C. B. (N.S.) 400; *R.* v. *Strand Board*, 4 B. & S. 526, where the boundary of a parish was defined by statute; *Micklethwait* v. *Newlay Co.*, 33 Ch. D. 145, a case of land bounded by a river). The rule applies to streets in a town as well as to highways in the country (*Haynes* v. *King*, [1893] 3 Ch. 439; *Re White's Charities*, [1898] 1 Ch. 659; *L. & N. W. Ry.* v. *Westminster*, [1902] 1 Ch. 279); and to leases as well as conveyances (*Haynes* v. *King*, *supra*; see *Landrock* v. *Metropolitan Ry. Co.* (1886), W. N. 195; *Mappin* v. *Liberty*, [1903] 1 Ch. 118). The rule does not apply to a grant of land adjoining a railway (*Thompson* v. *Hickman*, [1907] 1 Ch. 550). As to whether it applies to grants by the Crown, see *Mappin* v. *Liberty*, *supra*; *Att.-Gen.* v. *British Museum*, [1903] 2 Ch. 598. But the soil of the highway will not pass if it appears that such soil was not intended to pass, either from a map annexed to the conveyance, or from the form of the conveyance (*Salisbury* v. *G. N. Ry. Co.*, 5 C. B. (N.S.) 174; 28 L. J. C. P. 40; *Plumstead* v. *British Land Co.*, L. R. 10 Q. B. 16). The circumstances under which the conveyance was executed (*e.g.* trees on the highway having been omitted from a valuation) may assist to rebut the presumption (*Pryor* v. *Petre*, [1894] 2 Ch. 11). And where a conveyance described land as bounded by a street, which at that time was intended to be used as a highway, but had not been dedicated, the soil of the street did not pass (*Leigh* v. *Jack*, L. R. 5 Ex. D. 264; see *Mappin* v. *Liberty*, *supra*). Cotton, L.J., doubted whether the rule would ever apply to cases where land is sold in plots for building purposes, even although the roads had been actually laid out (*Leigh* v. *Jack*, *supra*). As to the effect of subsequent circumstances not contemplated at the time of the grant, see *Micklethwaite* v. *Newlay Co.*, 33 Ch. D. 133. Where the grantor is the owner of the soil beyond the *medium filum*, the presumption is that the conveyance passes the soil so far as vested in him (*Re White's Charities*, [1898] 1 Ch. 659). Strips of land along a highway, even though indirectly connected with waste, may pass under a conveyance of the adjacent inclosure (*Dendy* v. *Simpson*, 7 Jur. (N.S.) 1058; 9 W. R. 743; *Simpson* v. *Dendy*, 8 C. B. (N.S.) 433).

Ownership of waste

At common law (independently of statute) the presumption is, that waste land adjoining a road belongs to the owner of the adjoining

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adjoining highways.

inclosure, and not to the lord of the manor (*Steel* v. *Prickett*, 2 Stark. 463; *Scoones* v. *Morrell*, 1 Beav. 251); whether such owner be a freeholder, copyholder, or leaseholder (*Doe* v. *Pearsey*, 7 B. & C. 304). The right extends to the centre of the road (*Cooke* v. *Green*, 11 Price, 736). This presumption may be rebutted by evidence of acts of ownership by the lord of the manor (*Anon.*, Lofft, 358). And if the strip communicate with larger portions of land, the presumption is considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the strip (*Grose* v. *West*, 3 Taunt. 39; *Headlam* v. *Hedley*, Holt, N. P. C. 463). Upon this question the lord may give evidence of grants by him of the waste between the road and other inclosures at a distance from the spot, provided such evidence is confined to the road which passes by the spot (*Doe* v. *Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; see *Stanley* v. *White*, 14 East, 332; *Dendy* v. *Simpson*, 18 C. B. 831). The presumption may also be rebutted by the owner of the adjoining land accepting an allotment of the strip from commissioners appointed to inclose the wastes of the manor (*Gery* v. *Redman*, 1 Q. B. D. 161). Where the lord has conveyed land to A and other land to B, and a strip passed by one of these conveyances, but it is doubtful by which; no presumption arises in favour of A from the fact that the strip lies between a highway and land indisputably comprised in the conveyance to A (*White* v. *Hill*, 6 Q. B. 787). The presumption may also be rebutted by showing that the strip adjoins other land occupied adversely to such owner (*Doe* v. *Hampson*, 4 C. B. 267; 17 L. J. C. P. 225). Where a lord incloses a strip by the side of a highway, a presumption arises that what he leaves between the metal and his fence is dedicated to the public (*Copestake* v. *West Sussex*, [1911] 2 Ch. 331. See also *East* v. *Berkshire County Council*, 106 L. T. 65).

As regards recent statutes, sect. 149 of the P. H. Act, 1875, *ante*, p. 69, enables the local authority to demise the right of pasturage on the side of a highway (*Coverdale* v. *Charlton*, 4 Q. B. D. 104). On the other hand, sect. 11, sub-sect. 6 of the Local Government Act, 1888, does not vest in the county council strips of grass bordering the metalled part of a main road or the herbage thereon (*Curtis* v. *Kesteven Council*, 45 Ch. D. 504). As to the rights of the public over roadside wastes, see *ante*, p. 70.

(9) Balks and ditches.

Balks are strips of land lying between lands which are private property. In presumption of law, balks belong to the owners of the adjacent land, unless the contrary is proved (*Godmanchester* v. *Phillips*, 4 Ad. & Ell. 560).

The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet or eight feet has anything to do with it (*Vowles* v. *Miller*, 3 Taunt. 138). Where two adjacent fields are separated by a hedge and ditch there is a *primâ facie* presumption that the owner of the close on the side of the hedge opposite to the ditch owns the hedge (*Guy* v. *West*, Selw. N. P. 1218), and also the land constituting the ditch (*Doe* v. *Pearsey*, 7 B. & C. 308). The presumption is not rebutted by acts of ownership done by another without the knowledge of such owner (*Craven* v. *Pridmore*, 18 T. L. R. 282; *Henniker* v. *Howard*, 90 L. T. 157). Whether the presumption applies to a natural watercourse, qu. (*Marshall* v. *Taylor*, [1895] 1 Ch. 641). If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by

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proving acts of ownership (*Guy* v. *West*, Selw. N. P. 1218; see as to acts of ownership of a ditch, *Searby* v. *Tottenham Ry. Co.*, 5 Eq. 409; *Norton* v. *L. & N. W. Ry. Co.*, 13 Ch. D. 268; *Marshall* v. *Taylor*, *supra*, followed in *Kynoch* v. *Rowlands*, [1912] 1 Ch. 527). If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of the land in which the tree was first sown or planted (*Holder* v. *Coates*, M. & M. 112; see *Waterman* v. *Soper*, 1 Lord Raym. 737; *Masters* v. *Pollie*, 2 Roll. R. 141; *Anon.*, 2 Roll. R. 255). But the other owner can cut branches which overhang his land even where they have overhung for twenty years (*Lemmon* v. *Webb*, [1895] A. C. 1), or recover damage caused by overhanging branches (*Smith* v. *Giddy*, [1904] 2 K. B. 448).

B. *Private Rights of Way.*

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(1) Different kinds of ways.

There are four kinds of ways (Co. Litt. 56 a):—1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horse-way and foot-way—4, a drift-way (see *Cannon* v. *Villars*, 8 Ch. D. 420, 421). Although a carriage-way comprehends a horse-way and a foot-way (*Davies* v. *Stevens*, 7 C. & P. 570), yet it does not necessarily include a drift-way (*Ballard* v. *Dyson*, 1 Taunt. 279); but evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way (*Ibid.*). As to the meaning of a right of way to "lead manure," see *Brunton* v. *Hall*, 1 Q. B. 792. A way may be granted for agricultural purposes only (*Reynolds* v. *Edwards*, Willes 282); or for the carriage of coals only (*Iveson* v. *Moore*, 3 Ld. Raym. 291; 1 Salk. 15); or for the carriage of all other articles except coals (*Stafford* v. *Coyney*, 7 B. & C. 257; *Jackson* v. *Stacey*, Holt, N. P. C. 455). There may be a private right of way over a *cul de sac* (*Roe* v. *Siddons*, 22 Q. B. D. 234). Parishioners may by custom be entitled to a church-way within the churchyard (*Batten* v. *Gedye*, 41 Ch. D. 507); or across the demesne of a manor within the parish (*Brocklebank* v. *Thompson*, [1903] 2 Ch. 341).

Public and private ways co-existing.

There may be both an occupation way and a public highway over the same road (*Brownlow* v. *Tomlinson*, 1 M. & G. 484; *Wells* v. *London & Tilbury Co.*, 5 Ch. D. 126; *Att.-Gen.* v. *Esher Co.*, [1901] 2 Ch. 647). The acquiring a right of way by the public does not destroy a previously existing right of way over the same line (*Duncan* v. *Louch*, 6 Q. B. 904; *R.* v. *Chorley*, 12 Q. B. 515). The

Court acted on an enclosure award which set out the same way as a bridle and footpath for the public, and as a carriage-way for particular persons (*Pullin* v. *Deffel*, 64 L. T. 134).

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The right of a person who has land abutting on a highway to pass from one to the other is incontrovertible (*Burgess* v. *Northwich*, 6 Q. B. D. 275; *Marshall* v. *Ulleswater*, 7 Q. B. 172; *Ramuz* v. *Southend Board*, 67 L. T. 169; and see *Rowley* v. *Tottenham*, [1914] A. C. 95). It is a private right (*Chaplin* v. *Westminster*, [1901] 2 Ch. 329), quite different from such a person's individual interest in the public right of using the highway (*ibid.*; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 676; *Fritz* v. *Hobson*, 14 Ch. D. 554). He could sue in respect of this private right without joining the Attorney-General (*Boyce* v. *Paddington*, [1903] 1 Ch. 114).

Private access to highway.

A private right of way in gross (that is, not annexed or appurtenant to other property) can be created by express grant; but if so it is personal only and cannot be assigned (*Ackroyd* v. *Smith*, 10 C. B. 188). An easement of a right of way strictly so called implies the existence of a dominant tenement to which the easement is appurtenant (*Hawkins* v. *Rutter*, [1892] 1 Q. B. 671). To be so appurtenant the easement must be an incident of a known and usual kind (*Ackroyd* v. *Smith*, *supra*), and it must be beneficial to and connected with the enjoyment of the property to which it is appurtenant; *e.g.*, there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland (*Bailey* v. *Stevens*, 12 C. B. (N.S.) 91; see *Thorpe* v. *Brumfitt*, 8 Ch. 650). A right of way may be appurtenant either to land or to a right of fishing (*Hanbury* v. *Jenkins*, [1901] 2 Ch. 423).

Private rights of way, in gross, and appurtenant.

(2) Acquisition of private rights of way;

A private way is a right which one or more persons have of going over the land of another. This may be claimed by express reservation, or by grant, or as necessarily incident to a grant of land: or it may be claimed by prescription, custom, or by virtue of an Inclosure Act (Selw. N. P. 1266, 13th ed.).

(a) by express reservation:

A right of way may be claimed by express reservation; as where A grants land to another, reserving to himself a way over such land (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin (D. 2); and see *Cardigan* v. *Armitage*, 2 B. & C. 197). Tindal, C.J., in *Durham Ry. Co.* v. *Walker* (2 Q. B. 967), observed, "A right of way cannot in strictness be made the subject either of exception or reservation. A right of way *reserved* to a lessor is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same way as the right of sporting or fishing" (see *Doe* v. *Lock*, 2 Ad. & Ell. 705; *Wickham* v. *Hawker*, 7 M. & W. 63). The effect of such a reservation, operating as a re-grant, was considered (*Dynevor* v. *Tennant*, 33 Ch. D. 420; 13 App. Cas. 279; see *S. E. Ry. Co.* v. *Associated Manufacturers*, [1910] 1 Ch. 12). As to reservations of legal estates, see Law of Property Act, 1925, s. 65, *post*. In order to establish an easement claimed by lessors, as in the nature of a grant from the lessee, it would in general be essential to show the execution of the lease by the lessees (*Durham Ry. Co.* v. *Walker*, 2 Q. B. 967; *Corcor* v. *Payne*, I. R. 4 C. L. 380; see, however, *May* v. *Belleville*, [1905] 2 Ch. 605, where an agreement for sale reserving a right of way followed by a conveyance not executed by the purchaser bound the purchaser). A right of access stipulated for by a contract was extinguished by the deed of conveyance which did not reserve it (*Teebay* v. *Manchester Ry. Co.*, 24 Ch. D. 572; see *Leggott* v. *Barrett*, 15 Ch. D. 309; *Greswolde Williams* v. *Barneby*, 17 T. L. R. 110). In such a case the Court must see that the deed covers the whole ground of the contract (*Palmer* v. *Johnson*, 13 Q. B. D. 357); and if it does not there is no extinguish-

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ment (*Brazier* v. *Glasspool*, [1902] W. N. 162; see *De Lasselle* v. *Guildford*, [1901] 2 K. B. 215).

by express grant;

A way may be claimed by grant, as where an owner of land grants to another person a way through or over a particular close (Com. Dig. Chimin, D. 3). But the word "way" in a grant is not an apt word to create a new right of way. It is a word descriptive of an existing right—a right of way over the land of another person (*Roe* v. *Siddons*, 22 Q. B. D. 236). The description of a right of way in a grant was rectified, as not in accordance with the intention (*Cowen* v. *Truefitt*, [1899] 2 Ch. 309). A covenant by an owner of land that another person shall have and use a way amounts to an express grant (*Holme* v. *Seller*, 3 Lev. 305). A grant was implied from an express covenant (*Oakley* v. *Adamson*, 8 Bing. 356). A contract to grant a right of way was held equivalent to a contract for sale of real estate, so that no damages were given for breach (*Rowe* v. *London School Board*, 36 Ch. D. 619; see *Jones* v. *Watts*, 43 Ch. D. 574). If a right of way is appurtenant to a piece of land which is demised, the right of way passes also without any special mention of such right (*Skull* v. *Glenister*, 7 L. T. 827; see *Evans* v. *Angell*, 26 Beav. 205). The conveyance of an inland farm with the "appurtenances" did not pass the right to take seaweed from the neighbouring seashore (*Baird* v. *Fortune*, 7 Jur. (N.S.) 926; 10 W. R. 2). As to when a right of way will pass where there has been unity of seisin of the dominant and servient tenements, see the cases quoted below.

A railway company cannot grant a private right of way over land required for the purposes of its undertaking (*Mulliner* v. *Midland Ry. Co.*, 11 Ch. D. 611; *G. W. Ry.* v. *Talbot*, [1902] 2 Ch. 765), except where the way is not inconsistent with such purposes (*Re Gonty and Manchester Co.*, [1896] 2 Q. B. 439; see *Foster* v. *L. C. & D. Ry.*, [1895] 1 Q. B. 711; *S. E. Ry. Co.* v. *Associated Manufacturers*, [1910] 1 Ch. 12; *S. E. Ry. Co.* v. *Cooper*, [1924] 1 Ch. 211).

On the construction of the devise of a right of way, it was held limited to the lifetime of the devisee (*Pym* v. *Harrison*, 33 L. T. 796). General words reserving a wayleave to a bishop for coal got out of any land were restricted by the context to land belonging to the See (*Midgley* v. *Richardson*, 14 M. & W. 495; see *Hedley* v. *Fenwick*, 3 H. & C. 349).

A grant of a right of way to Blackacre made to A., "his heirs and assigns," who at the time was tenant from year to year, and subsequently acquired the freehold, enured for the benefit of such freehold (*Rymer* v. *McIlroy*, [1897] 1 Ch. 528).

The grant should define the way (*Metropolitan Ry. Co.* v. *G. W. Ry. Co.*, 84 L. T. 333). And a grantor having once defined a way cannot alter it (*Deacon* v. *S. E. Ry. Co.* (1889), W. N. 79). Compare the rule as to a way of necessity (*Pearson* v. *Spencer*, 1 B. & Sm. 584).

evidence as to grants;

In an action for obstructing a way, granted by a lease from the defendant to the plaintiff, the judge will receive evidence of the state of the premises at the time of the lease, and will then put a construction on the lease as to the line along which the way is granted: but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant (*Osborn* v. *Wise*, 7 C. & P. 761; see *R.* v. *Chorley*, 10 W. R. 2).

way passing by estoppel;

Where in a conveyance land was described as bounded by a street or roadway (*International Tea Stores* v. *Hobbs*, [1903] 2 Ch. 173;

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Espley v. *Wilkes*, L. R. 7 Ex. 304; *Roberts* v. *Karr*, 1 Taunt. 495; *Gogarty* v. *Hoskins*, [1906] 1 I. R. 173), or by the seashore (*Mellor* v. *Walmesley*, [1905] 2 Ch. 104), and the bounding land in fact belonged to the vendor, he was estopped from denying that the purchaser was entitled to a right of way over such bounding land. The inference of a right of way was assisted by a plan on the deed (*Espley* v. *Wilkes*, *supra*; *Furness Co.* v. *Cumberland Society*, 52 L. T. 144). A plan on the agreement cannot, it seems, be referred to to construe the deed (*Barlow* v. *Rhodes*, 1 C. & M. 439). Sometimes the agreement reserves power to vary the plan appearing thereon (*Whitehouse* v. *Hugh*, [1906] 2 Ch. 283). As to the effect of a plan, see further *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 441, 457; *Randall* v. *Hall*, 4 D. G. & Sm. 343; *Roe* v. *Siddons*, 22 Q. B. D. 228; *Re Lindsay and Forder*, 72 L. T. 832.

effect of plan.

In the case of deeds executed after 1881, a conveyance of land operates, where there is no contrary intention, to convey all ways appertaining or reputed to appertain to the land, or at the time of the conveyance demised, occupied or enjoyed with or reputed or known as part or parcel of, or appurtenant to the land (Law of Property Act, 1925, s. 62). As regards the operation of conveyances independently of this Act, there have been a number of decisions on the question what words will pass rights of way where there has been unity of seisin of the quasi-dominant and quasi-servient tenements. The effect of these decisions is stated in the next paragraphs.

Where there is unity of seisin, what words will pass ways which existed before the unity of seisin.

Where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In such a case the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" (*James* v. *Plant*, 4 Ad. & Ell. 761; *Kooystra* v. *Lucas*, 5 B. & Ald. 830; *Staple* v. *Haydon*, 6 Mod. 3; *Harding* v. *Wilson*, 2 B. & C. 96). The words "belonging or appertaining" are insufficient (*Barlow* v. *Rhodes*, 1 C. & M. 439; *Baring* v. *Abingdon*, [1892] 2 Ch. 390). Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass (*Grimes* v. *Peacock*, 1 Bulst. 17; *Saundeys* v. *Oliff*, Sir T. Moore, 467; *Whalley* v. *Thompson*, 1 Bos. & P. 371; *Phesey* v. *Vicary*, 16 M. & W. 484; *Clements* v. *Lambert*, 1 Taunt. 295; see *Worthington* v. *Gimson*, 2 E. & E. 618; and *Tatton* v. *Hammersley*, 3 Ex. 279; *Wardle* v. *Brocklehurst*, 1 Ell. & Ell. 1058; *Bolton* v. *Bolton*, 11 Ch. D. 968; *Brett* v. *Clowser*, 5 C. P. D. 376). In some cases, however, "appurtenances" may have a secondary meaning (*Thomas* v. *Owen*, 20 Q. B. D. 232; and see *Hansford* v. *Jago*, [1921] 1 Ch. 322, where it was held to include a right of way *de facto* enjoyed at the date of the conveyance).

Again, it has been laid down that where there are two adjoining closes belonging to one owner, and there exists over one of them a formed road, which is in fact used for the purposes of the other, and that other is granted with the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass, even though that road had been first constructed during the unity of possession of the two closes (*Barkshire* v. *Grubb*, 18 Ch. D. 622; *Baring* v. *Abingdon*, [1892] 2 Ch. 390). *Thompson* v. *Waterlow* (6 Eq. 36) and *Langley* v. *Hammond* (L. R. 2 Ex. 161), so far as contrary to this view, have been overruled by

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Watts v. *Kelson* (6 Ch. 166); and *Kay* v. *Oxley* (L. R. 10 Q. B. 360) (see *Barkshire* v. *Grubb, supra*; see further *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 457; *Roe* v. *Siddons*, 22 Q. B. D. 226; and *Geoghegan* v. *Fegan*, I. R. 6 Ch. 139). The Court will in these cases put such a construction upon general words, which *prima facie* might apply to rights and not to ways enjoyed *de facto* only, as is to be gathered from the true intention of the parties (*Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 455). As to the construction in such cases of the words "now or heretofore enjoyed," see *Roe* v. *Siddons*, 22 Q. B. D. 224. As to the acquisition of a right of way as between tenants of a common landlord, see *Flynn* v. *Harte*, [1913] 2 I. R. 322.

(b) Acquisition by implied grant upon severance of tenements.

The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way which is used and which is reasonably necessary for the reasonable and comfortable use of the part granted is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual (*Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 452). Compare the grant of easements implied upon the conveyance of one moiety of an outside wall (*Jones* v. *Pritchard*, [1908] 1 Ch. 635). Compare also the obligation of a lessor not to derogate from his grant implied in *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 896; *Aldin* v. *Latimer*, [1894] 2 Ch. 437; also the agreement by the grantor implied upon the grant of property for a particular purpose (*Robinson* v. *Kilvert*, 41 Ch. D. 88; *Corbett* v. *Jonas*, [1892] 3 Ch. 137). In applying, however, the doctrine of implied grant of easements, a distinction has been drawn between easements which are only used from time to time on the one hand, and on the other hand easements which are of necessity, or are apparent and continuous. And it has been laid down as clear law that upon a severance of tenements easements used from time to time only do not pass without appropriate language (*Polden* v. *Bastard*, L. R. 1 Q. B. 161; *Watts* v. *Kelson*, 6 Ch. 173). But see *Schwann* v. *Cotton*, [1916] 2 Ch. 459.

In accordance with this rule a right of way, as being an easement which was not apparent and continuous, did not pass under a lease (*Glave* v. *Harding*, 27 L. J. Ex. 292). So a right to go to a well and take water, as being an easement which was not continuous, did not pass under a devise (*Polden* v. *Bastard, supra; Taws* v. *Knowles*, [1891] 2 Q. B. 570).

On the other hand, where a formed road has been made over a quasi servient tenement to and for the apparent use of the quasi dominant tenement, the formed road is considered to be an apparent and continuous easement, and it may pass by implied grant without any general words at all (*Brown* v. *Alabaster*, 37 Ch. D. 507; *Thomas* v. *Owen*, 20 Q. B. D. 231; *Nicholls* v. *Nicholls*, 81 L. T. 811; and see *Schwann* v. *Cotton, supra; Hansford* v. *Jago*, [1921] 1 Ch. 322). Similarly where at the date of the grant of a gravel pit a tramway was in fact enjoyed with the pit in such a manner as to lead to a reasonable expectation that the enjoyment would be permitted to be continued, a grant was implied (*Brazier* v. *Glasspool*, [1901] W. N. 237; [1902] W. N. 162). Again, where a quasi dominant tenement is so constructed as that part of it, in order to its enjoyment in the state it is in when dealt with, involves a necessary dependence upon the adjoining quasi servient tenement it has been laid down that a grant of a right of way will be implied. So held in the case of a lease (*Ford* v. *Metropolitan Ry. Co.*, 17 Q. B. D. 28): and again where the same testator devised to different devisees the quasi dominant tenement and the quasi servient tenement adjoining (*Pearson* v. *Spencer*, 3 B & S. 761; *Milner's Safe Co.* v. *G. N. & City Ry. Co.*, [1907] 1 Ch. 208, 220).

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Where a formed road existed, a right of way over it was reserved by implication (*Thomas* v. *Owen*, 20 Q. B. D. 225).

Implied reservation.

Ways of necessity;

Where property devised or granted is landlocked, and there is no other way of getting at it without some way over the land of the testator or grantor, a way of necessity is created *de novo* (*Pearson* v. *Spencer*, 1 B. & S. 583; *Pinnington* v. *Galland*, 9 Exch. 1; *Pyer* v. *Carter*, 1 H. & N. 916; see *Beaudely* v. *Brook*, Cro. Jac. 189; *Howton* v. *Frearson*, 8 T. R. 50). An easement of necessity means an easement without which the property cannot be used at all, not one merely necessary to the reasonable enjoyment of that property (*Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 572). A way of *necessity* is in fact only a right of way by implied grant (1 Wms. Saund. 323, n.; see *Bullard* v. *Harrison*, 4 M. & S. 387; *Hinchliffe* v. *Kinnoul*, 5 Bing. N. C. 1; *Kavanagh* v. *Coal Mining Co.*, 14 Ir. C. L. R. 82; see *Donnelly* v. *Adams*, [1905] 1 I. R. 154). A grant of the right to use the staircase of a building was implied in a lease of an upper flat (*Miller* v. *Hancock*, [1893] 2 Q. B. 180). No grant will be implied where at the time the necessity did not exist (*Midland Ry. Co.* v. *Miles*, 33 Ch. D. 632). And a claim to a way of necessity was refused where one side of the land granted abutted on a highway twenty feet below it (*Titchmarsh* v. *Royston Co.*, [1899] W. N. 256). The right may arise by implied reservation. Thus if the owner of four closes, having no way to one of them but over the others, grant the latter without reserving a right of way, it will be reserved to him by operation of law (*Clarke* v. *Cogg*, Cro. Jac. 170; *Jordan* v. *Attwood*, Owen, 121; *London* v. *Rigg*, 13 Ch. D. 798). On the sale of land to a purchaser who has notice that the adjoining land is to be laid out in building in a manner which will make a way over the purchased land necessary to the vendor, such a right of way is reserved to the vendor by implication (*Davies* v. *Sear*, 7 Eq. 427); and see *Browne* v. *Maguire*, [1922] 1 I. R. 23. As to the implied reservation of an easement of necessity, see *Sherbrook* v. *Tufnell*, 46 L. T. 886; *Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 557; cases of support.

A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it (*Bullard* v. *Harrison*, 4 M. & S. 387; see 1 Wms. Saund. 323, n. 6).

instances of ways of necessity;

Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient (*Cobb* v. *Selby*, 6 Esp. 103; see *James* v. *Dodds*, 2 C. & M. 266). Where a man leases lands, reserving the timber, he may enter to show it to a purchaser (2 Roll. Abr. 74, 1, 41; 1 Roll. Abr. 109, 1, 5). So if a man grants to another certain trees in his wood, the grantee may go with carts over the grantor's lands to carry away the trees (*Liford's Case*, 11 Rep. 52 a; Vin. Abr. Incident). A man having a right to wreck thrown on another man's land, has necessarily a right of way over such land to take the wreck (*Anon.*, 6 Mod. 149). Where at the time of the grant in respect of which a right of way was claimed, there was a way which continued to exist, another way could not be claimed as a way of necessity, on the ground of its being more convenient than the former way (*Dodd* v. *Burchall*, 1 H. & C. 113). As to a right of way by necessity to land which had escheated to the lord of the manor, see *Proctor* v. *Hodgson*, 10 Exch. 824.

nature of a way of necessity;

Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there exist to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select (*Bolton* v. *Bolton*, 11 Ch. D. 968). The grantee cannot in general claim a right of way over one

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particular defined road as a way of necessity (*Brown* v. *Alabaster*, 37 Ch. D. 500; *Titchmarsh* v. *Royston Co.*, [1899] W. N. 256). A way of necessity once created must remain the same way as long as it continues at all (*Pearson* v. *Spencer*, 1 B. & S. 584; compare *Deacon* v. *S. E. Ry. Co.* (1899), W. N. 79; and *Allport* v. *General Security Co.*, 11 T. L. R. 310, a staircase to a flat). The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord (*Gayford* v. *Moffatt*, 4 Ch. 133). So where land was taken compulsorily for sewage works, the local board acquired a way of necessity for all purposes connected with these works (*Serff* v. *Acton*, 31 Ch. D. 679). In general, however, a way of necessity is only such a right as will enable the owner of the close to enjoy it in the condition it was in at the time of the creation of the way (*London* v. *Rigg*, 13 Ch. D. 798).

duration of a way of necessity.

A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as he would have done by using the old way, the latter will cease to exist (*Holmes* v. *Goring*, 2 Bing. 76; *Reynolds* v. *Edwards*, Willes, 282; but see *Buckley* v. *Coles*, 5 Taunt. 311, and the remarks of Parke, B., *Proctor* v. *Hodgson*, 10 Ex. 828; see also *Pheysey* v. *Vicary*, 16 M. & W. 491).

(c) Acquisition (based on user) by lost grant;

A private right of way may be claimed by lost grant. As to this mode of claim, see *ante*, p. 25. Such a grant may be presumed from long enjoyment, where its commencement cannot be accounted for, unless a grant has been made (*Doe* v. *Reed*, 5 B. & Ald. 237). The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave, or under a mistake, was held sufficient foundation for the presumption of a lost grant, although such grant must have been made within twenty-six years, as all former ways were at that time extinguished by Inclosure Act (*Campbell* v. *Wilson*, 3 East, 294). So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant (*Keymer* v. *Summers*, 3 T. R. 157; *Livett* v. *Wilson*, 3 Bing. 115). Though an uninterrupted user for twenty years and upwards be a bar to an action, yet the rule must be taken with this qualification, that the user was with the acquiescence of the person seised of an estate of inheritance (*Roberts* v. *James*, 89 L. T. 287). The mere knowledge of a tenant for years is not sufficient (*Daniel* v. *North*, 11 East, 372); but if the user has been for a great length of time, it may be presumed that the landlord was aware of it (*Davies* v. *Stephens*, 7 C. & P. 570; *Jamieson* v. *Coulter*, 21 W. R. 852; *Gray* v. *Bond*, 2 Brod. & Bing. 667; see *Dawson* v. *Norfolk*, 1 Price, 247). It has been held in Ireland that a grant may be presumed from one tenant to another (*Timmons* v. *Hewitt*, 22 L. R. Ir. 627).

by prescription at common law;

A private way may also be claimed by prescription at common law. As to this mode of claim, see *ante*, p. 224. A tenant for years claiming in this manner must, according to rules laid down before the Prescription Act, 1832, s. 5, *ante*, p. 17, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee (2 Salk. 562; Com. Dig. Chimin (D. 2); *Cantrell* v. *Stephens*, Styl. 300; *Dawney* v. *Cashford*, Carth. 432). A right of way could be claimed in respect of a dominant tenement which had been inclosed from a common within fifty years (*Codling* v. *Johnson*, 5 B. & C. 933). The user on which the prescription at common law is based must be uninterrupted. Locking a gate across the way is

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interruption, although the claimant is given a key (*Barry* v. *Lowry*, I. R. 11 C. L. 483; *Guest's Estates* v. *Milner's Safes*, 28 Times L. R. 59; compare *Davies* v. *Stephens*, 7 C. & P. 570). But a gate is not necessarily an obstruction to a private right of way (*Pettey* v. *Parsons*, [1914] 2 Ch. 653; compare *Flynn* v. *Harte*, [1913] 2 I. R. 322; *Guilford* v. *St. George's Golf Club*, 85 L. J. Ch. 664).

by prescription under Act;

A private right of way may also be claimed by prescription under the Prescription Act, 1832. As to this method of claim, see *ante*, p. 8.

by custom.

A custom that every inhabitant of a certain village shall have a way over certain land, either to church or to market, is good, because it is only an easement, but not a profit (6 Rep. 60 b; Co. Litt. 110 b; Cro. Eliz. 180; see 2 H. Bl. 393). See, as to a church way, *Batten* v. *Gedye*, 41 Ch. D. 507; *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.

(d) Acquisition by statute.

An Act which extinguished all ways over land allotted to B, contained a proviso that nothing in the Act should deprive A of the right of access to a watercourse to cleanse the same; this reserved to A his right of way for the purposes mentioned (*Adeane* v. *Mortlock*, 5 Bing. N. C. 236). An Act authorising the appropriation of land as a way for the improvement of an estate and the accommodation of tenants authorised the creation of exclusive private rights of way (*White* v. *Leeson*, 5 H. & N. 53). Commissioners of partition may award a right of way over the lands of one party to the lands of another party (*Lister* v. *L.*, 3 Y. & C. 140).

(3) Nature of right of way acquired by express grant.

Prima facie, the grant of a right of way is a grant having regard to the nature of the *locus in quo* over which it is granted and to the purpose for which it is intended to be used. Both these circumstances may be called in aid in determining whether it is a general right of way, or a footway, or a driftway (*Cannon* v. *Villars*, 8 Ch. D. 421; see *Osborn* v. *Wise*, 7 C. & P. 761, *ante*, p. 76). On this principle, a way was held to be a footway in *Cousens* v. *Rose*, 12 Eq. 366; and a way for all purposes in *Watts* v. *Kelson*, 6 Ch. 166; see also *Wood* v. *Stourbridge Co.*, 16 C. B. (N.S.) 222. On the construction of a lease the grant of a right of way was restricted to the way existing at the date of the lease (*Collins* v. *Slade*, 23 W. R. 199). Where a lease reserved to the lessor a right of way for the purpose of rebuilding erections on adjoining premises which belonged to the lessor, and the lessor erected a dispensary on those premises, the user of the way as an access to such dispensary was restrained (*Ardley* v. *St. Pancras* (1870), W. N. 203; 39 L. J. Ch. 871; see *Sloan* v. *Holliday*, 30 L. T. 757). Compare the ruling as to the extent of an easement to discharge drainage over another's land (*Wood* v. *Saunders*, 10 Ch. 582). The right of a landowner whose land had been severed by a railway to use a level crossing granted to him by the company was limited to what was intended at the date of the grant (*G. W. Ry.* v. *Talbot*, [1902] 2 Ch. 759). So the user of a level crossing as a means of access to a tennis club subsequently established was held excessive (*Taff Vale Co.* v. *Gordon Canning*, [1909] 2 Ch. 48). And under a verbal agreement for access by a gate of a specified width, the gate could not be widened (*Grand Hotel* v. *White*, [1913] 1 Ch. 113; affirmed in House of Lords, 84 L. J. Ch. 938).

Again, as regards additions to the dominant tenement, it has been laid down that if a man has a right of way to one close he cannot use the right for the purpose of going to another close adjoining the former (*Harris* v. *Flower*, [1904] W. N. 180; *Colchester* v. *Roberts*, 4 M. & W. 773). If a man has a right of way to a close called A, he cannot justify using the way to go to A, and from thence to another close of his own adjoining to A (1 Roll. Abr. 391, pl. 3; *Howell* v. *King*, 1 Mod. 191; *Lawton* v. *Ward*, 1 Ld. Raym. 75; and 1 Lutw. 111; *Skull* v. *Glenister*, 16 C. B. (N.S.) 81). As regards subdivisions

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of the dominant tenement, the right goes with every part (*Newcomen* v. *Coulson*, 5 Ch. D. 141), at least where the burden is not increased (*Bower* v. *Hill*, 2 Bing. N. C. 339).

On the other hand, where there is an express grant of a private right of way to particular land, to the unrestricted use of which land the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant (*Finch* v. *G. W. Ry. Co.*, 5 Ex. D. 254; see *Harris* v. *Flower*, [1904] W. N. 180; *United Land Co.* v. *G. E. Ry. Co.*, 10 Ch. 586; *Newcomen* v. *Coulson*, 5 Ch. D. 133; *S. E. Ry. Co.* v. *Cooper*, [1924] 1 Ch. 211). In *Allan* v. *Gomme* (11 Ad. & E. 759), the grantee of a right of way was limited to the use of a way to a place which should be in the same predicament as it was at the time of the grant. This ruling, however, was not approved of by Parke, B. (*Henning* v. *Burnet*, 8 Exch. 192), and the case was treated by Stephen, J., as turning on the construction of the particular deed (*Finch* v. *G. W. Ry. Co.*, 5 Ex. D. 259). The grant of a footway was not so limited (*Sketchley* v. *Berger*, 69 L. T. 754). A way over a private road to land abutting on the private road was not limited to a way through gates which existed at the time of the grant (*South Metropolitan Co.* v. *Eden*, 16 C. B. 42; compare the wide construction placed upon the grants of ways in *Cooke* v. *Ingram*, 68 L. T. 671; *Sketchley* v. *Berger*, 69 L. T. 754). A grant of a right of way for the grantee, his executors, administrators and assigns, undertenants and servants, extended to licensees (*Baxendale* v. *North Lambeth Club*, [1902] 2 Ch. 427). And a right for "visitors" included pupils (*Thornton* v. *Little*, [1907] W. N. 68).

Under a grant of a free and convenient horse and foot way, and for carts, &c., "to carry stones, timber, coals, and other things whatsoever," the grantee may lay a framed way across the land for carrying coals as being most convenient (*Senhouse* v. *Christian*, 1 T. R. 560). Where in 1630 land was granted excepting and reserving out of the grant all mines of coal with sufficient way-leave to the said mines the right was not confined to such ways as were in use at the time of the grant (*Dand* v. *Kingscote*, 6 M. & W. 174; see *Newcomen* v. *Coulson*, 5 Ch. D. 139; *Durham Ry. Co.* v. *Walker*, 2 Q. B. 940; *Farrow* v. *Vansittart*, 1 Ry. Cas. 614). Where, however, A granted land reserving a waggon or cart road of the width of eighteen feet, to be at all times thereafter kept in repair at his own cost, this reservation did not enable A to lay down a railroad for carrying coals from his neighbouring colliery (*Bidder* v. *North Staffordshire Ry. Co.*, 4 Q. B. D. 412). Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as abutting on an intended way, without specifying the breadth: the sub-lessee was entitled to a *convenient* way only (*Harding* v. *Wilson*, 2 B. & C. 96; see *Espley* v. *Wilkes*, L. R. 7 Ex. 298). The grant of a right of way which did not express the intention was rectified (*Cowen* v. *Truefitt*, [1899] 2 Ch. 309). Where a way was granted for a particular purpose, but the land had never been, and was not likely to be, used for that purpose, a declaration of right to the way was refused (*Metropolitan Ry. Co.* v. *G. W. Ry. Co.*, 84 L. T. 333).

Reasonable user.

A grant of a right of way over a private road only confers a right to a reasonable use of such road, and not necessarily over the whole surface of the road (*Clifford* v. *Hoare*, L. R. 9 C. P. 362; see *Sketchley* v. *Berger*, 69 L. T. 754; *Strick* v. *City Offices Co.*, 22 T. L. R. 667). So in the case of a private way over waste land (*Hulton* v. *Hamboro*, 2 F. & F. 218). Where a right of way is granted for the occupation of a dwelling-house, the grantee has

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everything needful for such occupation and may put down a flagstone in front of a door opening into the land over which the right exists (*Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 109). Where premises are conveyed with a right of way thereto, it may be a question for the jury what is a reasonable use of such right (*Hawkins* v. *Carbine*, 27 L. J. Exch. 44). Where a right of way was expressed to be "through the gateway of the plaintiff" (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load, but through subsequent alterations could not do so without trenching upon the plaintiff's premises, the defendant had, in the reasonable use of the right of way, a right to do this (*ibid.*).

The grant of the "exclusive use of a gateway" conferred on the grantee the ownership of the gateway as a corporeal hereditament (*Reilly* v. *Booth*, 44 Ch. D. 12); compare the grant of the exclusive right of drainage through a tunnel which gave the grantee possession of the tunnel (*Holywell* v. *Halkyn*, [1895] A. C. 117; see *Metropolitan Ry. Co.* v. *Fowler*, [1893] A. C. 416).

Nature of right of way acquired by implied grant.

As to the nature of the right in the case of a way acquired by implied grant, it was said in one case that the nature of the right depends on the user (*Milner's Co.* v. *G. N. & City Ry.*, [1907] 1 Ch. 220). See *Gayford* v. *Moffatt*, *Serff* v. *Acton*, *London* v. *Rigg*, all quoted, *ante*, p. 80.

(4) Nature of right of way acquired by user.

Where a right of way is acquired by user, the extent of the right must be measured by the extent of the user (*Williams* v. *James*, L. R. 2 C. P. 581; see *Finch* v. *G. W. Ry. Co.*, 5 Ex. D. 258). Accordingly a prescriptive right of way acquired for agricultural purposes only did not give a right of way for mineral purposes (*Bradburn* v. *Morris*, 3 Ch. D. 812), nor a right to cart building materials (*Wimbledon Conservators* v. *Dixon*, 1 Ch. D. 363). If, however, the way is proved to have been used for a variety of purposes, the jury may be warranted in finding a way for all purposes (*Cowling* v. *Higginson*, 4 M. & W. 245; see *Dare* v. *Heathcote*, 26 L. J. Ex. 245; *Ballard* v. *Dyson*, 1 Taunt. 279; *Jackson* v. *Stacey*, Holt, N. P. C. 455; *Higham* v. *Rabbett*, 5 Bing. N. C. 622). When a way to a dwelling-house had been acquired by user, there was no excess of user by opening a small shop (*Sloan* v. *Holliday*, 30 L. T. 757).

(5) Right to deviate.

A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over which the way runs, belongs to the grantor of the way (*Taylor* v. *Whitehead*, 2 Dougl. 475; *Bullard* v. *Harrison*, 4 M. & S. 387; 1 Wms. Saund. 322, a, n. (3); *Duncombe's Case*, Cro. Car. 366; see *Robertson* v. *Gauntlett*, 16 M. & W. 289). But where a private way has been obstructed by the grantor, the grantee may deviate over the grantor's land (*Selby* v. *Nettlefold*, 9 Ch. 111).

(6) Repair of way.

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin (D. 6); Godb. 53; *Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 108; Vin. Abr. Incidents (A.); *Newcomen* v. *Coulson*, 5 Ch. D. 143), and the grantor is not bound to repair (Com. Dig. Chimin (D. 6); *Jones* v. *Pritchard*, [1908] 1 Ch. 637); unless by prescription or stipulation, express or implied (1 Saund. 322, a, n.; *Rider* v. *Smith*, 3 T. R. 766; *Miller* v. *Hancock*, [1893] 2 Q. B. 181). The grantee of a private way is to make it (*Osborn* v. *Wise*, 7 C. & P. 764). By common law, unless the grantor has bound himself to do so, he who has the use of a thing ought to repair it (*Taylor* v. *Whitehead*, 1 Dougl. 720; *Pomfret* v. *Ricroft*, 1 Wms.

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Saund. 557; *Miller* v. *Hancock, supra*). This is not an obligation to which the grantee is subject; it is no more than this, that if he wants the way to be repaired he must repair it himself (*Duncan* v. *Louch*, 6 Q. B. 909, 910; see *Ingram* v. *Morecraft*, 33 Beav. 49). But in some cases the grantee might be liable for non-repair (*Jones* v. *Pritchard*, [1908] 1 Ch. 638). As to rebuilding a bridge, see *Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518.

Liability for negligence.

As to the liability for negligence attaching to a landowner who permits others to pass over his land, see *Gallagher* v. *Humphrey*, 10 W. R. 664; *Corby* v. *Hill*, 4 C. B. (N.S.) 556; *Belch* v. *Smith*, 7 H. & N. 736; *Gautret* v. *Egerton*, L. R. 2 C. P. 371; *Gwinnell* v. *Eames*, L. R. 10 C. P. 658; *Tarry* v. *Ashton*, 1 Q. B. D. 314.

(7) Extinction of rights of way:

by unity of seisin;

Where a person having a right of way over the land of another purchases such land, the right of way is extinguished by the unity of seisin and possession (*Heigate* v. *Williams*, Noy, R. 119; see *James* v. *Plant*, 4 Ad. & El. 761).

by abandonment;

A long forbearance to exercise a right of way may reasonably be accounted for by supposing a release of the right (*Doe* v. *Hilder*, 2 B. & Ald. 791; see *Moore* v. *Rawson*, 3 B. & C. 339). But a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it (*Crossley* v. *Lightowler*, 2 Ch. 482; *James* v. *Stevenson*, [1893] A. C. 162). It is the nature of the act done, or of the adverse act acquiesced in by the owner of the easement, and the intention thereby indicated, which are material (*R.* v. *Chorley*, 12 Q. B. 519; *Mulville* v. *Fallon*, I. R. 6 Eq. 458). Where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in (*Harvie* v. *Rogers*, 3 Bligh (N.S.) 444—447; see *Hillary* v. *Waller*, 12 Ves. 265; *Norbury* v. *Meade*, 3 Bligh, 211, 241).

The discontinuance for upwards of twenty years of the use of a right of way to a close, because the occupiers had a more convenient access, is not evidence of an intention to abandon (*Ward* v. *Ward*, 7 Exch. 838; where it was said, "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances to raise that presumption. The right is acquired by adverse enjoyment. The non-user must be the consequence of something which is adverse to the user." Compare *Cooke* v. *Ingram*, 68 L. T. 671.) But where for fifty years a roadway over which a right of way had been granted was never made, the conduct of the parties entitled to the right was held to amount to abandonment (*Swan* v. *Sinclair*, [1925] A. C. 227). A parol agreement for the substitution of a new way for an old prescriptive way, and the consequent discontinuance to use the old way, afford no evidence of the abandonment thereof (*Lovell* v. *Smith*, 3 C. B. (N.S.) 120; see *Hulbert* v. *Dale*, [1909] 2 Ch. 570). It is always a question of fact, to be ascertained by a jury or by the Court from the surrounding circumstances, whether the act amounts to an abandonment or was intended as such (*Cook* v. *Bath*, 6 Eq. 179; *Young* v. *Star Omnibus Co.*, 86 L. T. 41). The owner of closes A and B, connected by a right of way, who sold A without granting any right of way to the purchaser or reserving one to himself, was held to have abandoned the connecting way (*Midland Ry. Co.* v. *Gribble*, [1895] 2 Ch. 827). See also as to a release of a right of way, *Poulton* v. *Moore*, [1915] 1 K. B. 400. For the Scotch law as to substitution of ways, see *Young* v. *Kinloch*, [1910] A. C. 169.

by alteration of dominant tenement;

Where the mode of enjoyment of an easement has been altered, and an attempt has been made to usurp a greater right than the party was entitled to, the previously-existing right will not be affected by acts of usurpation in the case of those easements which depend

upon repeated acts of man, such as rights of way (see *Luttrell's Case*, 4 Rep. 86 a). Where a grant was implied of a right of way to a dominant tenement on which a warehouse was standing, and a railway station was substituted for the warehouse, it was said that under the existing circumstances the right was not exercisable at all (*Milner's Co.* v. *G. N. & City Ry.*, [1907] 1 Ch. 227). If a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by the cottage being altered (*Henning* v. *Burnet*, 8 Exch. 192; see *Sloan* v. *Holliday*, 30 L. T. 757). **Rights of Way.**

By the Inclosure Act, 1801, ss. 8, 10 and 11, the commissioners are directed to set out private ways, and it is declared that all ways not set out shall be extinguished; but there is a proviso that no old or accustomed road shall be stopped up without the order of two justices. A private way, not set out by the commissioners, was held to have been extinguished, the proviso only applying to public roads (*White* v. *Reeves*, 2 Moore, 23; *Holden* v. *Tilley*, 1 F. & F. 650); compare sects. 62—68 of the Inclosure Act, 1845, *Turner* v. *Crush*, 4 App. Cas. 221; *Hornby* v. *Silvester*, 20 Q. B. D. 797. As to the construction of local Inclosure Acts giving powers to stop up roads, see *Logan* v. *Burton* (5 B. & C. 513); *Harber* v. *Rand* (9 Price, 58); *R.* v. *Hatfield* (4 Ad. & Ell. 156). by statute.

(8) Remedy for disturbance; by abatement.

The owner of a right of way may, after proper notice requesting the removal of an obstruction, himself remove it, even if the obstruction is a house which is inhabited (*Lane* v. *Capsey*, [1891] 3 Ch. 411). The refusal by the Court to grant a mandatory injunction would not interfere with such a right (*ibid.*); and leave was given to exercise the right where the house was in the possession of a receiver appointed by the Court (*ibid.*). Notice before abatement is unnecessary in case of emergency or where the person in possession of the land himself creates the nuisance (*Lemmon* v. *Webb*, [1894] 3 Ch. 13). It is doubtful whether the right to abate exists in case of nonfeasance (*Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518).

Remedy by action; action by reversioner; companies; pleading;

An action lies for the disturbance of a right of way, created either by reservation, grant, or prescription (Com. Dig. Action on the Case for Disturbance (A. 2); 1 Roll. Abr. 109); and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use (*Lawton* v. *Ward*, 1 Lutw. 111). A reversioner cannot sue for the obstruction of a right of way unless the obstruction be such as either permanently injures the estate, or operates in denial of the right (*Hopwood* v. *Scholfield*, 2 M. & Rob. 34; see *Young* v. *Spencer*, 10 B. & C. 145; *Baxter* v. *Taylor*, 4 B. & Ad. 72; *Jackson* v. *Pesked*, 1 M. & S. 234; *Alston* v. *Scales*, 2 M. & Scott, 5; *Mott* v. *Shoolbred*, 20 Eq. 22; *Kidgill* v. *Moor*, 9 C. B. 364). There was such permanent injury from the obstruction of a siding by a railway company (*Bell* v. *Midland Ry. Co.*, 10 C. B. (N.S.) 287). Compare *Jones* v. *Llanrwst*, [1911] 1 Ch. 393 (pollution by sewage).

The Railway Clauses Act, 1845, s. 53, takes away the common law right of action for an interference by a railway company under its powers with a private right of way, except when special damage has been sustained (*Watkins* v. *G. N. Ry. Co.*, 16 Q. B. 961). As to compensation under the Lands Clauses Act, 1845, see *London School Board* v. *Smith*, [1895] W. N. 37.

In all cases for disturbance of a way, the obstruction ought to be alleged as occurring in the way itself to which the party has a right (*Tebbutt* v. *Selby*, 6 Ad. & Ell. 786). Where in an action for wrong-

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fully stopping up a way the precise locality of the way is material to the defence, the defendant is bound to show it in his pleadings (*Ellison* v. *Iles*, 11 Ad. & Ell. 665).

In an action brought since the Jud. Acts for obstructing a private way the pleading should, under the R. S. C., show the termini of the way and its course; and whether the plaintiff claims by prescription or grant (*Harris* v. *Jenkins*, 22 Ch. D. 481; compare *Pledge* v. *Pomfret*, [1905] W. N. 56). And where the defendant in an action of trespass pleads that the *locus in quo* was a highway, he must now state how it became a highway (*Spedding* v. *Fitzpatrick*, 38 Ch. D. 410; see under the old law, *Williams* v. *Wilcox*, 8 Ad. & El. 331). As to variances under the old law, see *Duncan* v. *Louch* (6 Q. B. 904); *Colchester* v. *Roberts* (4 M. & W. 769).

actions in the Chancery Division.

Where a bill was filed by a lessee to establish a right of way, an objection for want of parties, because the plaintiff's lessor was not before the Court, was allowed under the Chancery practice before the Judicature Acts (*Poore* v. *Clark*, 2 Atk. 515). As to the certainty required in such bills, see *Gell* v. *Hayward* (1 Vern. 312); *Cresset* v. *Mitton* (3 Bro. C. C. 481; 1 Ves. jun. 449). Agreements as to right of way were enforced by injunction in *Newmarch* v. *Brandling* (3 Swan. 99); *Phillips* v. *Treeby* (3 Giff. 632); *Collins* v. *Slade* (23 W. R. 199).

As to the remedy in equity, in the case of a licence for a right of way which has been executed, and where expense has been incurred, see *Mold* v. *Wheatcroft* (27 Beav. 510), and the cases quoted, *ante*, p. 41.

As to the obstruction of a right of way by the acts of several persons, see *Thorpe* v. *Brumfitt*, 8 Ch. 650, and other cases quoted p. 130, *post*. Injunctions have been granted to restrain interference with the private access of the owner of property abutting on the highway to and from the highway (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713; see *Fritz* v. *Hobson*, 14 Ch. D. 542). In a proper case a mandatory injunction will be granted (*Krehl* v. *Burrell*, 7 Ch. D. 551; 11 Ch. D. 146). The remedy of a parishioner in respect of a church way is in the Ecclesiastical Court (*Batten* v. *Gedye*, 41 Ch. D. 507). See further the forms of injunctions, Seton, 7th ed. 574 *et seq.*

V.—Watercourses and Rights in Relation to Water.

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Of Watercourses.

This note deals in the first instance with non-navigable streams. As to navigable streams, see *post*, p. 104.

Non-navigable streams flow through watercourses which are either natural or artificial. As regards the water of a non-navigable stream flowing through a natural watercourse, the channel may be either a defined channel or an undefined channel. And the defined channel may be either overground or underground. In this water flowing through a natural watercourse with a defined channel, riparian owners have by the general law certain rights called natural rights. And they may by prescription acquire other rights called prescriptive rights.

Different kinds of streams.

The natural rights of a riparian owner in water flowing through a natural watercourse with a defined channel may be said to be threefold: (1) the right of user, (2) the right of flow, (3) the right of purity. The rights of user and flow in overground streams have been described in the following cases: "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality" (*Gaved* v. *Martyn*, 19 C. B. (N.S.) 732). "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, for what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury" (*per* Lord Kingsdown, *Miner* v. *Gilmour*, 12 Moo. P. C. 156; adopted ever since; *John White* v. *White*, [1906] A. C. 79; see *Young* v. *Bankier Co.*, [1893] A. C. 696, 698).

(1) Natural rights in water in natural watercourse with defined channel.

(1) Rights of user and flow.

(a) Overground streams.

Again, Lord Cairns said: "The lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water. That is quite consistent with the right of the upper owner also to use the water for all ordinary purposes (namely, as has been said, *ad lavandum et ad potandum*), whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But further, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored, after the object of irrigation is answered, in a

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volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water" (*Swindon Co.* v. *Wilts Co.*, L. R. 7 H. L. 704). Again, Lord Macnaghten speaks of the "ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with . . . In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character" (*M'Cartney* v. *Londonderry Co.*, [1904] A. C. 306).

As regards the ordinary use and extraordinary use to which under the above cases the riparian owner is entitled, it has been said that the user which may at one time have been extraordinary may, by changes in the condition, become ordinary; and also that a user which might be extraordinary in an agricultural district might not be extraordinary in a manufacturing district (*per* Lord Esher, in *Ormerod* v. *Todmorden*, 52 L. J. Q. B. 450; see 11 Q. B. D. 168).

According to Lord Cairns, the extraordinary use includes manufacturing purposes; as to which see *Dakin* v. *Cornish*, 6 Exch. 360; and irrigation; as to which Parke, B., said, if the irrigation takes place not continuously but at intermittent periods when the river is full and no damage is done thereby to the working of a mill on the stream, and the diminution of water is not perceptible to the eye, it is not prohibited (*Embrey* v. *Owen*, 6 Exch. 372; see *Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 603). But the right of a riparian owner to an extraordinary use does not enable him to divert water to supply a lunatic asylum and county jail (*Medway Co.* v. *Romney*, 9 C. B. (N.S.) 575; 30 L. J. C. P. 236). Or to supply a town (*Swindon Co.* v. *Wilts Co.*, *supra*; *Roberts* v. *Gwyrfai*, [1899] 2 Ch. 612; *Owen* v. *Davies* (1874), W. N. 175). Nor did it enable a railway company who owned a tenement on a stream to divert water to a place outside that tenement and use it to supply locomotives along their line (*McCartney* v. *Londonderry Co.*, [1904] A. C. 306).

In a case where a stream had from time to time changed its course, it was laid down that the accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question (*Withers* v. *Purchase*, 60 L. T. 819).

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(b) Underground streams.

As regards the water of a natural stream flowing through a defined channel, where the course is subterranean but well known, as is the case with many, which sink underground a short space and then emerge again, the owner of the soil under which the stream flows can maintain an action for diversion, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground (*Dickenson* v. *Grand Junction Co.*, 7 Ex. 300; *Chasemore* v. *Richards*, 7 H. L. C. 374; see *Dudden* v. *Clutton Union*, 1 H. & N. 630).

The above are the natural rights of user and flow possessed by a riparian owner in the water of a natural stream flowing through a defined channel (whether overground or underground), as laid down in modern authorities. The doctrine of appropriation referred to in the earlier cases is not now accepted (see *Orr Ewing* v. *Colquhoun*, 2 A. C. 854; *Arkwright* v. *Gell*, 5 M. & W. 220).

The rules regulating the right of flow laid down as to water flowing in an undefined channel (see below) differ from those above stated as to defined channels. And in the case of water flowing from surface springs, there is often a difficulty in distinguishing whether they fall under the rules as to defined or undefined channels (see *Ennor* v. *Barwell*, 2 Giff. 423; *Briscoe* v. *Drought*, 11 Ir. C. L. R. (N.S.) 250). Where a natural defined stream issued from a springhead, it was held that the "stream began at the springhead, and that the owner of the land could only take such water from either as was incident to his right as riparian owner (*Dudden* v. *Clutton Union*, 1 H. & N. 627; *Bunting* v. *Hicks*, 70 L. T. 458; *Ewart* v. *Belfast*, 9 L. R. Ir. 172). The same principle applied even where at some remote period the springhead had been built round (*Mostyn* v. *Atherton*, [1899] 2 Ch. 360).

(2) Right of purity.

A riparian owner has a right to the natural stream of water flowing through the land in its natural state; and if overground water is polluted by a superior owner, the inferior owner has a cause of action against the superior owner, unless the latter has gained by enjoyment or grant a right to pollute (*Wood* v. *Waud*, 3 Ex. 748; see *Weeks* v. *Heward*, 10 W. R. 557). The same rule applies, if the character of the water be altered (*Young* v. *Bankier Co.*, [1893] A. C. 691). The natural right to purity extends to subterranean water when appropriated (*Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Turner* v. *Mirfield*, 34 Beav. 390; *Ballard* v. *Tomlinson*, 29 Ch. D. 115).

(2) Water flowing in undefined channels.

Turning to undefined channels, water flowing through these may be overground or underground. As regards such water when overground, it is settled that the right of a riparian owner does not extend to water flowing over or soaking through land previous to its arrival at such watercourse (*Broadbent* v. *Ramsbottom*, 11 Ex. 602). So the owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular definite course (*Rawstron* v. *Taylor*, 11 Exch. 369; see *Van Breda* v. *Silberbauer*, L. R. 3 P. C. 84).

(1) Rights of user and flow.

Overground water.

Underground water.

Underground water flowing through an undefined channel is governed by the same rule (*Chasemore* v. *Richards*, 7 H. L. C. 376). The last-mentioned case decided that every man has a right to divert or appropriate all water of this nature which he can find on his own land (*Ballard* v. *Tomlinson*, 29 Ch. D. 123; *Salt Union* v. *Brunner*, [1906] 2 K. B. 822; *English* v. *Metropolitan Board*, [1907] 1 K. B. 602). And this right he can exercise notwithstanding that his neighbour's well may be thereby left dry (*Acton* v. *Blundell*, 12 M. & W. 353), or that the stream which the neighbour owns

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may be diminished in consequence of the diverted or appropriated water not coming into it (*Bradford* v. *Pickles*, [1895] A. C. 586). No action will lie against a man who, by digging in his own land, drains his neighbour's land either by intercepting the flow of the water percolating through the soil, or by causing water already collected on his neighbour's soil to percolate away (*Ballacorkish Co.* v. *Harrison*, L. R. 5 P. C. 60; see *New River Co.* v. *Johnson*, 6 Jur. (N.S.) 374; 7 W. R. 179; *South Shields Co.* v. *Cookson*, 15 L. J. Ex. 315; *R.* v. *Metropolitan Board*, 3 B. & S. 710).

The decision in *Grand Junction Co.* v. *Shugar*, 6 Ch. 483, which seems inconsistent with the rules last stated, must be explained as relating to a direct tapping of an overground stream flowing in a defined channel, and not to a mere withdrawal of percolating underground water (*Jordeson* v. *Sutton Co.*, [1899] 2 Ch. 251; *English* v. *Metropolitan Board*, [1907] 1 K. B. 601).

As to the withdrawal of underground water support, see cases stated, *post*, p. 112.

In the case of underground water flowing through a channel defined but (as being only ascertainable by excavation) not known, the rule applicable to undefined channels was applied, and the lower riparian proprietor had no right of flow and could not restrain diversion (*Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655).

(2) Right of purity.

Where water in an undefined channel is poisoned by a landowner, his neighbour, on appropriating the water, would it seems have a right of action (*Ballard* v. *Tomlinson*, 29 Ch. D. 126).

In dealing with the natural or ordinary rights of a riparian proprietor, it may be convenient here to refer to the notes as to his right to divert flood-water, *post*, p. 98; as to his right to build on the bed, *post*, p. 98; and his right to fish, *ante*, p. 52.

(3) Prescriptive rights with regard to water; in natural stream; with defined channel.

In the case of water flowing through a natural watercourse with a defined channel, rights may be acquired by prescription which interfere with what would otherwise be the natural rights of other proprietors above and below (*John White* v. *White*, [1906] A. C. 80). A riparian owner may by user acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up or lower down the stream, unless the user affects the use such landowner has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above or below a servient tenement (*Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 590). Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it, derived from grant or Act of Parliament (*Bealey* v. *Shaw*, 6 East, 208; *Cox* v. *Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b; see *Dewhirst* v. *Wrigley*, 1 C. P. Coop. 329). In *Prescott* v. *Phillips* (cited *Bealey* v. *Shaw*, 6 East, 213; *Mason* v. *Hill*, 5 B. & Ad. 23) it was ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious. The right of diverting water, which in its natural course would flow over or along the land of a riparian owner, can be created only by grant, or enjoyment from which a grant may be presumed, or by statute. Such an easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance (*Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 587). Previously to the Prescription Act, 1832, the acquiescence of lessees would not bind the landlord; similarly, the uninterrupted possession of the

Prescriptive right acquired by user; to divert;

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water for over fifty years, with the acquiescence of tenants for life, did not affect the reversioner (*Bradbury* v. *Grinsell*, 2 Wms. Saund. 516). Evidence of user for twenty years of a head-stock to pen up a rivulet was insufficient to raise the presumption of a grant to warrant its continuance to the injury of church land; for one vicar could not bind his successor (*Wall* v. *Nixon*, 3 Smith's R. 316; see *Barker* v. *Richardson*, 4 B. & Ald. 579). As to enjoyment since the Prescription Act during a life tenancy, see *Bright* v. *Walker*, 1 C. M. & R. 211. As between absolute owners, the right to pen back a stream may be acquired by prescription (*Cooper* v. *Barber*, 3 Taunt. 99). So an inferior riparian proprietor can acquire a right to place a hatch on the land of the superior proprietor to regulate the flow of water (*Wood* v. *Hewett*, 8 Q. B. 913; see *Greenslade* v. *Halliday*, 6 Bing. 379); or for the latter purpose to go on the land of the superior proprietor and open lock gates (*Simpson* v. *Godmanchester*, [1897] A. C. 696). Again, the right to a fishing weir may be acquired in non-navigable rivers by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657; see *Barker* v. *Faulkner*, [1898] W. N. 69); and even in a navigable river a riparian proprietor can acquire an interest in its water power as derived from a reservoir artificially formed by a dam across its channel (*Hamelin* v. *Bannerman*, [1895] A. C. 237).

to pen back;

to obstruct;

A right to pollute a stream can be acquired by prescription (*Baxendale* v. *McMurray*, 2 Ch. 790; see *Eastwood* v. *Henley*, [1901] 1 Ch. 645), but only through the continuance of perceptible injury for twenty years (*Goldsmid* v. *Tunbridge*, 1 Ch. 349; see *Millington* v. *Griffiths*, 30 L. T. 65; *Murgatroyd* v. *Robinson*, 7 E. & B. 391; *Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 611; *O'Brien* v. *Enright*, I. R. 1 Ch. 718). And a grant in contravention of the Rivers Pollution Act, 1876, will not be presumed (*Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 218). And there can be no prescriptive right to justify a public nuisance (*Att.-Gen.* v. *Barnsley* (1874), W. N. 37).

to pollute water;

A right to discharge sewage through a drain can be acquired by prescription (*Att.-Gen.* v. *Dorking*, 20 Ch. D. 601; *Brown* v. *Dunstable*, [1899] 2 Ch. 378; see *Wright* v. *Williams*, 1 M. & W. 77). Such a right may be binding on a local authority (*R.* v. *Staines*, 60 L. T. 261; *Ogilvie* v. *Blything*, 65 L. T. 338; *Harrington* v. *Derby*, [1905] 1 Ch. 219). But see *Rochford* v. *Port of London*, [1914] 2 Ch. 916. And statutory rights of drainage into the sewers of a local authority are not analogous to prescriptive rights, and are not a defence to a claim by a private person for an injunction to restrain nuisance from sewage (*Jones* v. *Llanrwst*, [1911] 1 Ch. 393). See as to discharging sewage into a tidal river, *Somersetshire* v. *Bridgwater*, 81 L. T. 732; or into the sea, *Foster* v. *Warblington*, [1906] 1 K. B. 665, 678; *Hobart* v. *Southend*, 75 L. J. K. B. 305; and as to discharging noxious chemicals into sewers, *Liverpool* v. *Coghill*, [1918] 1 Ch. 307.

to discharge sewage.

In the case of water which percolates in an undefined course, no right to the uninterrupted flow can be acquired by prescription, for no grant can be presumed in the case of such water (*Chasemore* v. *Richards*, 7 H. L. C. 349, 370, 385). But an express grant of all streams of water that might be found in certain closes prevented the grantor and those claiming under him from working mines under adjoining land so as to divert underground water from wells in the closes (*Whitehead* v. *Parkes*, 2 H. & N. 870).

No prescription in water with undefined channel.

(4) Artificial watercourses:

The natural rights of a riparian proprietor are limited to natural streams, and do not attach in the case of artificial watercourses

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(*Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 500). Prescriptive rights, however, may be acquired in artificial watercourses of a permanent character (*Rameshur* v. *Koonj*, 4 App. Cas. 126; *Wood* v. *Waud*, 3 Exch. 777; *Blackburne* v. *Somers*, 5 L. R. Ir. 1; see *Bunting* v. *Hicks*, 70 L. T. 455; *Beeston* v. *Weate*, 5 El. & Bl. 986; *Gaved* v. *Martyn*, 19 C. B. (N.S.) 732; *Ivimey* v. *Stocker*, 1 Ch. 396; *Powell* v. *Butler*, I. R. 5 C. L. 309; and compare *Bankart* v. *Tennant*, 10 Eq. 141). The enjoyment must be as of right (*Chamber* v. *Hopwood*, 32 Ch. D. 349).

of a permanent character;

of a temporary character; no right to uninterrupted flow can be acquired by prescription against creator of stream;

But where the enjoyment of an artificial watercourse depends on temporary circumstances, no right to the uninterrupted flow of water can be acquired by prescription against the creator of of the stream. Thus, a party receiving water drained from a mine had no right to compel the owners of the mine to continue such discharge (*Arkwright* v. *Gell*, 5 M. & W. 203; see *Magor* v. *Chadwick*, 11 Ad. & Ell. 571). So in the case of a watercourse constructed for the purpose of a mill (*Burrows* v. *Lang*, [1901] 2 Ch. 502; but see *Lewis* v. *Meredith*, [1913] 1 Ch. 571, where permissive use of an artificial channel was held to have become a legal right under general words in a conveyance. A watercourse is constructed for a temporary purpose when it is constructed for a purpose which may within the reasonable contemplation of the parties come to an end ([1901] 2 Ch. 508). Further, it is more difficult to presume an agreement as to enjoyment when a watercourse is constructed entirely over the land of the creator than in the case of water pumped over another's land (*ibid.*; see *M'Evoy* v. *G. N. Ry.*, [1900] 2 I. R. 325).

nor against a superior proprietor.

Where the owners of a colliery had suffered water pumped out of their colliery to flow along an artificial channel no action lay (in the absence of any grant or prescriptive title) by the owner of land through which the water had been so accustomed to flow against an owner of land above, and through whose land the sough likewise passed, for diverting such water; for the owners by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, and the proprietor of the land below had no right to compel the owners above to permit the water to flow through their land for his benefit (*Wood* v. *Waud*, 3 Exch. 748; see *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058; *Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 584).

In ascertaining the rights in an artificial watercourse you must take into account, first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and thirdly, the mode in which it has been used and enjoyed (*Baily* v. *Clark*, [1902] 1 Ch. 668). The conclusion may be that the watercourse was originally constructed upon the condition that the rights of owners abutting should be the same as they would have been had the watercourse been a natural one (*ibid.*; *Whitmores* v. *Stanford*, [1909] 1 Ch. 427; see *Greatrex* v. *Hayward*, 8 Exch. 291; *Hanna* v. *Pollock*, [1900] 2 I. R. 664; *Holker* v. *Porritt*, L. R. 8 Ex. 116; *Roberts* v. *Richards*, 44 L. T. 271; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Nield* v. *L. & N. W. Ry. Co.*, L. R. 10 Ex. 4).

Right to purity.

As regards purity, it seems that (apart from prescription) appropriation of water in an artificial watercourse by a person entitled to appropriate it gives such a person a right to insist that the water shall not be polluted to his injury (*Whaley* v. *Laing*, 2 H. & N. 476; 3 H. & N. 675; *Wood* v. *Waud*, 3 Exch. 779; but see *Wood* v. *Sutcliffe*, 21 L. J. Ch. 254; *Magor* v. *Chadwick*, 11 Ad. & Ell. 571).

Independently of the prescriptive rights mentioned above, which

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Miscellaneous prescriptive rights.

are mainly called in question between riparian owners, other miscellaneous rights may be mentioned. Thus a landowner can acquire by prescription the right to bring water to his house through pipes over his neighbour's land (*Goodhart* v. *Hyatt*, 25 Ch. D. 182); or the right to go on his neighbour's land and draw water there from a spring (*Race* v. *Ward*, 4 E. & B. 702); or from a pump (*Polden* v. *Bastard*, L. R. 1 Q. B. 156).

To discharge water upon adjoining land.

As regards discharging water upon adjoining land, it has been laid down that an action may be maintained for the erection of a roof with eaves projecting over another's land, and discharging rain-water on to it, without proof that rain has actually fallen (*Fay* v. *Prentice*, 1 C. B. 828). The reversioner may sue (*Tucker* v. *Newman*, 11 Ad. & Ell. 40). Although, however, every one in building is bound not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw rain-water upon the neighbouring land (11 Hen. 7, f. 257), yet a right by user for twenty years for the owner to project his wall or eaves over the boundary line of his property, or to discharge rain from the roof of his house upon the adjoining land, has been recognised (*Thomas* v. *Thomas*, 2 C. M. & R. 34; see *Wright* v. *Williams*, 1 M. & W. 77; *Lady Browne's Case*, cited in *Slaney* v. *Pigott*, Palm. 446; Com. Dig. Action on Case for Nuisance (A.); *Baten's Case*, 9 Rep. 50, n. (*b*); Vin. Abr. Nuisance (G. 5)). Such a right will not be lost by raising the house (*Harvey* v. *Walters*, L. R. 8 C. P. 162). The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot by spouts discharge it upon such land in a body (*Reynolds* v. *Clarke*, Ld. Raym. 1399). For such an act trespass would not lie, but case (*Reynolds* v. *Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212). The flow of water for twenty years from the eaves of a house will not give a right to the neighbour to insist that the house shall not be altered so as to diminish the quantity of water flowing from the roof (*Wood* v. *Waud*, 3 Exch. 748; *Greatrex* v. *Hayward*, 8 Exch. 293, 294; *Arkwright* v. *Gell*, 5 M. & W. 233). A legal origin was presumed for the right of discharging water from a highway through a pipe on to adjoining land (*Att.-Gen.* v. *Copeland*, [1902] 1 K. B. 690).

(5) Modes of acquisition of rights with regard to water.

Grant presumed from enjoyment.

Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it derived from grant or Act of Parliament (*Bealey* v. *Shaw*, 6 East, 208; *Finch* v. *Resbridger*, 2 Vern. 390; Gilb. Eq. C. 3). In *Deeble* v. *Lineham*, 12 Ir. C. L. (N.S.) 1, there was sufficient evidence of enjoyment to support the presumption of a grant. A grant, however, was not presumed where it would have been void by statute (*Rochdale Co.* v. *Radcliffe*, 18 Q. B. 287; *Att.-Gen.* v. *G. N. Ry.*, [1909] 1 Ch. 775; see *Att.-Gen.* v. *Grand Junction Co.*, [1909] 2 Ch. 516), or where the user was precarious (*Gaved* v. *Martyn*, 19 C. B. (N.S.) 732), or where the owner of the dominant tenement was during the user tenant of the servient tenement (*Outram* v. *Maude*, 17 Ch. D. 391). And see *Bradbury* v. *Grinsell*, and *Wall* v. *Nixon*, quoted *ante*, p. 91. For the nature of the enjoyment requisite for obtaining under the Prescription Act acquired rights with regard to water, see the note to the Prescription Act, 1832, s. 2, *ante*, p. 8.

Acquisition under Prescription Act.

Acquisition by custom.

As to the acquisition by custom of a right to divert water in Devonshire, see *Bastard* v. *Smith* (2 M. & Rob. 129); and in Cornwall, *Gaved* v. *Martyn* (19 C. B. (N.S.) 732; 14 W. R. 62). For a customary right to pollute water, see *Carlyon* v. *Lovering* (1 H. & N. 784); and for a customary right to the use of water, see *Harrop* v. *Hirst* (L. R. 4 Ex. 43).

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Acquisition by express grant;

Water rights may be acquired by express grant. As to the construction of an express grant it has been laid down that the grant of a "watercourse" may mean (1) the right to the running of water; or (2) the drain which contains the water; or (3) the land over which the water flows (*Taylor* v. *S. Helens*, 6 Ch. D. 271; where the effect of the grant of an artificial watercourse was considered). The reservation of right to make a watercourse included the right to divert water and to use the water diverted (*Remfry* v. *Natal*, [1896] A. C. 558). A "spring of water" means a natural source of water of a definite and well-marked extent (*Taylor* v. *S. Helens*, 6 Ch. D. 273). A "stream" is water which runs in a defined course, so as to be capable of diversion (*ibid.*). The word did not include either the spring or water soaking through marshy ground (*M'Nab* v. *Robertson*, [1897] A. C. 129). In *Northam* v. *Hurley* (1 El. & Bl. 665), it was held on the construction of the grant of a watercourse from the land of the grantor to the land of the grantee, that the grantor could not alter the channel on his own land although no damage had occurred to the grantee. The effect of special words in an express grant or reservation of water was also considered in *Rawstron* v. *Taylor*, 11 Exch. 369; *Lee* v. *Stevenson*, 27 L. J. Q. B. 263; *Finlinson* v. *Porter*, L. R. 10 Q. B. 188. A grant (in pursuance of a statute) of the exclusive right of drainage through a watercourse gave the grantee not merely an easement but (for the purpose of rating) possession of the watercourse (*Holywell* v. *Halkyn*, [1895] A. C. 117). A watercourse may be vested in a corporation; as where there was a grant to the corporation of Carlisle of water to turn the city mills (*Carlisle* v. *Blamire*, 8 East, 487).

As to conveyances of land since 1881 carrying rights of water and watercourses, see the Law of Property Act, 1925, s. 62, *post*. Independently of that Act it was held that if land with a run of water upon it be sold, the water passes with the land (*Canham* v. *Fisk*, 2 Cr. & Jer. 126; see *Hamelin* v. *Bannerman*, [1895] A. C. 237). The rights, however, of a riparian proprietor cannot be granted apart from the land, so as to entitle the grantee as against the other riparian proprietors, even to the rights in respect of the ordinary use of water possessed by the grantor. The only right acquired by the grantee would be as against the grantor himself (*Ormerod* v. *Todmorden Co.*, 11 Q. B. D. 155; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; *Stockport Co.* v. *Potter*, 3 H. & C. 300; *Jones* v. *Dorothea Co.*, 58 L. T. 80; see *Insole* v. *James*, 1 H. & N. 243; and compare the licence to a stranger given in *Mostyn* v. *Atherton*, [1899] 2 Ch. 360).

by implied grant;

By the grant of part of a tenement, there pass by implication to the grantee all those continuous and apparent easements over the other part which are necessary to the enjoyment of the part granted and have been used therewith (*Wheeldon* v. *Burrows*, 12 Ch. D. 31. Compare the cases as to light, *post*, p. 120). This principle was applied to a watercourse (*Watts* v. *Kelson*, 6 Ch. 166; see *Pullan* v. *Roughfort*, 21 L. R. Ir. 73; *Key* v. *Neath*, 95 L. T. 771). As a general rule, however, there is no corresponding implication in favour of the grantor (*Wheeldon* v. *Burrows*, *supra*, disapproving of *Pyer* v. *Carter*, 1 H. & N. 916, in which case the grant of a right to a drain by the grantee of land had been implied in favour of the grantor). *Pyer* v. *Carter* had been approved in *Ewart* v. *Cochrane*, 4 Macq. H. L. C. 117; *Watts* v. *Kelson*, *supra*; but had been disapproved by Lord Westbury in *Suffield* v. *Brown*, 33 L. J. Ch. 249. As to implying the reservation of an easement of necessity, see *Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 557; *Ray* v. *Hazeldine*, [1904] 2 Ch. 17. A grant of the right to pollute a stream was implied in *Hall* v. *Lund* (1 H. & C. 676), but see *Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 218.

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As a general rule, it requires a deed to create a right and title to have a passage for water (*Fentiman* v. *Smith*, 4 East, 107; *Hewlins* v. *Shippam*, 5 B. & C. 233). As to creating rights with regard to water by parol licence, see *Liggins* v. *Inge* (7 Bing. 682), and the note on licences, p. 42, *ante*.

by licence.

(6) Extent of water rights acquired by express grant;

Where land and buildings were demised, together with the free passage of water and soil to a cesspool, the easement was restricted to a reasonable use for the purposes of the premises in the condition in which they were at the time of the demise, and was not extended to buildings subsequently erected (*Wood* v. *Saunders*, 10 Ch. 582; see *New Windsor* v. *Stovell*, 27 Ch. D. 665; *Metropolitan Board* v. *L. & N. W. Ry. Co.*, 17 Ch. D. 246). When a lease reserved the free running of water and soil through the demised premises from other contiguous lands, the reservation extended to water and soil coming from contiguous lands whether arising thereon or not, but was not extended to the refuse of tan pits (*Chadwick* v. *Marsden*, L. R. 2 Ex. 285).

Where by an inclosure award drains were set out, the occupiers of the land to keep the same of sufficient depth to carry off the water, the plaintiff was not thereby authorised to make an underdrain so as to cause increased water to pass into one of the awarded drains (*Sharpe* v. *Hancock*, 7 M. & Gr. 354). An inclosure Act empowering commissioners to set out ditches in the lands to be inclosed; and also to alter and improve any existing ditches: held, not to empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain from another township (*Dawson* v. *Paver*, 5 Hare, 415).

by prescription.

The extent of a prescriptive right of taking water is defined by the user proved (*Att.-Gen.* v. *G. N. Ry.*, [1909] 1 Ch. 779).

(7) Alteration in mode of enjoyment.

As to the mode of enjoyment of water rights; the enjoyment may vary slightly, but the burden on the servient tenement cannot be increased. If one has ancient pits which are supplied by a rivulet, he may cleanse them, but cannot change or enlarge them (*Brown* v. *Best*, 1 Wils. 174; see *Wood* v. *Saunders*, 10 Ch. 582; *New Windsor* v. *Stovell*, 27 Ch. D. 665). A millowner cannot alter his sluice so as to divert more water (*Bealey* v. *Shaw*, 6 East, 207), nor change the channels of a river to the prejudice of another owner (*Duncombe* v. *Randall*, Hetl. 32; see *Fletcher* v. *Smith*, 2 App. Cas. 781).

Scouring a river bed, however, so as to keep the stream in its accustomed course is not only permissible but obligatory on a riparian owner (*Rhodes* v. *Airdale*, 1 C. P. D. 392; see *Withers* v. *Purchase*, 60 L. T. 819). Again, a right to a watercourse is not destroyed by the owners slightly altering the course of the stream (*Hall* v. *Swift*, 4 Bing. N. C. 381). It is not necessary that the mode of enjoying a watercourse should always have been precisely the same (*Saunders* v. *Newman*, 1 B. & Ald. 258), where it was said that the owner is not bound to use the water in the same precise manner, or to apply it at the same mill; if he were, it would stop all improvement in machinery. If indeed the alterations made prejudiced the right of the lower mill, the case would be different (*ibid.*; see *Luttrell's Case*, 4 Rep. 87 a; *Frechette* v. *La Compagnie*, 9 App. Cas. 170; *Greenslade* v. *Halliday*, 6 Bing. 379). To destroy an easement the change must be material either in the nature or in the quantum of the servitude imposed (*Harvey* v. *Walters*, L. R. 8 C. P. 166). Compare the increased burden of support for a railway (*G. W. Ry.* v. *Cefn Co.*, [1894] 2 Ch. 157). A right to a watercourse which had been used to supply cattle sheds was held not to be lost by the erection of cottages in the place of cattle sheds (*Watts* v. *Kelson*, 6 Ch. 165). Where a person, who had

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a right to send down clean water through a gutter, sent down foul water, so that it was impossible to stop the nuisance without altogether interfering with his enjoyment, the whole enjoyment might be obstructed (*Cawkwell* v. *Russell*, 26 L. J. Ex. 34; see *Hill* v. *Cock*, 26 L. T. 185). A person entitled to the use of a drain which communicated with a sewer, could where the sewer was lowered by public authority also lower his drain (*Finlinson* v. *Porter*, L. R. 10 Q. B. 188).

Extent of right to pollute.

Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people (*Crossley* v. *Lightowler*, 2 Ch. 478; *McIntyre* v. *McGavin*, [1893] A. C. 268). Where town sewage had drained into a stream without perceptibly polluting it, but in consequence of the recent increase of the town, the stream became perceptibly polluted; an injunction was granted (*Goldsmid* v. *Tunbridge*, 1 Ch. 349; *Att.-Gen.* v. *Barnsley* (1874), W. N. 37; see *Foster* v. *Warblington*, [1906] 1 K. B. 678). Where a right to pollute water by a certain manufacture had been acquired it was said that the right would not be destroyed by altering the materials used (*Baxendale* v. *M'Murray*, 2 Ch. 790). But the discharge of the refuse of a different manufacture was held unjustifiable (*Clark* v. *Somersetshire*, 36 W. R. 890; see *Wood* v. *Saunders*, 10 Ch. 582; compare *Metropolitan Board* v. *L. & N. W. Ry. Co.*, 17 Ch. D. 249; *Att.-Gen.* v. *Acton Board*, 22 Ch. D. 221).

(8) Repair of drains, &c.

The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such (*Brent* v. *Haddon*, Cro. Jac. 555; *Cheetham* v. *Hampson*, 4 T. R. 319; *Boyle* v. *Tamlyn*, 6 B. & C. 329; *Russell* v. *Shenton*, 3 Q. B. 449; see *R.* v. *Kerrison*, 1 M. & S. 435; *Bullard* v. *Harrison*, 4 M. & S. 387; *Tenant* v. *Goldwin*, 1 Salk. 21, 360; 2 Salk. 770; *Payne* v. *Rogers*, 2 H. Bl. 349; *R.* v. *Pedly*, 1 Ad. & E. 822; see *Smith* v. *Archibald*, 5 App. Cas. 512). If the owner of land, on which is a house, construct on other part of the land a sewer, and let the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed (*Alston* v. *Grant*, 3 Ell. & Bl. 128). If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but an action of covenant does not lie against the lessor for not repairing it (*Pomfret* v. *Ricroft*, 1 Wms. Saund. 320; see *ante*, p. 83, *Buckley* v. *B.*, [1898] 2 Q. B. 608). Where an easement exists giving the owner of a house a right to bring water to his house through a pipe over adjoining land, such owner has the right to go on the adjoining land to repair the pipe (*Goodhart* v. *Hyett*, 25 Ch. D. 182; see *Smith* v. *Archibald*, 5 App. Cas. 512; *Jones* v. *Pritchard*, [1908] 1 Ch. 638; *Caldwell* v. *Kilkelly*, [1905] 1 I. R. 434). The right, however, being only for such access as was reasonably necessary did not prevent the owner of the servient tenement from constructing an embankment thereon (*Birkenhead* v. *L. N. W. Ry.*, 15 Q. B. D. 572). As to the obligation to repair drains, see further Tudor, L. C. Conv. 4th ed. 791.

(9) Extinction: by abandonment;

If the owner of a mill, formerly worked by a breast-shot wheel, which requires a high head of water, for twenty years discontinues the use of the breast-shot wheel, and uses a ground-shot wheel, he will lose his right to the high head of water (*Drewett* v. *Sheard*, 7 C. & P. 465; where see as to abandoning the right to keep a ditch opening into a stream). The right to have water flow into an old pond is not lost by discontinuing the use of such pond, and obtaining the same or a greater advantage from the use of three new ponds;

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a substitution of such a nature not being an abandonment of the right (*Hale* v. *Oldroyd*, 14 M. & W. 789). The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without evidence of an intention to abandon it: but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, any right of fouling a stream attached to them was lost (*Crossley* v. *Lightowler*, 2 Ch. 478). As to non-user of a well, see *Millington* v. *Griffiths*, 30 L. T. 65. In a case depending on Roman Dutch law a prescriptive right to water was held not lost by the owner applying for a licence (*Commrs. of French Hoek* v. *Hugo*, 10 App. Cas. 336).

by unity of ownership.

It seems that nothing of necessity to a building, *e.g.* a gutter *in alieno solo*, to carry off water, &c., is extinguished by unity of ownership (*Pheysey* v. *Vicary*, 16 M. & W. 484). As regards natural rights in water it was laid down in *Shury* v. *Piggott* (3 Bulstr. 339; Poph. 166; W. Jones, 145, which was an action on the case for stopping a watercourse) that the right to the flow of water in a natural stream is not extinguished by unity of ownership; in which respect it is distinguished from a way. Whitlock, J., says (3 Bulstr. 340), "There is a difference between a way, a common, and a watercourse. Bracton (lib. 4, fol. 221-2) calls them *servitutes prædiales;* those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. A watercourse does not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted" (see *Pyer* v. *Carter*, 1 H. & N. 916). As regards prescriptive rights in water, if the same person becomes absolute owner of the land from which a stream of water flows, and also of the land into which it flows, the easement which the latter might have claimed is extinguished (*Ivimey* v. *Stocker*, 1 Ch. 407).

(10) Remedies for disturbance of rights with regard to water;

Abatement.

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it (2 Smith's R. 9; Com. Dig. Pleader, 3 M. 41). Where there is excessive user by the owner of the dominant tenement, the owner of the servient tenement, if he abates the nuisance, is bound to do so in the most reasonable manner (*Hill* v. *Cock*, 26 L. T. 185). An abatement was held reasonable in *Roberts* v. *Rose*, L. R. 1 Ex. 82; *Macartney* v. *Londonderry Co.*, [1904] A. C. 301. An individual cannot abate a nuisance if he be not otherwise injured by it than as one of the public (*Colchester* v. *Brooke*, 7 Q. B. 339).

Indictments.

When the injury from a nuisance in respect of water is an injury to all the King's subjects, the remedy is by indictment (*R.* v. *Bristol Dock Co.*, 12 East, 429), or by information (*Stoke* v. *Price*, [1899] 2 Ch. 277). When, however, the inhabitants of a district had by custom a right to water, one inhabitant could sue without proving individual damage, on the ground of interference with right (*Harrop* v. *Hirst*, L. R. 4 Ex. 47); but such an action cannot be brought by a parish council suing alone (*Stoke* v. *Price*, [1899] 2 Ch. 277. As to local authorities suing, see *Tottenham* v. *Williamson*, [1896] 2 Q. B. 353).

Action;

Proof of actual damage is not necessary to enable a riparian proprietor to maintain an action for the obstruction or diversion of a natural stream (*Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 590; *Harrop* v. *Hirst*, L. R. 4 Ex. 43; *Ormerod* v. *Todmorden, &c., Co.*, 11 Q. B. D. 159). For the older law, see *Palmer* v. *Keblethwaite*, 1 Show. 64; *Glynne* v. *Nicholas*, 2 Show. 507; *Mason* v. *Hill*, 5 B. & Ad. 26; *Williams* v. *Morland*, 2 B. & C. 915. It is sufficient

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to show violation of the right, and the law will presume damage (*Embrey* v. *Owen*, 6 Ex. 353; compare *Young* v. *Bankier Co.*, [1893] A. C. 691). Where water was taken from a river and afterwards returned unpolluted and undiminished, it was held that the right of a lower riparian proprietor had not been interfered with, and an injunction was refused (*Kensit* v. *G. E. R. Co.*, 27 Ch. D. 122).

for diversion;

Diversion of water is actionable without proof of actual damage where the defendant might thereby acquire a right injurious to the plaintiffs (*Wilts Co.* v. *Swindon Co.*, 9 Ch. 961; *Harrop* v. *Hirst*, *supra*; *Roberts* v. *Gwyrfai*, [1899] 2 Ch. 608), and will be restrained (*ibid.*).

for obstruction;

Obstruction is also actionable irrespective of actual damage (*Norbury* v. *Kitchin*, 15 L. T. 501; *McGlone* v. *Smith*, 22 L. R. Ir. 559); and will be restrained (*Dewhirst* v. *Wrigley*, 1 C. P. Coop. 319; see *Elwell* v. *Crowther*, 31 Beav. 163; *Belfast Co.* v. *Boyd*, 21 L. R. Ir. 560).

Right of riparian proprietor to place erections on bed,

The owner of both banks of a non-tidal river may build on the bed provided he do not alter the natural flow of the water above or below his property (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839). Again, the owner of one bank only cannot as against the opposite proprietor build on his own moiety of the bed in such a manner as to interfere with the natural flow of the stream; and was restrained, although there was no proof that damage had been sustained or was likely to be sustained (*Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47). This principle has been extended to tidal navigable rivers (*Att.-Gen.* v. *Lonsdale*, 7 Eq. 377; *Att.-Gen.* v. *Terry*, 9 Ch. 423; see *Exeter* v. *Devon*, 10 Eq. 232).

As regards the rights of erection possessed by a riparian owner generally, it seems that he may erect a post for a ferry or for mooring a boat, or plant stakes to prevent poaching (*Withers* v. *Purchase*, 60 L. T. 821; compare *Att.-Gen.* v. *Wright*, [1897] 2 Q. B. 318); or place an erection on his own bank to protect it (*Ridge* v. *Midland Co.*, 53 J. P. 55; see *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 56; *Maxey Board* v. *G. N. Ry. Co.*, 106 L. T. 429). So it has been laid down that a riparian owner has a right to raise the banks upon his own land, so as to prevent the water from overflowing his land, with this restriction, that he does not occasion injury to the property of others (*R.* v. *Trafford*, 1 B. & Ad. 874; 8 Bing. 204; 2 Cr. & Jerv. 265; *Menzies* v. *Breadalbane*, 3 Bligh. (N.S.) 414, 418; *Att.-Gen.* v. *Lonsdale*, 7 Eq. 377). Compare the easement of opening locks acquired by a corporation for the protection of their land (*Simpson* v. *Godmanchester*, [1897] A. C. 696). If an extraordinary flood is seen to be coming on land, the owner may protect his land from it without being responsible for consequences, although his neighbour may be injured (*Nield* v. *L. & N. W. Ry. Co.*, L. R. 10 Ex. 4; see *Whalley* v. *Lancashire Ry. Co.*, 13 Q. B. D. 136, 140; *Gerrard* v. *Crowe*, 37 Times, L. R. 110. Compare the similar right on the seashore: *R.* v. *Pagham*, 8 B. & C. 355). But if the flood has already come, the owner must not, for the purpose of getting rid of the mischief, injure his neighbour (*Whalley* v. *Lancashire Ry. Co.*, *supra*). As to the duties in respect of a river-wall incumbent on the owner of land on a tidal navigable river, see *Nitro-Phosphate Co.* v. *London and S. Katharine's Docks*, 9 Ch. D. 524; *Burt* v. *Victoria Co.*, 47 L. T. 378.

or to divert flood water

A lower riparian proprietor cannot as against the owner of a fishery in the upper stream, erect a weir which will prevent trout from mounting (*Barker* v. *Faulkner*, [1898] W. N. 69; see as to salmon, *Pirie* v. *Kintore*, [1906] A. C. 484).

Action by reversioner;

If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as

by the tenant in possession, each of them being entitled to recover his respective loss (*Bedingfield* v. *Onslow*, 3 Lev. 209; *Queen's College* v. *Hallett*, 14 East, 489; 1 Wms. Saund. 567, ed. 1871; *Jesser* v. *Gifford*, 4 Burr. 2141; Com. Dig. Action on the case for Nuisance (B.); see *Brown* v. *Mallett*, 5 C. B. 599; *Bell* v. *Twentyman*, 1 Q. B. 766; *Peter* v. *Daniel*, 5 C. B. 568; *Egremont* v. *Pulman*, 1 Moo. & M. 403).

for continuance of nuisance;

An action will lie for the continuance of a nuisance (*Todd* v. *Flight*, 9 C. B. (N.S.) 377; *R.* v. *Bradford Navigation*, 6 B. & S. 631); but the owners of the soil of a stream were not liable for the continuance of an obstruction which had been erected by another without their authority, and where they had offered permission to the plaintiff to remove it (*Saxby* v. *Manchester R. Co.*, L. R. 4 C. P. 198).

damages and costs;

A right to take water from a well by reason of the occupation of a dwelling-house is an interest in land; and nominal damages having been recovered in an action for disturbing such a right, which were certified to be under forty shillings, the plaintiff was entitled to his full costs under 43 Eliz. c. 6, s. 2 (*Tyler* v. *Bennett*, 4 Ad. & E. 377; see 3 & 4 Vict. c. 24; *Shuttleworth* v. *Cocker*, 2 Sc. N. R. 47; *Thompson* v. *Gibson*, 5 Jur. 390). The expenses of the surveying to ascertain whether a weir had been improperly used will not be allowed on taxation (*Ormerod* v. *Thompson*, 16 M. & W. 860).

relief in the Chancery Division;

Before the Jud. Acts, a bill in equity would lie for the establishment of the enjoyment of a watercourse, and for the performance of a covenant to cleanse it (*Holmes* v. *Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; Gilb. Eq. C. 3; *New River Co.* v. *Graves*, 2 Vern. 431). And a man who had been in possession of a watercourse sixty years might sue a mortgagee, who foreclosed, to be quieted in possession, although he had not established his right at law (*Bush* v. *Western*, Prec. Ch. 530; see *Dorset* v. *Girdler*, *ibid.*, 531). The diversion of watercourses, or the pulling down their banks, and causing inundation, were nuisances against which a court of equity would grant an injunction (*Martin* v. *Stiles*, Mos. 144; see *Anon.*, 1 Ves. sen. 476; *Whitchurch* v. *Hide*, 2 Atk. 391; *Birch* v. *Holt*, 3 Atk. 726; *Anon.*, 1 Vern. 120, 129). An injunction might be granted on the ground of danger to property (*Robinson* v. *Byron*, 1 Br. C. C. 588; see *Anon.*, 1 Ves. jun. 140; *Crowder* v. *Tinkler*, 19 Ves. 620); or on account of the irreparable injury (*Chalk* v. *Wyatt*, 3 Mer. 688). Injunctions may now be granted by any Court whenever it appears just or convenient; Jud. Act, 1925, s. 45. Forms of injunctions as to water rights are given, Seton, 7th ed. 582. An injunction which directs the defendant to perform an act, may, under special circumstances, be granted before trial (*Blakemore* v. *Glamorganshire Navigation*, 1 M. & K. 154; see *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774). Such orders in actions relating to water have been made before trial to enforce a covenant (*Mexborough* v. *Bower*, 7 Beav. 127); or to prevent irreparable damage (*Westminster Co.* v. *Clayton*, 36 L. J. Ch. 476). Such orders should now be made in a direct mandatory form (*Jackson* v. *Normanby Co.*, [1899] 1 Ch. 438).

mandatory injunction;

laches and acquiescence.

As to the effect of laches and acquiescence in depriving parties of their remedy by injunction, see *Weller* v. *Smeaton* (1 Br. C. C. 572; 1 Cox, 102); *Birmingham Canal Co.* v. *Lloyd* (18 Ves. 515; Coop. C. C. 77, 193); *Blakemore* v. *Glamorganshire Navigation* (1 M. & K. 154); where the action is by the Attorney-General see *Att-Gen.* v. *Grand Junction Co.*, [1909] 2 Ch. 505; *Att.-Gen.* v. *Birmingham Board*, [1910] 1 Ch. 48.

Whenever the Court of Chancery had jurisdiction to entertain

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an application for an injunction against a breach of any agreement, or against the commission or continuance of any wrongful act, it might award damages, either in addition to, or in substitution for, such injunction (21 & 22 Vict. c. 27, s. 2). This Act has been repealed by 46 & 47 Vict. c. 49, but the repeal has not affected the jurisdiction of the Chancery Division (*Sayers* v. *Collier*, 28 Ch. D. 103); as to which see now *Elmore* v. *Pirrie*, 57 L. T. 333, and the cases quoted p. 126, *post*.

(11) Pollution. Action for damages.

A riparian proprietor has a right of action for pollution of the water of a stream, unless a right to pollute has been acquired by user (*Wood* v. *Waud*, 3 Exch. 748; *Magor* v. *Chadwick*, 11 Ad. & Ell. 571; see *Moore* v. *Webb*, 1 C. B. (N.S.) 673). And it is no defence that the pollution arises from a trade carried on in a reasonable and proper manner (*Stockport Co.* v. *Potter*, 7 H. & N. 160; see *Bamford* v. *Turnley*, 3 B. & S. 66). As to whether a person having permission from an owner of land on the bank of an artificial watercourse to take water thereout, can sue for pollution, see *Whaley* v. *Laing* (2 H. & N. 476; 3 H. & N. 675). An action may be maintained for the pollution of underground water (*Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Ballard* v. *Tomlinson*, 29 Ch. D. 115).

Injunctions to restrain pollution;

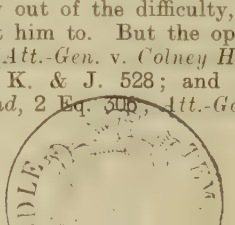
Having regard to the nature of the injury caused by pollution of water, an injunction, rather than damages, is the appropriate remedy (*Pennington* v. *Brinsop, &c., Co.*, 5 Ch. D. 769). For the general grounds upon which such an injunction will be granted, see the remarks of Kindersley, V.-C., in *Wood* v. *Sutcliffe*, 2 Sim. (N.S.) 165. A *quia timet* action to restrain an apprehended pollution may be maintained on proof of imminent danger of a substantial kind, or that the apprehended injury would be irreparable (*Fletcher* v. *Bealey*, 28 Ch. D. 688). A riparian proprietor can maintain an action to restrain actual pollution without showing that the fouling is injurious to him (*Crossley* v. *Lightowler*, 2 Ch. 478; *Lingwood* v. *Stowmarket Co.*, 1 Eq. 79; see *Elmhirst* v. *Spencer*, 2 Mac. & G. 45). The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one (*Crossley* v. *Lightowler*, 2 Ch. 478; *Blair* v. *Deakin*, 57 L. T. 522; see *Wood* v. *Waud*, 3 Exch. 748; *Att.-Gen.* v. *Leeds*, 5 Ch. 583; compare *Att.-Gen.* v. *Birmingham Board* [1910] 1 Ch. 48). The grantee of a right of fishing can obtain an injunction to restrain pollution (*Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96). Where there is jurisdiction to grant an injunction damages in substitution therefor may be given for injury which has occurred, whether before or since the commencement of the action (*Chapman* v. *Auckland Union*, 23 Q. B. D. 298; *Warwick Co.* v. *Burman*, 63 L. T. 673).

actual injury not necessary;

previous pollution no justification;

public bodies liable.

A public body exercising its statutory powers so as to create or increase a nuisance by means of the sewage of a town may be made liable in damages or restrained by injunction in the same manner as an individual, unless it can show a statutory justification (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 349; *Holt* v. *Rochdale*, 10 Eq. 354; *Att.-Gen.* v. *Basingstoke*, 24 W. R. 817; *Att.-Gen.* v. *Acton*, 22 Ch. D. 221; and see *Glossop* v. *Heston Board*, 12 Ch. D. 111). The principles applicable to the construction of a statute in such a case are stated by the C. A. in *Price's Co.* v. *London C. C.*, [1908] 2 Ch. 543. Where the plaintiff has proved his right the court will grant an injunction at once, it being the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. But the operation of the injunction may be suspended (*Att.-Gen.* v. *Colney Hatch*, 4 Ch. 146; *Att.-Gen.* v. *Birmingham*, 4 K. & J. 528; and see the orders made in *Att.-Gen.* v. *Richmond*, 2 Eq. 306; *Att.-Gen.* v. *Acton*, 22 Ch. D. 221; *Islington*



v. *Hornsey*, [1900] 1 Ch. 695). An injunction against a local authority may be enforced by sequestration (R. S. C., Ord. XLII. r. 31; see *Selous* v. *Croydon Board*, 53 L. T. 209; *Spokes* v. *Banbury*, 1 Eq. 42; *Att.-Gen.* v. *Walthamstow* (1878), W. N. 90). An injunction to restrain pollution by the sewage of a town will not in general be granted, unless serious injury is proved (*Att.-Gen.* v. *Kingston*, 34 L. J. Ch. 481; *Lillywhite* v. *Trimmer* 15 W. R. 763; *Att.-Gen.* v. *Gee*, 10 Eq. 131; *Att.-Gen.* v. *Cockermouth*, 18 Eq. 172). In determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 355). Where, however, no serious damage was proved injunctions were granted, on the ground that the defendants, by their pleading, claimed a right to continue a wrongful act (*Att.-Gen.* v. *Acton*, 22 Ch. D. 221); or that they were acting in violation of a statute (*Att.-Gen.* v. *Cockermouth*, 18 Eq. 172; see *Att.-Gen.* v. *Shrewsbury Co.*, 21 Ch. D. 752).

Where a sewage nuisance has been created by the acts of others, and a local authority is subsequently constituted, but does no act to create or increase the nuisance, it cannot be made liable in damages or restrained by injunction (*Glossop* v. *Heston Board*, 12 Ch. D. 102; *Att.-Gen.* v. *Dorking*, 20 Ch. D. 595; *Att.-Gen.* v. *Clerkenwell*, [1891] 3 Ch. 527, cf. *Att.-Gen.* v. *Birmingham Board*, [1912] A. C. 788). But the jurisdiction to grant an injunction and give damages arises as soon as the local authority begins to alter the sewers (*Warwick Co.* v. *Burman*, 63 L. T. 673), or itself commits acts bringing about a nuisance (*Foster* v. *Warblington*, [1906] 1 K. B. 648; and see *Jones* v. *Llanrwst*, [1911] 1 Ch. 393; *Att.-Gen.* v. *Lewes*, [1911] 2 Ch. 495). The court will not interfere by injunction to compel a local authority to perform its statutory duty of effectual drainage (*Glossop* v. *Heston Board*, 12 Ch. D. 115; *Att.-Gen.* v. *Clerkenwell*, [1891] 3 Ch. 527; *Harrington* v. *Derby*, [1905] 1 Ch. 205; compare *Stretton's Co.* v. *Derby*, [1894] 1 Ch. 431; the appropriate remedy in such a case is by complaint to the Local Government Board under sect. 299 of P. H. Act, 1875; see *Robinson* v. *Workington*, [1897] 1 Q. B. 619; *Pasmore* v. *Oswaldtwistle*, [1898] A. C. 387). Nor will the court interfere by injunction to compel a local authority to take proceedings against others (*Att.-Gen.* v. *Dorking*, 20 Ch. D. 609; *Att.-Gen.* v. *Clerkenwell*, *supra*).

Where a nuisance arises from connections with the sewer of a local authority, made in the past by third parties, and which the local authority has no right to stop up, no injunction will be granted against the authority (*Att.-Gen.* v. *Acton*, 22 Ch. D. 232; *Att.-Gen.* v. *Clerkenwell*, [1891] 3 Ch. 527; *Brown* v. *Dunstable*, [1899] 2 Ch. 378); *secus*, in the case of connections which the authority has the right to stop up (*Charles* v. *Finchley*, 23 Ch. D. 767). As regards connections to be made in the future which the authority has no right to prevent, injunctions have been granted restraining the authority from "directing or authorising" them (*Att.-Gen* v. *Acton*, *supra*; *Brown* v. *Dunstable*, *supra*), but not from permitting them (*ibid.*).

Under the Public Health Act, 1875, local authorities have statutory powers of discharging their sewers into streams (sects. 15, 16, and 17). See *Durrant* v. *Branksome Council*, [1897] 2 Ch. 291; *Att.-Gen.* v. *Birmingham Board*, [1908] 2 Ch. 551.

Several forms of injunctions in the case of pollution of water are given in Seton, 7th ed. 605.

The right of a riparian proprietor to immediate relief by injunction is not interfered with by the month's notice required by Metropolis Management Act, 1862, s. 106 (*Att.-Gen.* v. *Hackney*, 20 Eq. 626; *Bateman* v. *Poplar Board*, 33 Ch. D. 360); or Public Health

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Act, 1875, s. 264 (*Flower* v. *Low Leyton*, 5 Ch. D. 347; *Chapman* v *Auckland Union*, 23 Q. B. D. 294; where damages were given in substitution).

The doctrine of acquiescence, as applied to the right of riparian proprietors to restrain the pollution of a stream by sewage, was considered in *Att.-Gen. v. Halifax* (17 W. R. 1088); and as to delay in such a case, see *Att.-Gen.* v. *Bradford Canal* (2 Eq. 71); *Att.-Gen.* v. *Leeds* (5 Ch. 583). A public body was not bound by acquiescence where their acts were held to have been *ultra vires* (*Islington* v. *Hornsey*, [1900] 1 Ch. 695).

Statutory remedies.

The Rivers Pollution Act, 1876, provides a summary means of preventing the pollution of rivers (see *Yorkshire* v. *Holmfirth*, [1894] 2 Q. B. 842; *River Ribble* v. *Halliwell*, [1899] 2 Q. B. 385; *Yorkshire Rivers Board* v. *Linthwaite*, [1915] 2 K. B. 436, cf. *Rochford* v. *Port of London*, [1914] 2 K. B. 916; see also Public Health Act, 1875, ss. 68—70).

(12) Action for escape of water.

Where in the ordinary and proper working of the defendant's mine water, which was naturally present there, flowed from his mine into the plaintiff's, the defendant was not liable (*Smith* v. *Kenrick*, 7 C. B. 564; *Clegg* v. *Dearden*, 12 Q. B. 576; compare *Wilson* v. *Waddell*, 2 App. Cas. 95; *West Cumberland, &c., Co.* v. *Kenyon*, 11 Ch. D. 782). On the other hand, where the defendant, the owner of an upper mine, pumped water into his mine which flooded a lower mine belonging to the plaintiff, it was held, that the defendant was liable (*Baird* v. *Williamson*, 15 C. B. (N.S.) 376; see *Young* v. *Bankier Co.*, [1893] A. C. 697). These decisions were followed by the House of Lords in a case which arose as to liability for the escape of water from a mine; and it was laid down, that where the owner of land without wilfulness or negligence uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; see *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *Nichols* v. *Marsland*, 2 Ex. D. 1; *Box* v. *Jubb*, 4 Ex. D. 78; *Hurdman* v. *N. E. Ry. Co.*, 3 C. P. D. 168; *Whalley* v. *Lanc. & Yorkshire Ry. Co.*, 13 Q. B. D. 131; *Snow* v. *Whitehead*, 27 Ch. D. 588; *Greenock* v. *Caledonian Ry. Co.*, [1917] A. C. 556). Where a landowner brought water upon his land in a goit, and his neighbour subsequently acquired from him a right to use the water in the goit (and to repair the goit for that purpose), this did not affect the original obligation of the landowner to keep the goit in repair (*Buckley* v. *Buckley*, [1898] 2 Q. B. 608). For the case, however, where the neighbour assents to the water being on the landowner's premises, see further *Gill* v. *Edouin*, 72 L. T. 579, and *Blake* v. *Woolf*, [1898] 2 Q. B. 426.

The occupier of the upper floor of a house was held not liable to the occupier of the lower floor for escape of water (*Ross* v. *Fedden*, L. R. 7 Q. B. 661; see *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602).

(13) Actions in respect of water rights arising by contract.

Where an injunction was granted against heating water contrary to agreement, it was laid down that where the construction of a contract is clear and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction (*Tipping* v. *Eckersley*, 2 K. & J. 264; *Dickenson* v. *Grand Junction Co.*, 15 Beav. 260). "There is a manifest distinction between cases depending on nuisance and those

depending on contract. Where there is a contract the court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance; the main point is whether the contract has been broken" (*Att.-Gen.* v. *Mid Kent Ry. Co.*, 3 Ch. 104; compare the language of Lord Cairns in *Doherty* v. *Allman*, 3 App. Cas. 720; and see, as to damages, *Lord Manners* v. *Johnson*, 1 Ch. D. 679; *Richards* v. *Revitt*, 7 Ch. D. 224). Injunctions were granted to restrain breaches of agreements as to sewage in *Wood* v. *Harrogate*, [1874] W. N. 132, 225; *Nuneaton* v. *General Sewage Co.*, 20 Eq. 127. As to specific performance of a contract to purchase the right to divert the water of a river, see *Wright* v. *Howard*, 1 S. & Stu. 190; *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609; and of a contract to erect a pump and reservoir and supply water, see *Cooke* v. *Chilcott*, 3 Ch. D. 694.

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(14) Statutory powers.

Those who obtain from the legislature powers to interfere with rights of property are bound not to exceed those powers (*Westminster Corporation* v. *L. N. W. Ry.*, [1905] A. C. 430; *Liverpool* v. *Chorley Co.*, 2 D. M. & G. 852; *Dawson* v. *Paver*, 5 Hare, 415); and are also bound to act reasonably (*ibid.*; *Southwark Water Co.* v. *Wandsworth*, [1898] 2 Ch. 611). Further, a public body which has powers given it by a statute for the performance of a particular object, is responsible for injury caused by it in the exercise of its powers, unless the act done was absolutely necessary for the object of the statute (*Att.-Gen.* v. *Colney Hatch*, 4 Ch. 146; *Metropolitan District* v. *Hill*, L. R. 6 H. L. 193; *Truman* v. *L. B. & S. C. Ry. Co.*, 29 Ch. D. 108; compare *Vernon* v. *St. James'*, 16 Ch. D. 449; *Att.-Gen.* v. *Hackney*, 20 Eq. 626; *Ogston* v. *Aberdeen Co.*, [1897] A. C. 111). A corporation empowered by statute to improve the navigation of the river were not liable to clear away weeds, which were no detriment to navigation (*Parrett Co.* v. *Robins*, 10 M. & W. 593; *Cracknell* v. *Thetford*, L. R. 4 C. P. 629). But the statutory powers may be so framed as to throw on the corporation an obligation to take care that no injury shall be caused to adjoining lands (*Gaddis* v. *Bann Reservoir*, 3 App. Cas. 430).

Where water is diverted in a manner, or to an extent not authorised by statutory powers, the diversion will not be restrained except at the instance of the *Att.-Gen.* (who need not prove damage), or of an individual who can show special damage (*Liverpool* v. *Chorley Co.*, 2 D. M. & G. 852; *Ware* v. *Regent's Canal Co.*, 3 De. G. & J. 212; *London Association* v. *London & India Docks Committee*, [1892] 3 Ch. 270). As to the duty of the Att.-Gen. in such a case, see *Att.-Gen.* v. *G. E. Ry. Co.* (11 Ch. D. 449; *Att.-Gen.* v. *Birmingham Board*, [1910] 1 Ch. 48); and as to private injury, see *Pudsey Co.* v. *Bradford* (15 Eq. 167).

A penalty for suffering washings to flow into and foul a well was held recoverable from a gas company in *Pipkins* v. *Birmingham Gas Co.* (5 H. & N. 74; 6 H. & N. 250). A power for a navigation company to alter a dam was held to continue, although the compensation commission had become extinct (*Kennet Co.* v. *Witherington*, 18 Q. B. 581). The funds of conservators of river banks were allowed to be applied in opposing a Bill for a project likely to be injurious to the banks (*Bright* v. *North*, 2 Ph. 216).

Waterworks companies.

The Waterworks Clauses Act, 1847, consolidates the provisions usually contained in Acts authorising the making of waterworks for supplying towns with water. This Act places the taking of streams upon the same footing as the taking lands under the L. C. C. Act, 1845; and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first complying with the provisions of the latter Act (*Ferrand* v. *Bradford*, 21 Beav. 412; see

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Purnell v. *Wolverhampton Co.*, 10 C. B. 576; *Hildreth* v. *Adamson*, 8 W. R. 470; *Busby* v. *Chesterfield Co.*, 1 El. Bl. & El. 176). As to compensation, see *Bush* v. *Trowbridge Co.*, 10 Ch. 459. A waterworks company was restrained from polluting a river, its Act not authorising the pollution (*Clowes* v. *Staffordshire Co.*, 8 Ch. 125). The Waterworks Clauses Act, 1863, consolidates additional clauses frequently inserted in Acts relating to waterworks.

(15) Navigable rivers.

Whether a river be navigable or not is a question of fact for the jury (*Vooght* v. *Winch*, 2 B. & Ald. 662). The test in French law is, the possible use of the river for transport in some practical and profitable manner (*Bell* v. *Quebec*, 5 App. Cas. 84). The flux or reflux of the tide is evidence of a navigable river (*Miles* v. *Rose*, 5 Taunt. 705; *Colchester* v. *Brooke*, 7 Q. B. 373; see *Ilchester* v. *Raishleigh*, 61 L. T. 477). Proof of the fact of navigation is decisive (*Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 687). Instances of persons going up a creek on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence of a public navigable river (*Miles* v. *Rose*, 1 Marsh. 313; 5 Taunt. 705; 4 M. & S. 101).

Right of navigation.

The public right over a navigable river is a right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713; *Blount* v. *Layard*, [1891] 2 Ch. 689, n.; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 168). But the analogy between a navigable river and a public road is not complete (*Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 687; [1904] A. C. 509). Windermere is a public highway (*Dixon* v. *Curwen* (1877), W. N. 4); as to public rights on the Norfolk Broads, see *Micklethwaite* v. *Vincent*, 67 L. T. 225. As to a piece of water which is a *cul de sac*, see *Bourke* v. *Davis*, 44 Ch. D. 110. The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it (*Case* v. *Midland R. Co.*, 27 Beav. 247). An artificially navigable river may be dedicated as a public highway (*Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 709, 716; see *Simpson* v. *Att.-Gen.*, [1904] A. C. 494). The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. It is no trespass if a vessel remains aground till the tide serves, although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding (*Colchester* v. *Brooke*, 7 Q. B. 339). Such right is not strictly an easement (*Hawkins* v. *Rutter*, [1892] 1 Q. B. 668). There is also a public right to fix moorings in the soil of navigable waters, such being an ordinary incident of navigation (*Att.-Gen.* v. *Wright*, [1897] 2 Q. B. 318). The same right, if enjoyed immemorially in a locality, might also be supported by presuming a grant from the Crown subject to the right (*ibid.*). But there is no right as an incident of navigation to keep a raft moored to the bank or bed, or to attach to them pleasure boats for hire (*Campbell's Trustees* v. *Sweeney*, [1911] S. C. 1319). The public right of navigating a river may be connected with a right of access to a particular part of the bank, which latter is a private right (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Bell* v. *Quebec*, 5 App. Cas. 84). In general, a riparian proprietor on a navigable river has (subject to the public right of navigation) the same rights of access to the river as such a proprietor on a non-navigable river (*ibid.*; *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612). This right of access extends over a portion of the bed left dry even when vested in another (*Hindson* v. *Ashby*, [1896] 2 Ch. 30). The reasonable limits of the right of a riparian owner

to moor a vessel alongside his wharf are stated in *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713. As to acquiring prescriptive rights in a navigable river, see *Hamelin* v. *Bannerman*, [1895] A. C. 237.

Extinction of right of navigation.

Although adverse enjoyment for twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public navigable river: for no such obstruction will bar a public right (*Vooght* v. *Winch*, 2 B. & Ald. 662; *Weld* v. *Hornby*, 7 East, 195). A public right of navigation may be extinguished either by an Act of Parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud (*R.* v. *Montague*, 4 B. & C. 598). Where by any natural cause the channel becomes choked up the river ceases to be navigable, at least until such causes are by some means counteracted (*Colchester* v. *Brooke*, 7 Q. B. 374). Where water which is a highway changes its course, the new channel becomes a highway (*Carlisle* v. *Graham*, L. R. 4 Ex. 367).

Obstructions to navigation.

An action will lie for the special damage occasioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland (*Rose* v. *Miles*, 4 M. & S. 101). Where the defendant wrongfully placed timber in a navigable river, whereby the access to the plaintiff's public-house was obstructed, an action lay for the particular injury (*Rose* v. *Groves*, 5 M. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 991).

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. Where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere (*Williams* v. *Wilcox*, 8 Ad. & Ell. 314; *Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657). It is not competent either to the Crown or to a subject, to use the soil of a navigable river for any purpose amounting to a nuisance (*Att.-Gen.* v. *Johnson*, 2 Wils. C. C. 87). Where the defendant, as grantee of the Crown, was entitled to the soil of a navigable river, such ownership did not justify him in constructing a jetty which interfered with the navigation (*Att.-Gen.* v. *Lonsdale*, 7 Eq. 377; *Att.-Gen.* v. *Tomline*, 14 Ch. D. 69; *Liverpool Co.* v. *Mersey Co.*, [1908] 2 Ch. 460). A corporation, being the conservators of a river, and the owners of the soil between high and low water mark, cannot authorise their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation (*R.* v. *Grosvenor*, 2 Stark. N. P. C. 511).

As regards an owner of land at the side of a public navigable river who is not the owner of the soil of the river, it was said that he cannot, for the benefit of his own trade, erect on such soil any structure, whether an obstruction to navigation or not (*Att.-Gen.* v. *Terry*, 9 Ch. 423; see *White* v. *Phillips*, 15 C. B. (N.S.) 245). But he may moor to his bank a floating wharf which is no obstruction (*Booth* v. *Ratte*, 15 A. C. 188).

The liability of wharfingers in respect of the soil of a navigable river adjoining their jetty is dealt with in *The Moorcock*, 14 P. D. 64; *The Calliope*, [1891] A. C. 11. And the liability of the owner of a sunken wreck in a navigable river in *Brown* v. *Mallett*, 5 C. B. 599; *The Snark*, [1900] P. 105. And as to the right of persons

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entitled to land from a navigable river on the bank adjoining, to pass over permanent obstructions, see *Eastern Counties Ry. Co.* v. *Dorling*, 5 C. B. (N.S.) 821; *Marshall* v. *Ulleswater Co.*, L. R. 7 Q. B. 166. Navigators were liable for injuring oysters placed in the channel of a navigable river (*Colchester* v. *Brooke*, 7 Q. B. 339; *Hawkins* v. *Rutter*, [1892] 1 Q. B. 668; *The Swift*, [1901] P. 168).

Conservators empowered by statute to remove obstructions to navigation were not liable for damage to a barge injured by an obstruction, as being unpaid public trustees with a discretionary power, but no compulsory duty, of removing obstructions (*Forbes* v. *Lea Board*, 4 Ex. D. 116; see also *Jolliffe* v. *Wallasey Board*, L. R. 9 C. P. 62, where a public body was held guilty of negligence in the performance of a public duty with regard to navigation). A corporation empowered by statute to improve navigation was held entitled to sue in respect of abstraction of water without proof of actual damage to navigation (*Medway Co.* v. *Romney*, 9 C. B. (N.S.) 575). The Attorney-General can restrain interference with the public right of navigation without showing actual injury (*Att.-Gen.* v. *Shrewsbury Co.*, 21 Ch. D. 752; compare *Att.-Gen.* v. *Birmingham Board*, [1910] 1 Ch. 61). As to purpresture and the remedy in that case, see *Att.-Gen.* v. *Johnson* (2 Wils. C. C. 87).

(16) Ownership of soil of tidal waters.

The presumption as to the ownership of the soil of rivers depends on whether they are tidal or non-tidal (see *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 847). In the case of navigable tidal waters (including rivers, estuaries, and arms of the sea), the presumption is that the soil is vested in the Crown (*Gann* v. *Free Fisheries of Whitstable*, 11 H. L. C. 192; *Att.-Gen.* v. *Tomline*, 14 Ch. D. 69; *Att.-Gen.* v. *Emerson*, [1891] A. C. 649). But the soil if tidal waters may be vested in a subject (*Att.-Gen.* v. *Emerson*, *supra*; *Neil* v. *Devonshire*, 8 App. Cas. 135), *e.g.* where he can claim it as included in an adjoining manor (*Le Strange* v. *Rowe*, 4 F. & F. 1048; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139); or where he is the owner of a several fishery (*Att.-Gen.* v. *Emerson*, *supra*; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139). A title to the foreshore on a tidal navigable river was established as against the Crown by acts of possession on the part of an adjoining owner, subject to the public right of navigation (*Lord Adv.* v. *Blantyre*, 4 App. Cas. 770; see *Att.-Gen.* v. *Emerson*, *supra*). The city of London has been stated to own the soil of the Thames (Dav. 56, b; Com. Dig. Navigation (B.)); see, however, *Att.-Gen.* v. *London*, 2 Mac. & G. 247; *Att.-Gen.* v. *Johnson*, 2 Wils. C. C. 87. See further as to the bed of the Thames and the powers of the conservators, *Thames Conservators* v. *Port of London*, [1894] 1 Q. B. 647; *Thames Conservators* v. *Smeed*, [1897] 2 Q. B. 334; *Palmer* v. *Thames Conservators*, [1902] 1 Ch. 163. As to the duties of an owner of land abutting on a tidal navigable river, in respect of a river wall, see *Nitro-Phosphate Co.* v. *London and St. Katharine's Docks* (9 Ch. D. 524); *Burt* v. *Victoria Co.* (47 L. T. 378).

Soil of non-tidal waters (whether navigable or non-navigable);

In the case of a non-tidal navigable lake, the Crown has no *de jure* right to the soil (*Bristowe* v. *Cormican*, 3 App. Cas. 641). It is, however, doubtful whether the riparian owners are entitled *ad medium filum* (*ibid.*, 666; see *Mackenzie* v. *Bankes*, 3 App. Cas. 132, n.). In the case of non-tidal navigable rivers, the presumption is that the soil is the property of the owners on each side to the middle of the river, and if a man owns the land on both sides, the presumption is that the whole bed of the river belongs to him (*Blount* v. *Layard*, [1891] 2 Ch. 689, n). The same presumptions apply in the case of a non-navigable river (Hale, De Jure Maris,

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Cap. I.; *Carter* v. *Murcot*, 4 Burr. 2162; Harg. L. Tracts, 5; Davies, R. 155; *R.* v. *Wharton*, 12 Mod. 510; *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 58). Where a non-tidal river was divided by an island, the *medium filum* was drawn between the island and one bank (*Great Torrington* v. *Moore Stevens*, [1904] 1 Ch. 347; see *Zetland* v. *Glover*, L. R. 2 H. L. Sc. 70). But in each case the ownership of the soil is a question of fact. Thus the soil may form part of the waste of a manor (*Tilbury* v. *Silva*, 45 Ch. D. 110). Again, the owner of the land on one side of a river only may be entitled to the whole bed (*Jones* v. *Williams*, 2 M. & W. 326). See the evidence of acts of ownership in the last-mentioned case, and in *Smith* v. *Andrews*, [1891] 2 Ch. 678; *Blount* v. *Layard*, *ibid.*, 681, n.; *Lord Advocate* v. *Blantyre*, 4 App. Cas. 770, 791. The above presumption *prima facie* applies to the ownership of the bed of an artificial channel (*Whitmores* v. *Stanford*, [1909] 1 Ch. 427). The relation of the ownership of the soil to the ownership of the fishery is stated, *ante*, p. 54.

As to pleadings in an action to establish title to the soil of a watercourse, see *Pledge* v. *Pomfret*, [1905] W. N. 56.

when soil of river passes by conveyance of bank.

The right of ownership of the moiety of the soil of a non-tidal river passes, according to a legal presumption, under a conveyance of land on one bank, whether the land is freehold, copyhold, or leasehold (*Tilbury* v. *Silva*, 45 Ch. D. 98); and this even where the conveyance points to a boundary which would not include any part of the bed (*Crossley* v. *Lightowler*, 3 Eq. 279); or where the quantity specified in the deed and the colouring on the map, excludes the bed (*Micklethwait* v. *Newlay Co.*, 33 Ch. D. 133; *Mellor* v. *Walmesley*, [1905] 2 Ch. 179); or where the river is of more than ordinary breadth (*Dwyer* v. *Rich*, Ir. R. 6 C. L. 144). The presumption apples also where the grantor is owner of both banks of the river (*Micklethwait* v. *Newlay Co.*, *supra*). The presumption may be rebutted by surrounding circumstances (*Devonshire* v. *Pattinson*, 20 Q. B. D. 263); but not by reason of subsequent circumstances not contemplated at the time of the grant (*Micklethwait* v. *Newlay Co.*, *supra*). It is doubtful whether the presumption applies when the bank is acquired by statutory award made under an Inclosure Act (*Ecroyd* v. *Coulthard*, [1897] 2 Ch. 567; *Hindson* v. *Ashby*, [1896] 2 Ch. 9. See the cases quoted *ante*, pp. 54, 71).

Rights of navigation proprietors in the soil of river;

An Act of Parliament, passed to make navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them the privilege of cleansing it, which is a mere easement (*R.* v. *Mersey Navigation*, 9 B. & C. 114; *R.* v. *Thomas*, *ibid.*, 95). The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an Act of Parliament allowing them the use of the land through which the river passes (*Hollis* v. *Goldfinch*, 1 B. & C. 221). A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water (*Lord* v. *Sydney*, 12 Moo. P. C. C. 473).

rights in banks.

The fee simple in the towing-path by the River Lee remains in the adjoining owner, subject to the rights of the conservators in connection with navigation (*Lee Conservators* v. *Button*, 6 App. Cas. 685). And a conveyance of land adjoining a towing-path included it (*Thames Conservators* v. *Kent*, [1918], 2 K. B. 272). As to the liability of conservators for the condition of a towing-path, see *Winch* v. *Thames Conservators* (L. R. 9 C. P. 378). The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded on statute or on usage (*Ball* v. *Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra;* see also *Pierce* v. *Falconberge*, 1 Burr. 292).

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As to fishing from a towing-path, see *Staffordshire, &c. Navigation* v. *Bradley*, [1912] 1 Ch. 91.

The use of the banks of the river for more than twenty years by fishermen, who occasionally levelled them, is evidence of a grant of a right of landing by the owner of the soil, although both fishery and landing-place once belonged to the same person, and there was no evidence to show that the owners knew of the user (*Gray* v. *Bond*, 2 Brod. & Bing. 667). As to repairing the banks of non-navigable rivers, see *Long* v. *Gowlett*, [1923] 2 Ch. 177.

(17)

Rights as to the seashore.

Foreshore.

Definition.

Primâ facie title of Crown.

Apart from usage, the Crown is entitled to the "*littus maris*," as well as to the soil of the sea adjoining the coast (*Att.-Gen.* v. *Chambers*, 4 D. M. & G. 213); its right landward being limited *primâ facie* by the line of the medium high tide between the springs and the neaps (*ibid.*, 218). The land between medium high and low water marks is ordinarily referred to as "the foreshore" (*Mellor* v. *Walmsley*, [1905] 2 Ch. 164; see the definitions of "sea-shore" quoted by Romer, L.J., *ibid.*, 177). As to the landward limits of the foreshore prescribed by the law of Scotland, see *Musselburgh* v. *M.*, [1905] A. C. 494, 495. The Crown is entitled to the area of the sea within three miles of the shore (*Secretary of State for India* v. *Sri Raja*, 85 L. J. P. C. 222). Subject to the rights mentioned below, the Crown's title is a beneficial one (*Brinckman* v. *Matley*, [1904] 2 Ch. 325).

Title against the Crown.

As against the Crown a title to the foreshore can be acquired by proving either an express grant from the Crown or facts from which such grant may be presumed (*Att.-Gen.* v. *Emerson*, [1891] A. C. 653). The ownership of a several fishery over the foreshore raises a presumption that the soil is vested in such owner (*ibid.*, 649).

Lord of Manor.

Again, the foreshore may be shown to be parcel of the adjoining manor (*Constable's Case*, 5 Rep. 107; Harg. Law Tracts, 12), *e.g.* where the lord has the franchise of taking wreck (Hale De Jure Maris, Cap. 6). It was treated as such in *Att.-Gen* v. *Hanmer*, 27 L. J. Ch. 837; *Att.-Gen.* v. *Tomline*, 14 Ch. D. 18; *Truro* v. *Rowe*, [1902] 2 K. B. 709; *Brinckman* v. *Matley*, [1904] 2 Ch. 313; *Foster* v. *Warblington*, [1906] 1 K. B. 648. As to evidence in support of the lord's title, either in the shape of entries on the court rolls, or previous decisions, see *Tomline, Ex parte*, 21 W. R. 475; *Le Strange* v. *Rowe*, 4 F. & F. 1048; *Foster* v. *Warblington*, [1906] 1 K. B. 659. Where by an ancient Crown grant of a manor its limits were not defined, modern usage was admissible to show that the foreshore was parcel of the manor (*Beaufort* v. *Swansea*, 3 Ex. 413; *Att.-Gen.* v. *Jones*, 2 H. & C. 347; *Calmady* v. *Rowe*, 6 C. B. 861; *Alston, Ex parte*, 28 L. T. 337). Crown grants of wreck coupled with usage may also support as against the Crown, a title to foreshore (*Chad* v. *Tilsed*, 2 Brod. & Bing. 403; see *Att.-Gen.* v. *Emerson*, [1891] A. C. 660; *Healey* v. *Thorne*, Ir. Rep. 4 C. L. 495; *Hamilton* v. *Att.-Gen.*, 5 L. R. Ir. 555).

Title by possession.

Foreshore in Cornwall belonged to the Duke of Cornwall (*Philpot* v. *Bath*, [1905] W. N. 114). As against the Crown, a title to foreshore in Scotland may be acquired by prescriptive possession (*Lord Adv.* v. *Blantyre*, 4 App. Cas. 770; *Lord Adv.* v. *Young*, 12 App. Cas. 544). In other parts of the United Kingdom a title to foreshore may be acquired by possession; as against the Crown under the Nullum Tempus Act (*Alston, Ex parte*, 28 L. T. 337); and as against a subject of the Crown under the ordinary Statutes of Limitation (see *Philpot* v. *Bath*, [1905] W. N. 114; *Foster* v. *Warblington*, [1906] 1 K. B. 658; *Truro* v. *Rowe*, [1902] 2 K. B. 715). Erecting piles on the foreshore was an act of ownership only as regards the site of the piles (*Beaufort* v. *Aird*, 20 T. L. R. 603).

The title of the Crown and of those claiming under it to foreshore

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is subject to an obligation to protect the realm from the inroads of the sea by maintaining natural barriers (*Att.-Gen.* v. *Tomline*, 14 Ch. D. 58; *West Norfolk* v. *Archdale*, 16 Q. B. D. 754 distinguished in *Nesbitt* v. *Mablethorpe*, [1918] 2 K. B. 1; see *Musselburgh* v. *M.*, [1905] A. C. 491) and the destruction of natural barriers by removing shingle was restrained (*ibid.*). Such title is also subject to other rights of the public (*Brinckman* v. *Matley*, [1904] 2 Ch. 325), which are as follows:—

Public rights controlling Crown's title.

When the foreshore is covered with water, every subject of the King has a right of navigation, and has also *prima facie* a common of fishery (*ibid.* 315; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139). When the foreshore becomes dry there is for purposes of navigation a common law right to cross the foreshore in case of peril or necessity; and for the purpose of fishing, there may be a right to launch a boat ([1904] 2 Ch. 316). As to drawing up fishing boats on the shore, see *Ilchester* v. *Rashleigh*, 61 L. T. 478. There is also a right to get shell-fish on the dry foreshore (*Bagott* v. *Orr*, 2 Bos. & P. 472; *Brinckman* v. *Matley*, [1904] 2 Ch. 327). There is not, however, *prima facie* a public highway along the foreshore (*Brinckman* v. *Matley*, [1904] 2 Ch. 324), nor a right of entry either for taking seaweed (*Howe* v. *Stowell*, 1 Alcock & Napier, 348), or for shooting wild duck (*Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139), or for holding religious services (*Llandudno* v. *Woods*, [1899] 2 Ch. 705). Nor is there any common law right to bathe in the sea, and as incident thereto to cross the foreshore on foot or with bathing machines (*Blundell* v. *Catterall*, 5 B. & Ald. 268; *Brinckman* v. *Matley*, [1904] 2 Ch. 313; *Mace* v. *Philcox*, 15 C. B. (N.S.) 600), or any common law right to appropriate foreshore for storing oysters to the exclusion of others (*Truro* v. *Rowe*, [1902] 2 K. B. 715). Nor is there any common law right to discharge sewage into the sea so as to cause a nuisance (*Foster* v. *Warblington*, [1906] 1 K. B. 665, 689; *Hobart* v. *Southend*, 75 L. J. K. B. 305). The owner of a tenement adjoining the sea was held to have the same right of access to the sea as a riparian proprietor has to a tidal river (*Att.-Gen. Straits Settlement* v. *Wemyss*, 13 App. Cas. 192).

Occupier of foreshore.

A person in possession of foreshore may maintain trespass against a wrongdoer without displacing the Crown's title (*Hastings* v. *Ivall*, 19 Eq. 558). So, irrespectively of title, trespass was maintained by the occupier of oyster ponds on the foreshore (*Foster* v. *Warblington*, [1906] 1 K. B. 648).

Grant of foreshore.

As to what words in the grant will pass the soil of the foreshore, see *Scratton* v. *Brown*, 4 B. & C. 485; *Hastings* v. *Ivall*, 19 Eq. 558; *Mellor* v. *Walmsley*, [1905] 2 Ch. 164, where the land was described as "situate on the sea-shore"; *Nesbitt* v. *Mablethorpe*, [1918] 2 K. B. 1 (sandhills adjoining the shore).

A grant by the Crown (as lord of a manor adjoining an estuary) of minerals within the waste was held to pass minerals under the foreshore (*Att.-Gen.* v. *Hanmer*, 27 L. J. Ch. 837). The effect of a lease by the Crown of minerals below low water mark was considered in *Lord Adv.* v. *Wemyss*, [1900] A. C. 48. Acts of user of foreshore by the grantee were relevant to explain a Crown grant of land adjoining the sea (*Van Diemen Co.* v. *Table Board*, [1906] A. C. 92). Crown grants of non-manorial lands were shown by usage to include foreshore (*Brew* v. *Haren*, I. R. 11 C. L. 198; *Daly* v. *Murray*, 17 L. R. Ir. 185; *Re Belfast Dock Act*, I. R. 1 Eq. 128). The Courts have presumed grants by the Crown of a licence to discharge sewage over foreshore (*Somersetshire* v. *Bridgwater*, 81 L. T. 732), of a several fishery in tidal waters (*Goodman* v. *Saltash*, 7 App. Cas. 633). An express grant of fishing over the foreshore of Canada was considered, *Cabot* v. *Att.-Gen. of*

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Quebec, [1907] A. C. 511. Possession by the Crown of foreshore after a grant thereof by it to another created a presumption against the grant (*Parmeter* v. *Att.-Gen.*, 1 Dow. 328). A modern grant of foreshore by the Crown was dealt with, *Liverpool Co.* v. *Mersey Co.*, [1909] 1 Ch. 209. As to management of the Crown's foreshore and disputes in relation thereto, see Crown Lands Act, 1906, ss. 2 and 3.

Where a parish lies on the seashore or extends up to a tidal river, the land between medium high water and low water mark is *prima facie* extra-parochial (*Bridgwater* v. *Bootle-cum-Linacre*, L. R. 2 Q. B. 4; see *Smart* v. *Suva*, [1893] A. C. 301).

(18) Accretions and alluvium.

Gradual accretions of land from the sea belong to the owner of the land gradually added to (*R.* v. *Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh, (N.S.) 147; *Doe* v. *East India Co.*, 10 Moo. P. C. 140; *Mellor* v. *Walmsley*, [1904] 2 Ch. 530; see *Scratton* v. *Brown*, 4 B. & C. 485, where a grant of foreshore was held to pass the foreshore as it shifted from time to time). Similarly in the case of gradual accretions from a non-navigable river (*Ford* v. *Lacey*, 30 L. J. Ex. 351; *Zetland* v. *Glover*, L. R. 2 H. L. Sc. 70). As to accretions which are not gradual, see *Att.-Gen.* v. *Reeve*, 1 T. L. R. 675. Conversely land gradually encroached upon by water ceases to belong to the former owner (*Re Hull and Selby Ry. Co.*, 5 M. & W. 327). This law is based on the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water (see *Foster* v. *Wright*, 4 C. P. D. 446). In the case of a river, it was doubted whether the doctrine of accretion would apply where the original bank remained clearly defined (*Hindson* v. *Ashby*, [1896] 2 Ch. 27, 28). The question whether accretions passed by a conveyance of land "bounded by the seashore" was discussed: *Mellor* v. *Walmsley*, [1904] 2 Ch. 530; [1905] 2 Ch. 164. Land added by accretion becomes subject to any custom affecting the land to which it is added (*Mercer* v. *Denne*, [1905] 2 Ch. 538).

The title to alluvium, arising from artificial causes, does not differ as to the rights of landowners from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore, and not from acts done with a view to the acquisition of the seashore. Where the acts of ownership relied on consisted merely of turning cattle upon a marsh which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle were allowed to stray without interruption, Lord Chelmsford, C., said "the effect of acts of ownership must depend partly upon the acts themselves, and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition" (*Att.-Gen.* v. *Chambers*, 4 De G. & J. 65; and see *Re Hainault Forest Act*, 9 C. B. (N.S.) 648, and Lord Blackburn's remarks in *Lord Adv.* v. *Blantyre*, 4 App. Cas. 791; *Hindson* v. *Ashby*, [1896] 2 Ch. 24; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 421; *Re Vernon*, [1901] 1 I. R. 1).

(19) Ferries.

A ferry is the exclusive right to carry passengers and goods across a river or arm of the sea either (1) from one vill to another, or

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(2) to connect a continuous highway leading from one township or vill to another (*Newton* v. *Cubitt*, 12 C. B. (N.S.) 32; *Cowes Council* v. *Southampton Co.*, [1905] 2 K. B. 295). It is not a servitude imposed upon a large area of land and is wholly unconnected with the ownership or occupation of land (*ibid.*; see *Matthews* v. *Peache*, 5 E. & B. 546). A ferry is not a monopoly to carry by any means whatever, but only to carry by means of a ferry (*Dibden* v. *Skirrow*, [1908] 1 Ch. 47).

A disturbance of a ferry may arise from the establishment of a new ferry in proximity to an ancient ferry (*Newton* v. *Cubitt*, *supra*; *Huzzey* v. *Field*, 2 Cr. M. & R. 432; *General Estates Co.* v. *Beaver*, [1914] 3 K. B. 918). But there was no disturbance where a new ferry was established to provide for a new traffic (*Cowes Council* v. *Southampton Co.*, [1905] 2 K. B. 287; *Hammerton* v. *Dysart*, [1916] 1 A. C. 57); or where a new bridge was made (*Hopkins* v. *G. N. Ry.*, 2 Q. B. D. 224; *Dibden* v. *Skirrow*, [1908] 1 Ch. 41).

A ferry forms part of the highway, and its owner, in consideration of the monopoly, is bound under pain of indictment to have his ferry always ready (*Letton* v. *Goodden*, 2 Eq. 131; *Anon.*, 1 Ves. sen. 476). All ancient ferries had their origin in royal grant or in prescription which presumes a royal grant (*Simpson* v. *Att.-Gen.*, [1904] A. C. 490). Thirty-five years' usage was sufficient to show a legal origin (*Trotter* v. *Harris*, 2 Y. & J. 285). A ferry is a matter of public interest, and accordingly evidence in support of the right may be given in the form of reputation or of a judgment of a competent Court (*Pym* v. *Currell*, 6 M. & W. 234). A custom of keeping a ferry boat was alleged by a parish (*Pain* v. *Patrick*, 3 Mod. 289, 294).

VI.—Right of Support.

(1) *Support for Land in its Natural Condition*...111.
(2) *Support for Incumbered Land or Excavated Land*...113.
(3) *Support for one Building by another*...113.
(4) *When Right of Action arises*...114.

(1) Support for land in its natural condition: from land. *Prima facie* rules.

Certain rights in respect of support have been held to be easements within sect. 2 of the Prescription Act, 1832 (*Dalton* v. *Angus*, 6 App. Cas. 798; *Lemaitre* v. *Davis*, 19 Ch. D. 291; see *Simpson* v. *Godmanchester*, [1897] A. C. 709). And the right to damage surface by withdrawing support has also been held to be an easement (*Sitwell* v. *Londesborough*, [1905] 1 Ch. 465; *Rowbotham* v. *Wilson*, 8 H. L. C. 348; see *Richards* v. *Harper*, L. R. 1 Exch. 199). Accordingly a short note is here added as to support.

First, as to land in its natural condition, unincumbered by building and unexcavated.

Questions as to support arise where the title to land A has been severed from the title to land B, which is subjacent to land A vertically; or from the title to land C, which is adjacent to land A laterally. It is settled that, independently of the result of any facts or instruments connected with the severance, and also of custom, the owner of land A is of common right entitled to have it supported vertically by land B (*Humphries* v. *Brogden*, 12 Q. B. 739), and laterally by land C (*Hunt* v. *Peake*, John. 705; *Dalton* v. *Angus*, 6 App. Cas. 808); the right to lateral support extending only over "that portion of land the existence of which in its

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natural state is necessary for the support of " land A (*Birmingham* v. *Allen*, 6 Ch. D. 289). The surface owner's right of support is a right, not to an easement, but to the ordinary enjoyment of his land (*West Leigh Co.* v. *Tunnicliffe*, [1908] A. C. 30).

Further, as regards instruments effecting the severance. Where the owner of the surface and subsoil severs them, and the instrument contains no provision bearing on support, the *prima facie* rule is, that the right of support is attached as of common right to the surface; not only where the surface is granted and the subsoil retained (*Proud* v. *Bates*, 34 L. J. Ch. 412), but also where the surface is retained and the subsoil is granted (*Davis* v. *Treharne*, 6 App. Cas. 460). This *prima facie* rule is explained in *Butterley* v. *New Hucknall*, [1910] A. C. 381. The rule holds good whether the instrument is a lease, or a grant, or reservation, or Inclosure Act or award (*Butterknowle Co.* v. *Bishop Auckland Co.*, [1906] A. C. 313).

Exceptions to *prima facie* rule.

The *prima facie* rule may, however, be altered by the express words of the instrument of severance or necessary intendment therefrom (*ibid.*; *Aspden* v. *Seddon*, 10 Ch. 401; *Davis* v. *Treharne*, 6 A. C. 467; *Dixon* v. *White*, 8 A. C. 843; *Jones* v. *Consolidated Collieries*, [1916] 1 K. B. 123; *Beard* v. *Moira Colliery*, [1915] 1 Ch. 257; *Davies* v. *Powell, &c., Co.*, [1917] 1 Ch. 488). As to the meaning in such an instrument of the words " mines " and " minerals " see *Glasgow* v. *Farie*, 13 A. C. 687, 689.

Words of instrument. Inclosure Act.

Again, where the title to the surface and the underlying minerals is severed in pursuance of an Inclosure Act, while the above rule giving the surface owner a right to support ordinarily applies (*Love* v. *Bell*, 9 App. Cas. 297; *Thomson* v. *St. Catharine's College*, [1919] A. C. 468), the right may be expressly or impliedly limited by the Act (*Bell* v. *Dudley*, [1895] 1 Ch. 186; *Consett Co.* v. *Ritson*, 22 Q. B. D. 318, 702; 43 W. R. 122; *Butterknowle Co.* v. *Bishop Auckland Co.*, [1904] 2 Ch. 424; [1906] A. C. 305; *Welldon* v. *Butterley Co.*, [1920] 1 Ch. 130).

Railways Clauses Act, 1845.

Again, the *prima facie* rule may, in the case of a purchase by a railway company, be altered by the provisions of the Railways Clauses Act, 1845. For where under that Act a railway company purchases the surface without the underlying minerals, the owner of the minerals, when not compensated therefor, may after notice so work them (working properly) as to let down the surface (*Pountney* v. *Clayton*, 11 Q. B. D. 820); even in the case of minerals gotten by open workings (*Midland Ry. Co.* v. *Robinson*, 15 App. Cas. 19; see *G. W. Ry.* v. *Blades*, [1901] 2 Ch. 625). But the provisions of the Act do not apply to mines outside the limit of forty yards from the railway (*Howley Park Co.* v. *L. & N. W. Ry. Co.*, [1913] A. C. 11). See, generally, as to the statutory provisions which limit or extend the *prima facie* right, *L. & N. W. Ry. Co.* v. *Evans*, [1893] 1 Ch. 16; and *Bell* v. *Dudley*, [1895] 1 Ch. 182, and cases there referred to.

Custom.

Again, the *prima facie* rule may be altered by custom, *e.g.*, a custom that the lord may, by working his own subjacent minerals, let down the surface of a copyholder, making, however, compensation (*Aspden* v. *Seddon*, 1 Ex. D. 510).

Support from subterranean water.

It has been said that at common law there is no right of support from subterranean water (*Popplewell* v. *Hodgkinson*, L. R. 4 Ex. 248; *Elliot* v. *N. E. Ry. Co.*, 10 H. L. C. 333; *English* v. *Metropolitan Board*, [1907] 1 K. B. 588; see, however, the judmgents in *Jordeson* v. *Sutton Co.*, [1899] 2 Ch. 217). But where land is supported by a bed of wet sand or running silt, an adjoining owner who, by excavating and pumping, withdraws this support is liable in damages (*Jordeson* v. *Sutton Co.*, *supra*). So also in the case

of a bed of semi-fluid pitch (*Trinidad Asphalte Co.* v. *Ambard*, [1899] A. C. 594). See also the Brine Pumping (Compensation for Subsidence) Act, 1891; and *Salt Union* v. *Brunner*, [1906] 2 K. B. 822. **Right of Support.**

(2) Support for incumbered land.

Secondly, as to land incumbered by buildings, &c.

Where the title to land A, on which a building has been or is about to be erected, is severed from the title to the subjacent or adjacent land, the right to have such building supported by the subjacent or adjacent land is not of common right, but must be acquired (*Dalton* v. *Angus*, 6 App Cas. 792, 809). When acquired the right is precisely the same as that of support for land (*ibid.*). The right may be acquired by grant, whether express (*ibid.*) or implied (*ibid.*). And the implication may be made not only where at the time of the severance land A had buildings standing on it (*Dalton* v. *Angus*, 6 App. Cas. 792), but also where it was conveyed expressly with a view to the erection of buildings (*Caledonian Co.* v. *Sprot*, 2 Macq. H. L. C. 449; *Rigby* v. *Bennett*, 21 Ch. D. 559). A reservation of such a right will not generally be implied in favour of the grantor (*Union Co.* v. *London Dock Co.*, [1901] 2 Ch. 300; [1902] 2 Ch. 557). Right may arise under grant; express; or implied;

When a statute gives the right to make and maintain something requiring support, *e.g.*, a canal, and provision is made for compensation to landowners, the requisite right of support is also given (*L. & N. W. Ry. Co.* v. *Evans*, [1893] 1 Ch. 16). or under statute;

The right of support may be acquired by enjoyment for buildings which have in fact been standing for twenty years (*Dalton* v. *Angus*, 6 App. Cas. 740; see *Jordeson* v. *Sutton Co.*, [1898] 2 Ch. 625). And even where buildings are in an infirm condition damages may be recovered from the owner of the servient tenement, if the injury has resulted from his acts (*Dodd* v. *Holme*, 1 A. & E. 506). The enjoyment, however, must not be *clam*. Thus, no right of support for dock sides from underground rods was acquired by twenty years' enjoyment which had not been open and visible (*Union Co.* v. *London Dock Co.*, [1902] 2 Ch. 557). or by enjoyment;

Where buildings have been standing for less than twenty years, damages may be recovered on proof that the unincumbered land would have sunk (*Hamer* v. *Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102; see *Att.-Gen.* v. *Conduit Co.*, [1895] 1 Q. B. 301).

Apparently, the right of support for buildings may also be acquired by lost grant (*Dalton* v. *Angus*, 6 App. Cas. 811). by lost grant.

As regards acquiring a right of support for excavated land, see *Partridge* v. *Scott*, 3 M. & W. 220; *Birmingham* v. *Allen*, 6 Ch. D. 284. Excavated land.

(3) Support for one building by another.

Further, as to support for one building by an adjacent building, see *Sack* v. *Jones*, [1925] Ch. 235. This right is similar to the right of support for a building by land (*Lemaitre* v. *Davis*, 19 Ch. D. 290). The right may be claimed by implied grant or reservation on the severance of two houses erected by the same owner (*Richards* v. *Rose*, 9 Ex. 218; see *Howarth* v. *Armstrong*, 77 L. T. 62). Where the owner of building A and building B (which is subjacent to A and supports it) demises A the lessor cannot withdraw the support but there is no covenant implied by him to repair B (*Colebrook* v. *Girdlers Co.*, 1 Q. B. D. 234). In the case of houses belonging to different owners, the right may be claimed by prescription (*Lemaitre* v. *Davis*, 19 Ch. D. 281; see *Waddington* v. *Naylor*, 60 L. T. 480); in which case the enjoyment must have been as of right (see *Tone* v. *Preston*, 24 Ch. D. 739), and therefore open (*Lemaitre* v. *Davis*, *supra*; *Solomon* v. *Vintners' Co.*, 4 H. & N.

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601—603; *Gately* v. *Martin*, [1900] 2 I. R. 269; see *Dalton* v. *Angus*, 6 App. Cas. 740). As to adjoining buildings in London, see London Building Act, 1894. As to party walls see Law of Property Act, 1925, s. 38, *post*.

(4) When right of action arises.

The right called the right of support is not a right on the part of the landowner to have the adjoining soil remain in its natural state (*Dalton* v. *Angus*, 6 App. Cas. 808), but a right to have his own land remain in its natural condition unaffected by any act done in the neighbouring land (*Bonomi* v. *Backhouse*, E. B. & E. 657; 28 L. J. Q. B. 381). Accordingly, if on the working of the subjacent soil a subsidence can be prevented by the use of artificial means of support, no cause of action arises (*Bower* v. *Peat*, 1 Q. B. D. 327); but if an actual subsidence takes place, a cause of action arises by reason of the injury to the right, even though there is no pecuniary loss (*Att.-Gen.* v. *Conduit Co.*, [1895] 1 Q. B. 311; *Mitchell* v. *Darley Main Co.*, 14 Q. B. D. 137).

The Statute of Limitations only runs from the date of the subsidence (*Backhouse* v. *Bonomi*, 9 H. L. C. 503; see *Spoor* v. *Green*, L. R. 9 Ex. 99); and each successive subsidence gives rise to a separate cause of action (*Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127; *Crumbie* v. *Wallsend*, [1891] 1 Q. B. 503; *West Leigh Co.* v. *Tunnicliffe*, [1908] A. C. 27). A lessee of mines, however, is not liable for subsidence occurring during his lease, but caused by the acts of his predecessors (*Greenwell* v. *Low Beechburn Co.*, [1897] 2 Q. B. 165; *Hall* v. *Norfolk*, [1900] 2 Ch. 493).

In addition to damages, a person whose right to support is infringed may claim an injunction (*Mundy* v. *Rutland*, 23 Ch. D. 81; see Seton, 7th ed. 563).

VII.—Of the Right to Pews and Vaults.

(1) *Rights in regard to Pews*...114.
(2) *Proof of Prescriptive Rights to Pews*...115.
(3) *Voting in respect of Pews and Mortgage of Pew Rents*...117.
(4) *Chancels*...117.
(5) *Remedies for Disturbance of Pews*...117.
(6) *Vaults*...119.

Lord Penzance expressed an opinion that a prescriptive right to a pew in the nave of a parish church cannot be claimed under sect. 2 of the Prescription Act (*Crisp* v. *Martin*, 2 P. D. 15; see *Halliday* v. *Phillips*, 23 Q. B. D. 54; *Proud* v. *Price*, 62 L. J. Q. B. 490). It is clear, however, that the right to a pew or vault can be claimed as a prescriptive easement annexed to an ancient house in the parish (*Mainwaring* v. *Giles*, 5 B. & Ald. 361; *Stileman Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 749; *Bryan* v. *Whistler*, 8 B. & C. 288). Accordingly a note is added on the right to pews and vaults.

(1) General right with regard to pews.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the *parishioners*; and the disposing of the seats therein the right of the ordinary (Hob. 69; Gibs. Cod. tit. 9, c. 4).

According to the common law the rector, whether endowed or spiritual only, is entitled to the chief seat in the chancel, unless some other person be in a condition to prescribe for it from time immemorial. The Ecclesiastical Court, in the exercise of its ordinary

authority, would allot to him such sitting and protect him against the disturbance of such right (*Spry* v. *Flood*, 2 Curt, 357). By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use *in common* of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary (12 Rep. 105; 3 Inst. 202; *Halliday* v. *Phillips*, 23 Q. B. D. 53; *Blake* v. *Usborne*, 3 Hagg. Eccl. R. 733; *Claverley* v. *C.*, [1909] P. 213). The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated (*Reynolds* v. *Monkton*, 2 M. & Rob. 384; *Asher* v. *Calcraft*, 18 Q. B. D. 607; *Taylor* v. *Timson*, 20 Q. B. D. 676); and, in allotting seats in a church built under the Church Building Acts, may give preference to subscribers to church expenses (*St. Saviour, Westgate-on-Sea, Vicar of*, [1898] P. 217).

Particular rights.

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris*; it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. Mere possession is not good against the churchwardens and the ordinary (*Halliday* v. *Phillips*, 23 Q. B. D. 53). The churchwardens may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would give a person in possession, *cæteris paribus*, the preference over a mere stranger (1 Phill. R. 324). The churchwardens are not justified in dispossessing any one of a sitting which he has enjoyed for a time, without giving notice of their intention, and offering an opportunity for explanation (*Horsfall* v. *Holland*, 6 Jur. (N.S.) 278). Mere possession, however, is sufficient to maintain a suit against a mere disturber (*Spry* v. *Flood*, 2 Curt. 356). The fact of possession implies either the actual or virtual authority of those having power to place. The disturber may show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty (1 Phill. R. 324). Such a grant may be presumed although there may be evidence that the pew was originally acquired under circumstances which would not confer a legal right (*Halliday* v. *Phillips*, [1891] A. C. 228). Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession (*Morgan* v. *Curtis*, 3 M. & R. 389). On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives (3 Hagg. Eccl. R. 733). A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked (2 Hagg. Eccl. R. 417).

(2) Prescriptive right to pews, how proved.

It was laid down in 1 Phillim. 325, that a *prescriptive right* must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any

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acts have been done by the inhabitants of such messuage they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right (compare *Crisp* v. *Martin*, 2 P. D. 15). The *onus* and *beneficium* are supposed to go together. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the Prescription Act, 1832, was not required (1 Hagg. Cons. R. 322). As against the ordinary, mere occupancy of the pew does not prove the right (*Proud* v. *Price*, 63 L. J. Q. B. 61; *Stileman Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 749). But the uniform and exclusive possession of the pew by the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title. To exclude the jurisdiction of the ordinary, the strongest evidence is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary (*Stocks* v. *Booth*, 1 T. R. 428; *Walter* v. *Gunner*, 1 Hagg. 322). The evidence was considered (*Halliday* v. *Phillips*, 23 Q. B. D. 54; [1891] A. C. 228). Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been done within the period of anyone living (*Knapp* v. *Willesden*, 2 Rob. Ec. Rep. 358; see *Stileman Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 759, where evidence of other acts of user was held sufficient). Twenty years' adverse possession seems to bar the right to a pew (1 Phill. R. 328).

Where the members of a corporation have as such occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund (*R.* v. *Warwick*, 10 Jur. 262; 15 L. J. Q. B. 306).

Extra-parochial persons.

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title (*Byerly* v. *Windus*, 5 B. & C. 1; as to prohibition against granting a faculty, see *Hallack* v. *Cambridge*, 1 Q. B. 593). A pew in the body of the church may be prescribed for as appurtenant to a house out of the parish (*Davis* v. *Witts*, Forr. R. 14; *Lonsley* v. *Hayward*, 1 Y. & J. 583). A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations (2 Addams, R. 427). A man may prescribe for a chancel or for an aisle, or for a pew in an aisle, or even in the nave of a church, if he prescribes for that he and those whose estate he has, have always had it, and have always repaired it, even though the estate or house in question be out of the parish (*per* Kindersley, V.-C., *Churton* v. *Frewen*, 2 Eq. 656).

Prescriptive right to pew cannot be severed from occupancy of messuage.

A pew annexed by prescription to a certain messuage cannot be severed from the occupancy of the house, but passes with the messuage to the tenant for the time being (1 Hagg. Cons. R. 319; *Stocks* v. *Booth*, 1 T. R. 430; 3 M. & R. 334; 2 Ad. 428); and the pew cannot be sold nor let without a special Act of Parliament (1 Hagg. Eccl. R. 319, 321); or under the provisions of the Church Building Acts (see 58 Geo. 3, c. 45, ss. 65, 66, 75—79; 59 Geo. 3, c. 134, ss. 26, 32; 8 & 9 Vict. c. 70, s. 11). Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with and thus annex it to his house, but it reverts to the disposal of the churchwardens (1 Hagg. Eccl. R. 34). A person who has permission from the churchwardens to sit in a pew temporarily, and in order to carry into effect the conditions of sale of a house with a pew, cannot bring a suit for perturbation of seat against a mere intruder, such permission being illegal, as confirming the sale of the pew (*Blake* v. *Usborne*, 3 Hagg. Eccl. R. 726). Customs pleaded, "that pews are

appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad (1 Hagg. Cons. R. 317). But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew (2 Add. 428). Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been constantly reprehended by the Ecclesiastical Courts, and discouraged as often as set up (1 Hagg. Cons. R. 317).

32 & 33 Vict. c. 94 contains provisions for the surrender of pews which are private property, or subject to any trust, to the bishop of the diocese or the ecclesiastical commissioners. And by 35 & 36 Vict. c. 49, provision is made for the free use of seats in certain churches.

(3) Right to vote in respect of pews.

On the construction of private Acts it was held that the proprietors of pews did not acquire such a freehold interest in the soil of the church as entitled them to a county vote; but only a right to sit in it to hear divine service, which right was of the nature of an easement (*Hinde* v. *Chorlton*, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, L. R. 5 C. P. 224; *Greenway* v. *Hockin*, *ibid.* 235).

Mortgage of pew rents.

A mortgage of pew rents made by a vicar of a district church is void under 13 Eliz. c. 20 (*Ex parte, Arrowsmith*, 8 Ch. D. 96), where it was said that the pew rents resembled the payment which the lord of the manor received for stallage in a market.

(4) Chancels.

The rector is entitled to the principal pew in the chancel, but the ordinary may grant permission to other persons to have pews there (*Clifford* v. *Wicks*, 1 B. & A. 498; see *Stileman Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 749). A pew in a chancel may legally belong to a party in respect of the ownership of a house (*Parker* v. *Leach*, 4 Moore, P. C. C. 180). The above rules as to claiming pews by prescription were applied in the case of a pew in the chancel (*Stileman Gibbard* v. *Wilkinson, supra*).

Immemorial repair of a chapel or lesser chancel, which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it. Such a freehold may be vested in a private person; and the enjoyment of such a chapel or chancel, and the right to its exclusive use is not necessarily annexed to a dwelling-house (*Chapman* v. *Jones*, L. R. 4 Ex. 273). Immemorial occupation, coupled with reparation, may entitle the lord of the manor to the exclusive use of the chancel without the freehold, and such a right may be appendant to an estate or house not situate in the parish (*Churton* v. *Frewen*, 2 Eq. 634). On the question whether a building forms part of the chancel of a parish church, or is private property, see *Norfolk* v. *Arbuthnot*, 5 C. P. D. 390. As to church buildings, partly parochial and partly formerly conventual, see *Fowke* v. *Berrington*, [1914] 2 Ch. 308.

(5) Remedy for disturbance of pews by action.

Where a pew is claimed as annexed to a house by faculty or prescription, the Courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action (*Mainwaring* v. *Giles*, 5 B. & Ald. 361). So where the pew is in a chancel, the freehold of an individual (*May* v. *Gilbert*, 2 Bulstr. 151). The Ecclesiastical Court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury (Report of Eccl. Commrs., p. 49; see *Re Bateman*, 9 Eq. 660). So if a man claim title by prescription to an aisle,

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chancel, &c., as his freehold (see 1 Burn's Eccl. Law, 8th ed., 366, 367; *Witcher* v. *Cheslam*, 1 Wils. 17; *Corwen* v. *Pym*, 12 Rep. 105; *Jacob* v. *Dalton*, 2 Raym. 1755; *Boothby* v. *Bailey*, Hob. 69; *Francis* v. *Lee*, Cro. Jac. 366; *Day* v. *Beddingfield*, Noy's Rep. 104; *Buxton* or *Bunton* v. *Bateman*, 1 Sid. 89; *S. C.*, 1 Lev. 71; Sir T. Raym. 52; *Crook* v. *Sampson*, 2 Keb. 92; *Brabin* v. *Tradum*, Poph. 140; 2 Roll. Abr. 287, 288).

Evidence.

The uninterrupted possession of a pew in a church for twenty years affords presumptive evidence of a legal title by prescription or by a faculty against a wrongdoer (*Darwin* v. *Upton*, 2 Wms. Saund. 506, ed. 1871). But if the right was claimed as appurtenant to an ancient messuage the claim would, before the Prescription Act, 1832, be rebutted by proof that the pew began to exist within time of legal memory (*Griffith* v. *Matthews*, 5 T. R. 296; see *Crisp* v. *Martin*, 2 P. D. 15). In an action for disturbing the possession of a pew of which there had been uninterrupted enjoyment for thirty-six years, but which had been an open pew before that period, the jury were directed to presume a title after so long a possession (*Rogers* v. *Brookes*, 1 T. R. 431, n.; see *Halliday* v. *Phillips*, [1891] A. C. 228; see, however, *Morgan* v. *Curtis*, 3 M. & R. 389). A pew in a parish church was claimed in respect of an ancient messuage; and it was proved that, so far as living memory extended, the pew had been one of three pews adjoining all claimed under one and the same claim of right, *viz.*, in respect of the said ancient messuage; it was held, that proof of repairs done to one of the pews, not that in question, was evidence as to all (*Pepper* v. *Barnard*, 12 L. J. Q. B. 361). The pew must be claimed as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not sufficient title to maintain an action for disturbing the enjoyment thereof, but a prescriptive right or faculty must be proved (*Stocks* v. *Booth*, 1 T. R. 428). Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration and proved, as the building or repairing of the pew (*Kenrick* v. *Taylor*, 1 Wils. 326; *Ashley* v. *Freckleton*, 3 Lev. 73; see *Fiske* v. *Rovitt*, Lofft, 423; Com. Dig. Action upon the Case for Disturbance (A. 3); Gibs. 197, 198).

Who can sue.

The grant of part of the chancel of a church by a *lay impropriator* to A, his heirs and assigns, is not valid in law, and therefore such grantee cannot maintain trespass for pulling down his pews there erected (*Clifford* v. *Wicks*, 1 B. & Ald. 498). But the churchwardens have not, as against the incumbent of a church, a joint possession of it, so as to disable him from maintaining trespass against them for pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate (*Jones* v. *Ellis*, 2 Y. & J. 265). The perpetual curate of an augmented parochial chapelry may maintain trespass for breaking and entering the chapel and destroying the pews (*ibid.*).

Priority in a pew.

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house, by the inhabitants of it, who have repaired the seat time out of mind (*Carleton* v. *Hutton*, Noy, 78; Gibs. 221). The right to sit in a pew may be apportioned (*Harris* v. *Drewe*, 2 B. & Ad. 164). As to a licence by a pew owner to the churchwarden to divide the pew, see *Adams* v. *Andrews* (15 Q. B. 284).

Remedy in the Chancery Division.

It seems that a bill in equity would not lie to be quieted in the possession of a pew, though there was a decree for it before the ordinary (*Baker* v. *Child*, 2 Vern. 226). See *Cardinall* v. *Molyneux*

(7 Jur. (N.S.) 854), as to proceedings against an incumbent who removed pews and substituted chairs in the church. **Of the Right to Pews.**

A man may prescribe that he is tenant of an ancient messuage, and ought to have a separate burial in a particular vault within the church (Com. Dig. Cemetery (B.)). It seems that the same rules are applicable to vaults as to pews (*Bryan* v. *Whistler*, 8 B. & C. 293; see *Francis* v. *Ley*, Cro. Jac. 366; Gibs. Cod. 542). As to faculties for the exclusive use of family vaults, see *Kellett* v. *St. John's, Burscough Bridge*, 32 Times L. R. 571. (6) Vaults.

VIII.—Rights to Light.

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(1) Creation by statute.

A right to light may be created by statute. The right may also arise as an adventitious advantage from a statute not dealing with the creation of easements (*Boyce* v. *Paddington*, [1903] 1 Ch. 115).

(2) Acquisition by express grant.

A right to light may also be acquired by express grant (*Booth* v. *Alcock*, 8 Ch. 667). A conveyance since 1881 of land with buildings thereon, includes a grant of "light" (L. P. Act, 1925, s. 62, sub-s. 2). At law such an easement can only be granted by deed (*McManus* v. *Cooke*, 35 Ch. D. 689). But in equity a verbal agreement for such a right may be enforced when there has been part performance. (*Ibid.* 681.) See now L. P. Act, 1925, s. 52, *post*.

Cases as to contracts.

An equitable right to light claimed under a contract did not bind a purchaser for value without notice of the servient tenement (*Prinsep* v. *Belgravia*, [1896] W. N. 39). But such an equitable right, of which an intending purchaser of the servient tenement had notice, was an objection to title (*Pemsel* v. *Tucker*, [1907] 2 Ch. 191). The mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them (*Allen* v. *Seckham*, 11 Ch. D. 790). A contract for the sale of a house with windows looking over the land of a third person implies no representation that the windows are entitled to light over that land (*Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324; *Smith* v. *Colbourne*, [1914] 2 Ch. 533).

Cases as to express grants.

A, owning Blackacre, with lights overlooking Whiteacre, and also owning Whiteacre, demised Blackacre and its lights to B, and subsequently demised Whiteacre to C; it was held that A could not have blocked the lights, and that C was in no better position (*Davies* v. *Marshall*, 1 Dr. & Sm. 557); similarly, where A subsequently conveyed Whiteacre to C in fee (*Richardson* v. *Graham*, [1908] 1 K. B. 39). The words of a grant, however, must be restricted to what a grantor has power to grant at the time; thus, where A demised a house with lights to B for twenty-one years, having at the time the servient tenement for a shorter term, and subsequently acquired the

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fee of the servient tenement, A could after the expiration of the shorter term obstruct B's lights (*Booth* v. *Alcock*, 8 Ch. 663; *Godwin* v. *Schweppes*, [1902] 1 Ch. 932; compare *Davis* v. *Town Properties* [1903] 1 Ch. 797).

Acquisition of right to light by implied grant.

The rule that a man may not derogate from his grant is a rule of law, and does not depend on the implication of a covenant (*Cable* v. *Bryant*, [1908] 1 Ch. 264). Under this rule the grantor of land for a particular purpose expressed or referred to in the deed cannot do anything on his adjoining property which would prevent the purpose (*Aldin* v. *Latimer* [1894] 2 Ch. 437; see *Grosvenor Co.* v. *Hamilton*, [1894] 2 Q. B. 836).

Implied grant of right to light upon sale of house by owner of adjoining land;

As a man cannot derogate from his own grant, it is established, that where the same person possesses a house with lights, and also the adjoining land, and sells the house retaining the land, there, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct those lights (*Palmer* v. *Fletcher*, 1 Lev. 122; *Robinson* v. *Grave*, 29 L. T. 7; *Key* v. *Neath*, 95 L. T. 771). The principle was applied where the vendor was a mortgagee selling under his statutory power of sale (*Born* v. *Turner*, [1900] 2 Ch. 211). The same principle applies where at the time of the grant the erection of a particular building is contemplated by both parties, though no building has been actually erected (*Bailey* v. *Icke*, 64 L. T. 789; *Fred. Betts* v. *Pickfords*, [1906] 2 Ch. 87); but not where there is merely an intention on the part of the purchaser to build which is known to the vendor (*Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; see *Robinson* v. *Grave*, 29 L. T. 9). The principle was held not to apply where the vendor had contracted to sell the adjoining land before the sale of the house (*Beddington* v. *Atlee*, 35 Ch. D. 317, 328; see *Davies* v. *Thomas*, [1899] W. N. 244), or where the vendor had no right in the adjoining land except a builder's right of entry (*Quicke* v. *Chapman*, [1903] 1 Ch. 659). A, the owner of two adjoining houses, granted a lease of one of them to B, and afterwards leased the other to C, there then existing in it certain windows. After that B accepted a new lease of the house from A; it was held, that B could not alter his tenement, so as to obstruct the windows existing in C's house at the time of his lease from A, though the windows were not twenty years old at the time of the alteration (*Coutts* v. *Gorham*, 1 M. & M. 396; see *Cox* v. *Matthews*, 1 Ventr. 237; *Jacomb* v. *Knight*, 11 W. R. 585; *Warner* v. *Macbride*, 36 L. T. 360; *Riviere* v. *Bower*, 1 Ry. & M. 24). The extent of the implied grant of light must be measured by circumstances existing at date of the lease and known to both parties (*Birmingham Banking Co.* v. *Ross*, 38 Ch. D. 295; *Corbett* v. *Jonas*, [1892] 3 Ch. 137; *Godwin* v. *Schweppes*, [1902] 1 Ch. 926). And where A on taking a lease of a building knew that the adjoining land was being laid out for building and stipulated for a passage twenty feet wide adjoining the demised building, there was no implied grant (*Birmingham Banking Co.* v. *Ross*, *supra*). But the mere reference in A's conveyance to the adjoining land as "building land" would not alone prevent an implied grant. The burden of setting limits to the right lies on the grantor (*Broomfield* v. *Williams*, [1897] 1 Ch. 602; see *Pollard* v. *Gare*, [1901] 1 Ch. 834; *Mellor* v. *Walmsley*, [1905] 2 Ch. 176; and see note to sect. 62 of the L. P. Act, 1925, *post*).

On a sale by a railway company of surplus land with a house thereon, the company can only obstruct the lights by railway constructions, not by a hoarding (*Myers* v. *Catterson*, 43 Ch. D. 470). So in the case of a lease of part of a building estate, the lessor's right of obstructing lights on the demised premises is confined to building on the adjoining land. He cannot erect a hoarding (*Wilson* v. *Queen's Club*, [1891] 3 Ch. 522).

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sale of land by owner of adjoining house;

Where a person owning a house with ancient lights, and also owning the adjoining land, sells the land retaining the house, the purchaser may obstruct the lights, there being no implied reservation in favour of the vendor (*Curriers' Co.* v. *Corbet*, 2 Dr. & Sm. 360; *White* v. *Bass*, 7 H. & N. 722; see *Tenant* v. *Goldwin*, 2 Ld. Raym. 1093; *Rosewell* v. *Prior*, 6 Mod. 116; *Canham* v. *Fisk*, 2 Cr. & J. 128; *Ellis* v. *Manchester, &c., Co.*, 2 C. P. D. 13; *Master* v. *Hansard*, 4 Ch. D. 718). To enable a reservation to be implied, the easement must be one of necessity (*Ray* v. *Hazeldine*, [1904] 2 Ch. 17; *Wheeldon* v. *Burrows*, 12 Ch. D. 57; *Union Co.* v. *London Co.*, [1902] 2 Ch. 557). If, however, on a sale of land adjoining a house to be built by the vendor, it is agreed that a wall of the house may stand within the lands sold with windows overlooking such lands, and if the house be erected accordingly, the purchaser cannot obstruct (*Russell* v. *Watts*, 10 App. Cas. 602).

simultaneous sale of land and house.

Where a person owning a house with lights looking over adjoining land and also owning such land, at the same time sells the house to A and the land to B, both purchasers being aware of the simultaneous conveyances, B cannot obstruct the lights of A (*Allen* v. *Taylor*, 16 Ch. D. 355; see *Rigby* v. *Bennett*, 21 Ch. D. 567; *Compton* v. *Richards*, 1 Price, 27; *Swansborough* v. *Coventry*, 9 Bing. 305). The same principle was applied to the devise in a will of the house to A, and the adjoining land to B (*Phillips* v. *Low*, [1892] 1 Ch. 47; *Barnes* v. *Loach*, 4 Q. B. D. 494); and to successive mortgages of plots of land comprised in one building scheme, the mortgagees having notice of the scheme (*Russell* v. *Watts*, 10 App. Cas. 590).

Nature of the right to light acquired by grant express or implied.

As to the nature of the right to light acquired by express grant, it is clear that a special right to light may be created by express covenant or grant, in which case an injunction would be granted without regard to damage (*Leech* v. *Schweder*, 9 Ch. 474). It is a question of the construction of the deed, which may be controlled by a collateral agreement (*Salaman* v. *Glover*, 20 Eq. 444). Or, again, a restrictive covenant may cease to be applicable according to the intent and spirit of the contract (*Bedford* v. *British Museum*, 2 M. & K. 552). A grant of "lights" among the general words of a deed carries nothing but a right similar to the ordinary right acquired by prescriptive user (*Leech* v. *Schweder*, 9 Ch. 473. As to the nature of this prescriptive right, see below). And the ordinary covenant for quiet enjoyment does not enlarge such grantee's rights (*ibid.*; see *Potts* v. *Smith*, 6 Eq. 311). As regards implied grants, the grant usually implied on a disposition by the owner of two tenements carries nothing but a right similar to the ordinary right acquired by prescriptive user (*Leech* v. *Schweder*, 9 Ch. 472). In the case of leases the Court has protected special light required for the business of a diamond merchant so described in the lease (*Herz* v. *Union Bank*, 2 Giff. 686), but not special light required for a business (that of a woolbroker) not immediately contemplated at the date of the lease (*Corbett* v. *Jonas*, [1892] 3 Ch. 137).

(3) Prescriptive right to light.

Mode of acquisition.

A prescriptive right to light may be acquired by user. Before the Prescription Act, 1832, the modes of acquiring by user the easement of light were (1) by prescription at common law, (2) by presuming a lost grant. The Act has provided an additional mode, but the former modes still exist (*Aynsley* v. *Glover*, 10 Ch. 283; *Gardner* v. *Hodgson's Co.*, [1903] A. C. 238). As to the method of claiming light under the Act, see the note to sect. 3 (*ante*, p. 11); as to the method of claim by prescription at common law or lost grant, see the note, *ante*, p. 24. The old doctrine of acquiring light by common law prescription was stated in *Moore* v. *Rawson*,

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3 B. & C. 340; and was discussed in *Cross* v. *Lewis*, 2 B. & C. 686; *Darwin* v. *Upton*, 2 Wms. Saund. 507.

The acquisition by user of a prescriptive right may be prevented by the servient owner erecting a hoarding during the period of enjoyment. Such a hoarding may be erected by a railway company (*Bonner* v. *G. W. Ry. Co.*, 24 Ch. D. 1; *Foster* v. *L. C. D. Ry.*, [1895] 1 Q. B. 718, 723; see *Myers* v. *Catterson*, 43 Ch. D. 470), or by a local authority (*Paddington* v. *Att.-Gen.*, [1906] A. C. 1).

Nature of prescriptive right to light acquired by user.

The nature of the prescriptive right to light acquired by user has been considered in the House of Lords, where it was laid down that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, shop or other place of business (*Colls* v. *Home Stores*, [1904] A. C. 208, 204). The test of the right according to the House of Lords is whether the obstruction complained of is a nuisance ([1904] A. C. 185, 204, 210). In considering the question whether a case of nuisance is established, regard may, it seems, be had not only to the present use of his light by the plaintiff, but also to any ordinary uses to which the tenement is adapted ([1904] A. C. 202, 211; see the rulings as to possible future user in *Moore* v. *Hall*, 3 Q. B. D. 183; *Dicker* v. *Popham*, 63 L. T. 379). Whether in dealing with this question the Court can have regard to the previous condition of the premises and compare the present with the past, see the judgments in *Higgins* v. *Betts*, [1905] 2 Ch. 210; *Kine* v. *Jolly*, [1905] 1 Ch. 480, [1907] A. C. 1; and see *Paul* v. *Robson*, 83 L. J. P. C. 304. The direction from which the light comes may be altered if the *quantum* is not diminished (*Davis* v. *Marrable*, [1913] 2 Ch. 421).

The nature of the prescriptive right to light acquired by user was not altered by the Prescription Act, which was only concerned with the conditions or length of user (*Colls* v. *Home Stores*, [1904] A. C. 183, 199). The nature of the right to light is the same whether it be claimed by prescription at common law, or under the statute (*ibid.*), or by lost grant (*Leech* v. *Schweder*, 9 Ch. 463), or by grant implied on a disposition by the owner of the two tenements (*ibid.*).

The nature of the prescriptive right to light enjoyed in respect of a building may differ according as the building is situate in town or country (*Colls* v. *Home Stores*, [1904] A. C. 183, 185). In the case of nuisances other than obstructions to light the question varies with locality (*Rushmer* v. *Polsue*, [1906] 1 Ch. 250; [1907] A. C. 123).

Light for special purpose.

As to acquiring by user a prescriptive right to an extraordinary amount of light for a special purpose, it has (since the decision in *Colls* v. *Home Stores*) been held that such a right cannot be acquired by twenty years' enjoyment, even where the owner of the servient tenement was aware of the enjoyment (*Ambler* v. *Gordon*, [1905] 1 K. B. 417). Before *Colls* v. *Home Stores* the question of special light had been considered in many cases; see *Mackey* v. *Scottish Widows Co.*, I. R. 11 Eq. 541 (a seed merchant); *Cartwright* v. *Last* (1876), W. N. 60 (a dentist); *Theed* v. *Debenham*, 2 Ch. D. 165 (a sculptor); *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282 (a photographer); *Warren* v. *Brown*, [1902] 1 K. B. 15 (a hosier). See also on this question *Moore* v. *Hall* (3 Q. B. D. 178); *Att.-Gen.* v. *Queen Anne's Co.*, 60 L. T. 761; *Lazarus* v. *Artistic Co.*, [1897] 2 Ch. 214.

Rule of 45°.

As to the rule sometimes suggested that a person who has 45 degrees of light left to him cannot complain, it was said by Lord Lindley, "There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he

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cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window (*Theed* v. *Debenham*, 2 Ch. D. 165). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well." Cotton, L.J., pointed this out in *Eccl. Commrs.* v. *Kino* (14 Ch. D. 228); see also *Parker* v. *First Avenue Hotel Co.* (24 Ch. D. 282); *Colls* v. *Home Stores*, [1904] A. C. 210. The decision in the latter case has not abrogated the jurisdiction of the Court to entertain actions *quia timet* in cases of obstruction of ancient lights (*Litchfield-Speer* v. *Queen Anne's Gate Syndicate*, [1919] 1 Ch. 407).

(4) Alterations of ancient lights.

The owner of an ancient light may pull down the building with a view to restoration without interfering with his right to light (*Eccl. Commrs.* v. *Kino*, 14 Ch. D. 213); and may change the purpose for which the building is to be used (*Scott* v. *Pape*, 31 Ch. D. 569). Such an owner may also make alterations in the framework and glazing of his windows without losing his right (*Turner* v. *Spooner*, 1 Dr. & Sm. 467). With regard to an alteration in the plane of the window it has been laid down by the C. A. that no such alteration will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the new building the same or a substantial part of the same light which passed through the old apertures into the old building (*Scott* v. *Pape*, 31 Ch. D. 554; see *Newson* v. *Pender*, 27 Ch. D. 71; *National Co.* v. *Prudential Co.*, 6 Ch. D. 757; *Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; *Barnes* v. *Loach*, 4 Q. B. D. 494; *Bullers* v. *Dickinson*, 29 Ch. D. 155). Reference may also be made to some older cases in which a plaintiff who obscured the light and air to his own dwelling but left a substantial part unaffected was held not to be thereby disentitled to an injunction (*Arcedeckne* v. *Kelk*, 2 Giff. 683; *Staight* v. *Burn*, 5 Ch. 163; *Bourke* v. *Alexandra Co.* (1877), W. N. 30; see also *Dyers' Co.* v. *King*, 9 Eq. 438).

The above decisions were before *Colls* v. *Home Stores*, where *Scott* v. *Pape* was criticised. But since *Colls* v. *Home Stores* the main decision in *Scott* v. *Pape* has been followed by Neville, J., who has laid down that in the case of an alteration of the dominant tenement, the preservation of the right to light depends on identity of light, not on identity of aperture (*Andrews* v. *Waite*, [1907] 2 Ch. 500; a case in which the alterations were made during the currency of the statutory period). The rule, however, laid down in *Colls* v. *Home Stores*, that the plaintiff must prove a nuisance renders the proof of his case (where the dominant tenement has been altered) a matter of difficulty, having regard to the necessity of showing that what is a nuisance under present conditions would have been a nuisance under former conditions (*Andrews* v. *Waite*, [1907] 2 Ch. 510). This difficulty proved fatal to a plaintiff since *Colls* v. *Home Stores* (*Ankerson* v. *Connelly*, [1907] 1 Ch. 678, applied in *Bailey* v. *Holborn and Frascati*, [1914] 1 Ch. 598, where it was held that the acquiescence of the owner of the dominant tenement in the abstraction of light did not entirely negative his right to the light over other adjoining property in respect of the same openings, though he could not prevent the erection on that other property of a building which he could not have prevented had he not assented to the prior abstraction of light. See also the older case of *Raper* v. *Fortescue* (1886), W. N. 78).

In the case of an alteration, accurate evidence as to the position, &c., of the old lights should be preserved (*Fowlers* v. *Walker*, 42 L. T. 356; 51 L. J. Ch. 443; *Scott* v. *Pape*, 31 Ch. D. 554; see *Pendarves*

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v. *Monro*, [1892] 1 Ch. 611). But evidence of the owner's intention to preserve ancient lights is not necessary (*Smith* v. *Baxter*, [1900] 2 Ch. 138).

Where there is an ancient light and other lights are added, and an obstruction is raised against the added lights, which from their position cannot be obstructed without also obstructing the ancient light, the House of Lords, overruling older cases, decided that such obstruction is illegal (*Tapling* v. *Jones*, 11 H. L. C. 290; see *Frechette* v. *La Compagnie*, 9 App. Cas. 185).

(5) Effect of unity of ownership.

Where the easement of light has been acquired, and the ownership of the dominant and servient tenements subsequently becomes united for different estates, the union does not extinguish the easement, but suspends it: upon a severance of the ownership the easement revives (*Simper* v. *Foley*, 2 J. & H. 555).

(6) Abandonment of right.

The abandonment of an easement is a question of intention to be decided on the facts of each case (*Crossley* v. *Lightowler*, 2 Ch. 482; *James* v. *Stevenson*, [1893] A. C. 167; *Swan* v. *Sinclair*, [1925] A. C. 227). Certain acts will clearly amount to abandonment of light, *e.g.*, shutting up windows with bricks and mortar for above twenty years (*Lawrence* v. *Obee*, 3 Camp. 514). And it was said that if a man pulls down his house and does not use the site for two or three years or converts it into tillage, he may be taken to have abandoned his right (*Moore* v. *Rawson*, 3 B. & C. 341). As to the *onus* of proof, see on the one hand the opinion of Abbott, C.J., that the burden of proving an intention of resuming the use of light lies on the party who has discontinued it (*ibid.*). See, on the other hand, the opinion of Stirling, J., that in the case of rebuilding, evidence on the part of the owner of his intention to preserve ancient lights is unnecessary (*Smith* v. *Baxter*, [1900] 2 Ch. 142). In general it seems clear that the mere pulling down of a building does not destroy the right (*Eccl. Commrs.* v. *Kino*, 14 Ch. D. 223), and the necessity of proving an intention to abandon has been insisted on (*Greenwood* v. *Hornsey*, 33 Ch. D. 471). Supposing the owner of a dominant tenement to have communicated to the owner of the servient tenement an intention to abandon the right, it was doubted in one case whether such a communication would destroy the right until it was acted upon by the servient owner (*Stokoe* v. *Singers*, 8 E. & B. 37; see *Moore* v. *Rawson*, *supra*; *Cook* v. *Bath*, 6 Eq. 179).

(7) Remedies for disturbance of right to light.

Abatement.

As a general rule, a person who is injured by a private nuisance may abate it (Jenk. Cent. 260, Cent. 6, Case 57; *Penruddock's Case*, 5 Rep. 100 b); but no more of a house which is erected as a nuisance can be pulled down than is necessary to abate such nuisance (*James* v. *Hayward*, 1 W. Jones, 221, 222). If a person builds a house so near that of another that it stops his lights, the person injured may enter upon the owner's soil and pull the house down (*R.* v. *Rosewell*, 2 Salk. 459; *Lane* v. *Capsey*, [1891] 3 Ch. 411; see *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Thompson* v. *Eastwood*, 8 Exch. 69). As to the necessity of giving notice before abatement, see *Lemmon* v. *Webb*, [1894] 3 Ch. 13.

Action: by whom actions may be brought;

When a party has acquired a right to light, an action lies for obstructing it (*Aldred's Case*, 9 Rep. 58; *Bury* v. *Pope*, 1 Leon. 168). A reversioner may sue (*Shadwell* v. *Hutchinson*, 2 B. & Ad. 97). The ground upon which a reversioner is allowed to sue is, that if the obstruction were acquiesced in it would become evidence of abandonment (*Bower* v. *Hill*, 1 Bing. N. C. 555; see 1 Wms. Saund. 346 b, n.; *Raine* v. *Alderson*, 4 Bing. N. C. 702). If anything be done to destroy

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the evidence of title, an action is maintainable by the reversioner (*Young* v. *Spencer*, 10 B. & C. 145; *Jesser* v. *Gifford*, 4 Burr. 2141; see *Metrop. Assoc.* v. *Petch*, 5 C. B. (N.S.) 504). And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery (*Shadwell* v. *Hutchinson*, 2 B. & Ad. 97).

The Court will restrain the interference with ancient lights, although the plaintiff does not occupy or intend to occupy the house interfered with (*Wilson* v. *Townend*, 1 Dr. & Sm. 324). A tenant from year to year may obtain an injunction (*Simper* v. *Foley*, 2 J. & H. 555; compare *Inchbald* v. *Robinson*, 4 Ch. 395); but the injunction will be limited to his tenancy (*Simper* v. *Foley*, *supra*). A tenant from year to year under notice to quit may apply (*Jacomb* v. *Knight*, 11 W. R. 812). And a tenant whose lease had expired, but who had agreed for a renewal (*Gale* v. *Abbott*, 10 W. R. 748). But where a tenant under an agreement for a lease sued to restrain his lessor from obstructing ancient lights, but did not ask to have the agreement specifically performed, an injunction was refused (*Fox* v. *Purssell*, 3 Sm. & Giff. 242). An injunction will not be granted where the title to the property sought to be protected has not been accepted by the plaintiff (*Heath* v. *Maydew*, 13 W. R. 199). An executor can recover damages for an obstruction to the light of a house of his testatrix (*Jones* v. *Simes*, 43 Ch. D. 607).

against whom actions may be brought;

The owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights (*Thomlinson* v. *Brown*, Say. R. 215; see also 4 Burr. 2141; 3 Leon. 109). Such an action may be brought not only against the party who first erected the nuisance, but also against his lessee or assignee for continuing it (*Rosewell* v. *Prior*, 12 Mod. 635; *S. C.*, 2 Salk. 460; 1 Ld. Raym. 713; see also Carth. 456; 1 Keb. 994; *Clarke v. Midland G. W. Ry.*, [1895] 2 I. R. 294); but after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given (12 Mod. 640; Carth. 455) unless there is a continuance of the nuisance. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen and the clerk who superintended the works are liable to an action (*Wilson* v. *Peto*, 6 B. Moore, 47). As to making occupiers defendants, see *White* v. *Jameson* (18 Eq. 303); *Broder* v. *Saillard* (2 Ch. D. 692). Under the Civil Procedure Act, 1833, s. 2, an action could be maintained against the executors of the person obstructing (*Jenks* v. *Clifden*, [1897] 1 Ch. 694). See now the Administration of Estates Act, 1925, s. 26, *post*.

corporations.

Compensation can be recovered, under the L. C. C. Act, 1845, from corporations for diminution of light: *Eagle* v. *Charing Cross Ry. Co.*, L. R. 2 C. P. 638; *Badham* v. *Marris*, 45 L. T. 579; *R.* v. *Poulter*, 20 Q. B. D. 132; see *Re Harvey and London Council*, [1909] 1 Ch. 528 (as to compensation for inchoate rights to light, see *Barlow* v. *Ross*, 24 Q. B. D. 381; *Re London, Tilbury &c., Ry. Co., ibid.* 326). Injunctions against corporations were accordingly refused (*Clark* v. *London Board*, 9 Ch. 120; *Bedford* v. *Dawson*, 20 Eq. 353; *Wigram* v. *Fryer*, 36 Ch. D. 87; see *London Board* v. *Smith*, [1895] W. N. 37). On the construction of an Act a company was held liable in damages for obstructing light, the plaintiff not being bound to come in under the compensation clause (*Turner* v. *Sheffield, &c., Ry. Co.*, 10 M. & W. 425).

Form of relief.

Damages or injunction.

As to the form of relief in an action for obstructing light, the question whether the Court shall grant damages or an injunction is a matter for judicial discretion: *Colls* v. *Home Stores*, [1904] A. C. 192, where Lord Macnaghten laid down the rule as follows: "In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money; if the defendant has

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acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff, or to evade the jurisdiction of the court. . . . But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

21 & 22 Vict. c. 27.

Before *Colls* v. *Home Stores*, the form of relief, depending as it did largely on 21 & 22 Vict. c. 27, had been discussed in many cases, the effect of which was stated in *Cowper* v. *Laidler*, [1903] 2 Ch. 339, as follows: The Act gives jurisdiction to substitute damages for an injunction (1) where the plaintiff asks for a mandatory injunction, or (2) for an injunction to restrain a continuing nuisance. But (3) where an injunction is asked to restrain a threatened injury, the jurisdiction was doubtful (*Martin* v. *Price*, [1894] 1 Ch. 376; *Dreyfus* v. *Peruvian Co.*, 43 Ch. D. 316). But it has been decided by the House of Lords that the Court can award damages in lieu of an injunction in cases in which an injury is threatened (*Leeds Industrial Society* v. *Slack*, [1924] A. C. 851). The cases before *Colls* v. *Home Stores* also laid down the following principles as to the form of relief. When a legal right has been established the plaintiff is *prima facie* entitled to an injunction (*Martin* v. *Price*, [1894] 1 Ch. 285; *Shelfer* v. *City of London Co.*, [1895] 1 Ch. 287; *Jordeson* v. *Sutton Co.*, [1899] 2 Ch. 217; see *Cowper* v. *Laidler*, [1903] 2 Ch. 341). And in cases of continuing actionable nuisance the jurisdiction to award damages ought only to be exercised under very exceptionable circumstances (*Shelfer* v. *City of London Co.*, [1895] 1 Ch. 316). Damages may be given in substitution for an injunction where the following requirements exist, *viz.*, where the injury to the plaintiff's legal right (1) is small, (2) capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*ibid.* 322). And the conduct of the parties may make damages the more appropriate remedy (*ibid.*; *Senior* v. *Pawson*, 3 Eq. 330). The rules laid down in *Shelfer* v. *City of London Co.* are unaffected by *Colls* v. *Home Stores* (*Slack* v. *Leeds Industrial Society*, [1924] 2 Ch. 475). As to the measure of damages, see *Griffith* v. *Clay*, [1912] 2 Ch. 291.

Form of prohibitory injunction.

Where a prohibitory injunction is granted, the proper form of it was suggested by Lord Macnaghten in *Colls* v. *Home Stores*, [1904] A. C. 194. And this form has since been adapted by the Court to varying circumstances (*Higgins* v. *Betts*, [1905] 2 Ch. 218; *Anderson* v. *Francis*, [1906] W. N. 160; *Andrews* v. *Waite*, [1907] 2 Ch. 510).

Mandatory injunction.

An injunction may also be granted in mandatory form ordering the pulling down of anything erected after the commencement of an action, or after notice given to the defendant that his erecting it will be objected to (*Smith* v. *Day*, 13 Ch. D. 651; *Kelk* v. *Pearson*, 6 Ch. 809), even where the erection was completed before writ issued (*Lawrence* v. *Horton*, 62 L. T. 749), and may be granted on interlocutory application (*Daniel* v. *Ferguson*, [1891] 2 Ch. 27; *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774). An undertaking in such a case is not essential (*Smith* v. *Day*, *supra*; *Mackey* v. *Scottish Widows*, I. R. 10 Eq. 113). On the question of granting such an injunction it is important to see if the defendant knew he was doing wrong (*Smith* v. *Smith*, 20 Eq. 503—505). But there must be no acquiescence on the part of the plaintiff (*Gaskin* v. *Balls*, 13 Ch. D. 324; *Baxter* v. *Bower*, 23 W. R.

805). In form a mandatory injunction should in direct words order the building to be pulled down (*Jackson* v. *Normanby Co.*, [1899] 1 Ch. 438). See also *Puddephatt* v. *Leith*, [1916] 1 Ch. 200. Rights to Light.

An injunction may be granted on an interlocutory application. As to the considerations of convenience and otherwise affecting this, see *Newson* v. *Pender*, 27 Ch. D. 43. On such injunction the plaintiff should in general give an undertaking as to damages (*Graham* v. *Campbell*, 7 Ch. D. 494), on which the defendant may obtain an inquiry even where the plaintiff has been guilty of no default in obtaining the injunction (*Griffith* v. *Blake*, 27 Ch. D. 474; see *Smith* v. *Day*, 21 Ch. D. 421). A cross undertaking by the plaintiff must also be given where the defendant gives an undertaking in lieu of an injunction (*Practice note*, [1904] W. N. 208). As to the effect of the plaintiff's undertaking where the action is subsequently dismissed, see remarks of Jessel, M.R. (Memorandum (1879), W. N. 74). Interlocutory injunction.

In *Leech* v. *Schweder* (22 W. R. 292), Jessel, M.R., gave reasons for refusing to inspect, as a judge, an alleged obstruction to light (see also *Jackson* v. *Newcastle*, 3 D. J. & S. 275). At the trial a surveyor was appointed to report (*Leech* v. *Schweder*, 9 Ch. 463; *Kelk* v. *Pearson*, 6 Ch. 810; *Cartwright* v. *Last* (1876), W. N. 60); but the appointment before trial was refused in *Stokes* v. *City Offices* (13 W. R. 537); *Baltic Co.* v. *Simpson* (24 W. R. 390). Lord Macnaghten approved the Court's calling in a competent adviser to report (*Colls* v. *Home Stores*, [1904] A. C. 192). See now R. S. C., Ord. 50, rr. 3, 4; Ord. 55, r. 19. Inspection by judge; report by surveyor;

In *Dann* v. *Spurrier* (7 Ves. 235), the Court laid down the doctrine that it will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title. This doctrine was applied in the case of an obstruction to light in *Cotching* v. *Bassett*, 32 Beav. 101. A plea of acquiescence was a good defence to an action for damages for obstruction of light (*Davies* v. *Marshall*, 10 C. B. (N.S.) 697). An injunction to restrain the obstruction of ancient lights was refused on the ground of delay (*Cooper* v. *Hubbuck*, 30 Beav. 160; *Cocks* v. *Romaine*, 14 L. T. 390). As to the difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction, see *Johnson* v. *Wyatt*, 2 D. J. & S. 18; *Turner* v. *Mirfield*, 34 Beav. 390. Where the plaintiff had submitted for six years to interference with an ancient light, an injunction was refused (*Gaunt* v. *Fynney*, 8 Ch. 8). Acquiescence and delay.

(8)

The law does not recognise any easement of prospect or privacy (*Browne* v. *Flower*, [1911] 1 Ch. 219). The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window (*Chandler* v. *Thompson*, 3 Camp. 80; see 9 Rep. 58 b; *Cotterell* v. *Griffiths*, 4 Esp. N. P. C. 69; *Turner* v. *Spooner*, 1 Dr. & Sm. 467; *Re Penny and South Eastern Ry. Co.*, 7 Ell. & Bl. 660; *Tapling* v. *Jones*, 11 H. L. C. 290; compare *Roberts* v. *Macord*, 1 M. & Rob. 230; *Potts* v. *Smith*, 6 Eq. 311). But a covenant for the protection of privacy was enforced (*Manners* v. *Johnson*, 1 Ch. D. 673). An injunction was refused where the application proceeded on a particular right to a long enjoyment of a prospect (*Att.-Gen.* v. *Doughty*, 2 Ves. sen. 453; see *Squire* v. *Campbell*, 1 M. & C. 459; *Dalton* v. *Angus*, 6 A. C. 824). So the building of a wall which merely intercepts the prospect of another, without obstructing his lights, is not actionable (*Knowles* v. *Richardson*, 1 Mod. 55; 2 Keb. 611, 642). A covenant, however, not to obstruct a prospect will be enforced in equity (*Piggott* v. *Stratton*, 1 D. F. & J. 33; *Western* v. *Macdermott*, 2 Ch. 72; compare *Murray* v. *Dunn*, [1907] A. C. 283). Privacy. Prospect.

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The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business (*Smith* v. *Owen*, 35 L. J. Ch. 317; *Butt* v. *Imperial Gas Co.*, 2 Ch. 158).

View of shop window.

IX.—Of Rights in Regard to Air, and of Nuisances.

Rights with regard to air.

As regards a general right to the access of air passing over the unlimited surface of neighbouring land, it was held that this could not be acquired by prescription either where the claim was for such access of air to a windmill (*Webb* v. *Bird*, 10 C. B. (N.S.) 263; 13 C. B. (N.S.) 841), or to the chimneys of a building (*Bryant* v. *Lefever*, 4 C. P. D. 172, 180), or to a structure for storing timber (*Harris* v. *De Pinna*, 33 Ch. D. 250, 259). But a right to the access of air to a defined aperture in a building can be claimed by prescription, not only where such access is claimed through a defined channel over the servient tenement (*Bass* v. *Gregory*, 25 Q. B. D. 481), but also, it seems, where there is no such defined channel (*Cable* v. *Bryant*, [1908] 1 Ch. 264; *Aldred's Case*, 9 Co. 58; *Gale* v. *Abbot*, 10 W. R. 748; *Dent* v. *Auction Mart Co.*, 2 Eq. 252; *Chastey* v. *Ackland*, [1895] 2 Ch. 400; [1897] A. C. 155).

As regards a claim under the Prescription Act to the access of air, it is clear that the claim made in that method cannot succeed where the access cannot be interrupted by the owner of the servient tenement (*Webb* v. *Bird*, *supra*; *Bryant* v. *Lefever*, *supra*; *Harris* v. *De Pinna*, *supra*). But where such access could be interrupted, it might, it seems, be an easement within sect. 2 (*Simpson* v. *Godmanchester*, [1897] A. C. 709; *Dalton* v. *Angus*, 6 A. C. 798).

A covenant not to intercept the access of air sufficient for the purposes of a slaughter-house was implied from thirty years' user (*Hall* v. *Lichfield Co.*, 43 L. T. 380). When land is expressly granted for a particular purpose the grantor cannot interrupt air so as to interfere with that purpose (*Aldin* v. *Latimer*, [1894] 2 Ch. 437; *Tebb* v. *Cave*, [1900] 1 Ch. 642). But the Court will only interfere in special cases (*City of London Brewery* v. *Tennant*, 9 Ch. 221; *Baxter* v. *Bower*, 33 L. T. 41).

Remedies for pollution of air, at law and in equity.

An action will lie for pollution of air (*St. Helens Co.* v. *Tipping*, 11 H. L. C. 642). And the pollution will be restrained (*Tipping* v. *St. Helens Co.*, 1 Ch. 66; *Crump* v. *Lambert*, 3 Eq. 409; see *Swaine* v. *G. N. Ry. Co.*, 12 W. R. 391). There may be a difference between town and country (*Colls* v. *Home Stores*, [1904] A. C. 183, 185). The owner of a house has a right at common law to untainted air, unless the business which creates a nuisance has been carried on for such a time as will raise a presumption of grant from neighbouring owners (*Elliottson* v. *Feetham*, 2 Bing. N. C. 134). Nothing less than a user of twenty years will afford such presumption (*Bliss* v. *Hall*, 5 Scott, 500; *Crump* v. *Lambert*, 3 Eq. 413; *Flight* v. *Thomas*, 10 Ad. & El. 590). There can be no prescription, however, to justify a public nuisance (*Att.-Gen.* v. *Barnsley* (1874), W. N. 37).

Nuisance.

What constitutes a private nuisance was thus defined by Knight-Bruce, V.-C.: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" (*Walter*

v. *Selfe*, 4 De G. & Sm. 322, adopted in *Soltau* v. *De Held*, 2 Sim. (N.S.) 133; *Crump* v. *Lambert*, 3 Eq. 413; *Bellamy* v. *Wells*, 63 L. T. 635; *Fleming* v. *Hislop*, 11 A. C. 691; see *Bosworth-Smith* v. *Gwynnes*, 89 L. J. Ch. 368). What would be a nuisance in one locality might not be so in another (*Rushmer* v. *Polsue*, [1906] 1 Ch. 250). See as to how far permission to carry on a business authorises a nuisance, *Pwllbach Colliery Co.* v. *Woodman*, [1915] A. C. 634.

Where a man, by burning bricks, causes so much annoyance to a neighbouring tenement, as to amount *prima facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land (*Bamford* v. *Turnley*, 3 B. & S. 66, overruling *Hole* v. *Barlow*, 4 C. B. (N.S.) 334). See *Shotts Iron Co.* v. *Inglis*, 7 App. Cas. 528; *Cavey* v. *Ledbitter*, 13 C. B. (N.S.) 470; *Luscombe* v. *Steer*, 15 W. R. 1191; and *St. Helens Co.* v. *Tipping*, 11 H. L. C. 642, where Lord Westbury distinguishes the cases where material injury is done to property, and those where personal discomfort is produced. As to the defence of reasonable user, see the views expressed on the one hand in *Broder* v. *Saillard*, 2 Ch. D. 692; *Reinhardt* v. *Mentasti*, 42 Ch. D. 68; and *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; and on the other hand in *Gaunt* v. *Fynney*, 8 Ch. 8; *Ball* v. *Ray*, *ibid.*, 467; and *Sanders Clark* v. *Grosvenor Mansions*, [1900] 2 Ch. 373. An injunction was granted to restrain brick burning (*Beardmore* v. *Tredwell*, 3 Giff. 683; *Walter* v. *Selfe*, 4 De G. & Sm. 315; *Boreham* v. *Hall* (1870), W. N. 57; *Roberts* v. *Clarke*, 18 L. T. 49); and the emission of noxious vapours (*Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 600). The fact of the plaintiff having come to the nuisance, does not disentitle him to relief (*Tipping* v. *St. Helens Co.*, 1 Ch. 66). As to how far the delicate nature of the plaintiff's trade can be taken into consideration, see *Cooke* v. *Forbes*, 5 Eq. 166; *Robinson* v. *Kilvert*, 41 Ch. D. 88. The plaintiff must prove damage, visible, substantial, and actual (*Salvin* v. *North Brancepeth Co.*, 9 Ch. 709). As to restraining alleged future nuisances, see *Rapley* v. *Smart*, [1894] W. N. 2; *Att.-Gen.* v. *Manchester*, [1893] 2 Ch. 87; *Att.-Gen.* v. *Nottingham*, [1904] 1 Ch. 673.

The right, however, to cause what would otherwise be a private nuisance may be acquired by prescription, *e.g.*, a right to pollute water (*Baxendale* v. *McMurray*, 2 Ch. 790; but see *Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 218); or air (*Crump* v. *Lambert*, 3 Eq. 413); or to annoy a neighbour by noise (*Sturges* v. *Bridgman*, 11 Ch. D. 863), or by discharging coal dust (*Royal Mail Co.* v. *George*, [1900] A. C. 480). But the nuisance must not be increased (*ibid.*).

Actions to restrain.

A weekly tenant can obtain an injunction (*Jones* v. *Chappell*, 20 Eq. 539), and tenants were added as co-plaintiffs by amendment at the trial (*House Property Co.* v. *H. P. Horsenail Co.*, 29 Ch. D. 190). As to joining as co-plaintiffs the occupiers of several houses affected by the nuisance, see *Truman* v. *L. B. & S. C. Ry. Co.*, 29 Ch. D. 89; *Umfreville* v. *Johnson*, 10 Ch. 580; *Hudson* v. *Maddison*, 12 Sim. 416. A reversioner can sue (*Shelfer* v. *City of London Electric Co.*, [1895] 1 Ch. 287; *Colwell* v. *St. Pancras*, [1904] 1 Ch. 707; *Jones* v. *Llanrwst*, [1911] 1 Ch. 393; but see *White* v. *London General Omnibus Co.*, 58 S. J. 339). As to liability of occupiers, see *White* v. *Jameson*, 18 Eq. 303; *Broder* v. *Saillard*, 2 Ch. D. 692.

The acts of two or more persons may, taken together, constitute such a nuisance that the Court in separate actions will restrain each of them from doing the acts constituting the nuisance, although the act of one taken alone would not amount to nuisance (*Lambton*

Of Rights to Air, and of Nuisances.

v. *Mellish*, [1894] 3 Ch. 163, where there were several actions; *Blair* v. *Deakin*, 57 L. T. 522, where there was one action against one such person).

Under the old practice such an injunction was granted in one action against several independent persons (*Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650). Whether under the present practice one action for an injunction can be maintained against several acting independently is doubtful (*Sadler* v. *G. W. Ry. Co.*, [1896] A. C. 450). But damages cannot be recovered in one action against separate tortfeasors (*ibid.*).

Acquiescence

Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage (*Bankart* v. *Houghton*, 27 Beav. 425). See also, as to the effect of acquiescence in such a case, *Williams* v. *Jersey*, Cr. & Phil. 91; *Savile* v. *Kilner*, 26 L. T. 276; *Sanders* v. *Manley* (1878), W. N. 181.

Where a nuisance ceases after writ, but before trial, an injunction may still be granted (*Chester Chapter* v. *Smelting Corporation*, [1901] W. N. 179; 85 L. T. 67; correcting *Dunning* v. *Grosvenor Dairies*, [1900] W. N. 265).

LIMITATION OF ACTIONS.

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I.—Limitation of Time for the Recovery of Land or Rent.

The Real Property Limitation Act, 1833.

3 & 4 Will. IV. c. 27, ss. 1—39, 43, 44.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]

1. *Interpretation clause, s.* 1, *p.* 132.
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10. *Receipt of rent deemed receipt of profits, s.* 35, *p.* 211.
11. *Abolition of real and mixed actions, &c., ss.* 36—39, *p.* 211.
12. *Limits of act, ss.* 43, 44, *p.* 213.

1.—*Interpretation Clause.*

3 & 4 Will. 4, c. 27, s. 1.

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (*c*) (other than tithes belonging to a spiritual or eleemosynary corporation sole) (*d*), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest (*e*), and whether freehold or copyhold, or held according to any other tenure; and the word "rent" (*f*) shall extend to all heriots (*g*), and to all services and suits for which a distress may be made (*h*), and to all annuities and periodical sums of money charged upon or payable out of any land (*i*) (except moduses or compositions (*k*) belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom, the person so claiming became

Meaning of the words in the Act.

"Land."

"Rent."

Person through whom another claims.

entitled to the estate or interest claimed, as heir, issue in tail (*l*), tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee (*m*), devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*n*); and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual (*o*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

3 & 4 Will. 4, c. 27, s. 1.

"Person."

Number and gender.

(1) *Construction of Statutes of Limitation generally*...133.
(2) *Meaning of the word "Land"*...133.
(3) *Meaning of the word "Rent," and of Rents generally*...136.
(4) *Meaning of "Person through whom another claims"*...142.
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(6) *Claims by and against the Crown, and of Presumption of Grants by the Crown, of Enrolments, and of Statutes*...143.

(1) Construction of statutes of limitation generally.

The object of all statutes of limitation is to prevent claims at great distances of time when evidences are lost (*Dundee* v. *Dougall*, 1 Macq. H. L. C. 321). These statutes all rest upon the principle that persons who have at some anterior time been rightfully entitled to land or other property have by neglect on their part to assert their rights slept upon them so long as to render it inequitable that they should disturb an enjoyment to which they have been tacit parties, (*Adnam* v. *Sandwich*, 2 Q. B. D. 489). These statutes being all in *pari materia* ought to receive an uniform construction notwithstanding variation in phrase, the object being the same (*Murray* v. *East India Co.*, 5 B. & Ald. 215). Being statutes of repose, they are to be liberally and beneficially expounded (*Tolson* v. *Kaye*, 6 Moore, 558; 3 Bro. & B. 217; compare *Roddam* v. *Morley*, 1 D. G. & J. 23). See the maxims "*Interest reipublicæ ut sit finis litium*" and "*Vigilantibus non dormientibus jura subveniunt*" (Broom's Legal Maxims, 7th ed. 672). Sect. 12 of the Law of Property Act, 1925, *post*, provides that nothing in Part I. of that Act affects the law of limitation of actions or proceedings relating to land. For the application of the Limitation Acts to registered land see sect. 75 of the Land Registration Act, 1925, *post*.

(2) "Land," meaning of word.

(*a*) "Land" refers to specific land, and did not include a right to have dower assigned, or land partitioned (*Williams* v. *Thomas*, [1909] 1 Ch. 726). Turnpike tolls are not within "land" (*Mellish* v. *Brooks*, 3 Beav. 22). Nor is an advowson in gross (*Brooks* v. *Muckleston*, [1909] 2 Ch. 519). Land extends under sect. 1 to corporeal hereditaments and also to any share, estate or interest in them. Where land was devised on trust for sale and a beneficiary mortgaged his interest under the will, the property for the purpose of the mortgage was regarded as land within this statute (*Kirkland* v. *Peatfield*, [1903] 1 K. B. 756; *Re Hazeldine*, [1908] 1 Ch. 34; *Re Fox*, [1913] 2 Ch. 75). See further as to this question, the argument in *Re Lloyd, L.* v. *L.*, [1903] 1 Ch. 389, 395; the decisions on the words of sects. 40 and 42, *post*, "money payable out of land," in *Bowyer* v.

Land given on trust for sale.

3 & 4 Will. 4, c. 27, s. 1.

"LAND."

Woodman, 3 Eq. 313; *Mutlow* v. *Bigg*, 18 Eq. 246; and compare the cases collected under sect. 77 of the Fines and Recoveries Act, 1833, *post*, as to the meaning of "estate in lands"; the interpretation clause in the last-mentioned statute being wider.

Hereditaments.

(*b*) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed (Co. Litt. 6 a; 3 Rep. 2; Shep. Touch. 91). The word sometimes denotes not the quantum of interest in the subject-matter, but the subject-matter itself of an inheritance (*Tomkins* v. *Jones*, 22 Q. B. D. 602; *Moor* v. *Denn*, 2 Bos. & P. 247). There may be hereditaments entirely personal (*Re Christmas, Martin* v. *Lacon*, 33 Ch. D. 338). In a will the word has been held to include money held in trust for investment in land (*Re Gosselin, G.* v. *G.*, [1906] 1 Ch. 120). Hereditaments are usually divided into two classes: *corporeal*, consisting wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land (Co. Litt. 4; 2 Bl. Com. 17); and *incorporeal*, which are rights issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same (*ibid.* 20; see *Re Brotherton, B.* v. *B.*, [1907] W. N. 230). "Incorporeal hereditaments" include a dignity which descends to heirs, whether it does or does not concern land (*Re Rivett Carnac*, 30 Ch. D. 139; *Cowley* v. *Cowley*, [1900] P. 310), but did not include certain harbour dues (*Re Christmas, Martin* v. *Lacon*, *supra*). Many incorporeal hereditaments are not within this Act. Periods for the acquisition of several incorporeal rights are prescribed by the Prescription Act, 1832 (*ante*, pp. 1, 4, 11).

Tithes.

(*c*) The word "tithes" has an ambiguous meaning, signifying either the estate in the tithes or the chattel itself, the fruits of the estate. Tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) are included in the word "land," which in its proper sense applies only to cases in which there are two parties, each claiming an estate in the land adverse to each other. It has been held, that the statute does not prevent the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for twenty years, but that the operation of the statute is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. Therefore a person who has received no tithes for the statutory period cannot recover the possession of them from another, who has for the same period received those tithes from the terre-tenant (*Ely* v. *Cash*, 15 M. & W. 617; *Ely* v. *Bliss*, 2 D. M. & G. 459; see *Shannon* v. *Hodder*, 2 Ir. L. R. 223). The effect of time as between tithe-owner and occupier is determined by the Tithe Act, 1832 (see *Salkeld* v. *Johnston*, 1 Mac. & G. 242, where Lord Cottenham thought that under that Act the proof of the enjoyment of the discharge claimed for the prescribed time is a sufficient answer to a demand for tithes: see *S. C.*, 2 Ex. 256; 2 C. B. 749). The cases on that Act are collected, Shelford, Tithes, 391, 3rd ed., and Supplement, 47, see Leach's Tithe Acts, 6th ed.

As regards payments for tithe imposed in London by 37 Hen. 8, c. 12, an action for their recovery was brought by a lay impropriator, and the defendant pleaded the Tithe Act, 1832. Held by House of Lords, affirming the C. A. (52 L. T. 532), who had reversed Kay, J. (*ibid.* 530), that these payments were not within that Act, which only applies to tithes in kind (*Payne* v. *Esdaile*, 13 App. Cas. 613). The defence of non-payment apart from statute was also held bad in H. L. (*ibid.*), affirming Kay, J. (53 L. T. 21). Lastly, the defendant relied on the Real Property Limitation Act, 1833, which the C. A. held did not apply (54 L. T. 705). This was reversed by H. L., who held that these payments fell within the words "periodical sums of money charged upon land" (*Payne* v. *Esdaile*, 13 App. Cas. 613).

Tithes, moduses or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of the present Act. The time for recovering lands belonging to such a corporation is prescribed by sect. 29, *post*, p. 204. 3 & 4 Will. 4, c. 27, s. 1.

"Land."

Tithe rent-charge not belonging to a spiritual or eleemosynary corporation sole is "rent" within sect. 2, and the right thereto will be extinguished by non-payment for the statutory period (*Irish Commission* v. *Grant*, 10 App. Cas. 14; *Irish Commission* v. *Ryan*, [1900] 2 I. R. 565). Tithe rent-charge, belonging to a spiritual corporation sole, is not a "*modus* or composition" within sect. 1 but rent, and therefore falls within the general operation of the Act (*Asplen* v. *Pullin*, [1917] 1 K. B. 187). And the same was held as to a tithe rent-charge belonging to a spiritual corporation sole, and which arose under the Tithe Rent-charge (Ireland) Act, 1838 (*Irish Commission* v. *Grant*, *Irish Commission* v. *Ryan*, *supra*; see *Connolly* v. *Gorman*, [1898] 1 I. R. 20). Tithe rent-charge.

As to the recovery of arrears of tithes and tithe rent-charge, see note to sect. 42, *post*, p. 229. Arrears of tithes.

(*d*) Spiritual corporations are those of which not only the members composing it are spiritual persons, but of which the object of the institution is also spiritual, such as bishops, some deans, and prebendaries, all archdeacons, parsons, and vicars, which are *sole* corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate (Co. Litt. 150 a; 1 Bl. Com. 471; 1 Kyd on Corporations, 22). Corporations.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them to such persons as he has directed (1 Bl. Com. 471). These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal by which it acts, although it have not the *name* of a college (*per* Holt, Skinn. 484). There are many hospitals not incorporated in which the succession is kept up by trustees (10 Rep. 31, 35). There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne, under the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy" (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20). And such are many corporations of trustees or governors of free schools (see 1 Kyd on Corporations, 25—27). All these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons (1 Lord Raym. 6), and although they, in some things, partake of the nature, privileges and restrictions of ecclesiastical bodies (1 Bl. Com. 471). Each university of Oxford and Cambridge is a *lay* corporation and not eleemosynary, as particular colleges are, although some salaries are attached to some of their officers (*R.* v. *Cambridge*, 3 Burr. 1652; see Tudor's Charitable Trusts, 4th ed.).

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of

3 & 4 Will. 4, c. 27, s. 1.

a college, the master and brethren of a hospital, the dean and chapter of a cathedral church (10 Rep. 29 b; 11 Rep. 69 b).

"Land."

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the King is a corporation sole (Co. Litt. 43). So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar (10 Rep. 29 b; Wood's Inst. 109; 1 Bl. Com. 470; 1 Kyd on Corporations, 20). Corporations are as liable to the operation of prescription as private persons (*Dundee* v. *Dougall*, 1 Macq. H. L. C. 317). See also as to corporations, sects. 74, 180 and 181 of L. P. Act, 1925, *post*.

Meaning of the term "freehold."

(*e*) The term *freehold*, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel (Co. Litt. 43 b; 1 Burr. 108). An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person" (Watk. Conv. 63; 1 Prest. on Estates, 200—203; see 2 Jur. 459). All interests in land for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or days, are deemed *chattel* interests (1 Prest. Estates, 203), which may subsist in both corporeal and incorporeal hereditaments (Noy's Maxims, 142, 357; Bac. Abr. Executors (H. 3)). See now as to estates in land, sect. 1 of L. P. Act, 1925, *post*.

By the common law no estate of inheritance or freehold is comprehended under the word chattels. Chattels real are so-called, not as being real estate, but because they are extractions out of the real (*Ridout* v. *Pain*, 3 Atk. 492). They are real because they concern the realty, as terms for years of lands or tenements, wardships, the interest of tenant by statute-staple, by statute merchant, by elegit and such like (Co. Litt. 118 b). See as to estates by elegit, *Johns* v. *Pink*, [1900] 1 Ch. 296. So "chattels real" include the next presentation to a church (Dyer, 135 a), and a rent issuing out of land held for a term of years (*Re Fraser, Lowther* v. *F.*, [1904] 1 Ch. 115).

(3) "Rent." Payments within the definition of rent.

(*f*) The following have been held to fall within the definition of rent in sect. 1, *viz.*: Quit rents payable in respect of freeholds (*De Beauvoir* v. *Owen*, 5 Ex. 166), or in respect of copyholds (*Howitt* v. *Harrington*, [1893] 2 Ch. 497); rent-charges granted by deed (*Jones* v. *Withers*, 74 L. T. 572); the yearly sum payable under the Land Tax Act, 1802, s. 123, by way of interest on money paid for redeeming land tax (*Skene* v. *Cook*, [1901] 2 K. B. 7; [1902] 1 K. B. 682); annuities charged on land by will (*James* v. *Salter*, 3 Bing. N. C. 544), or by deed (*Hughes* v. *Coles*, 27 Ch. D. 231; overruled however in *Re Jordison, Raine* v. *J.*, [1922] 1 Ch. 440; see note to sect. 10 of R. P. Lim. Act, 1874, *post*, p. 242); annuities charged on real and personal estate by deed (*Re Nugent*, 19 L. R. Ir. 140); or by will (*Dower* v. *Dower*, 15 L. R. Ir. 275); payments for tithe imposed in London by 37 Hen. 8, c. 12 (*Payne* v. *Esdaile*, 13 App. Cas. 613); tithe rent-charge (*Irish Commission* v. *Grant*, 10 App. Cas. 31); certain services not involving pecuniary render (*Doe* v. *Benham*, 7 Q. B. 981). Rent in sect. 2 means rent of inheritance (*Ely* v. *Bliss*,

2 D. M. & G. 472). It was said in an early case that the word in sect. 2 was confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rent service, fee farm rents or the like (*Grant* v. *Ellis*, 9 M. & W. 122). In a later and wider interpretation, it was said that if by statute a periodical payment charged upon land is created, and is a property distinct from the land, though not real property, it is "rent" within sect. 2 (*Skene* v. *Cook*, [1901] 2 K. B. 14; [1902] 1 K. B. 682; a case where interest on money paid to redeem income tax had not been paid for twenty years). "Rent" in sect. 2 does not include ordinary interest upon a mortgage (*Skene* v. *Cook*, [1901] 2 K. B. 14) or a conventional rent reserved by a lease (*Irish Commission* v. *Grant*, 10 A. C. 26). But the words "arrears of rent" in sect. 42 do include such a reserved rent (*Archbold* v. *Scully*, 9 H. L. C. 375; see *Grant* v. *Ellis*, 9 M. & W. 120, 125). See generally as to the use of the word "rent" in the statute, *Doe* v. *Angell*, 9 Q. B. 328. And as to annuities see further, p. 141, *post*.

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

(*g*) Heriots are usually divided into two sorts, heriot service and heriot custom. Heriot service consists in the lord's right to seize the best beast or chattel of a tenant upon the tenant's death. It may arise from a tenure created before the Statute Quia Emptores; in which case heriot service becomes due upon the death of a tenant in fee. But it may, it seems, also be reserved on a lease for lives, or years determinable on lives, if such heriot be reserved payable during the term (*Lanyon* v. *Carne*, 2 Wms. Saund. 485). A right to heriot service could not, it seems, exist in the case of copyholds (*Western* v. *Bailey*, [1897] 1 Q. B. 86). Heriot *service* may be recovered either by seizure (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192), or by distress within the manor (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11). Any goods belonging to another, found upon the lands charged with heriot service, may be distrained (Bro. Har. 6; Cro. Car. 260; *Austin* v. *Bennet*, 1 Salk. 356).

Heriots: heriot service;

Heriot custom depends on immemorial usage (Co. Cop. s. 24). It consists in the lord's right to seize a certain chattel belonging to a tenant upon his death or upon alienation by him of land held of the manor (2 Watk. Cop. c. 6). Heriot custom was usually an incident of copyholds, but it might exist in the case of customary freeholds (*Damarell* v. *Protheroe*, 10 Q. B. 20; *Copestake* v. *Hoper*, [1908] 2 Ch. 10). It might be payable on the death or alienation of a tenant of an estate of inheritance or for life or years (Keilway, 80), or at will (*Hix* v. *Gardiner*, 2 Bulst. 195). Where there was a custom of a manor giving right to a heriot upon the death of a tenant solely "seised" of customary freeholds, and such a tenant executed a legal mortgage but remained in possession and died while in possession, he was not so "seised" as to entitle the lord to a heriot (*Copestake* v. *Hoper, supra*). The chattel which the lord could seize under heriot custom might consist of the best beast or the second best or other animal (Elton Cop. 200). Such beast might be seized outside the manor although it had never been within it (*Western* v. *Bailey*, [1897] 1 Q. B. 86). As the property of it vested immediately in the lord on the death or alienation of the tenant, the lord might seize the identical thing, though he could not distrain any other chattel for it (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker* v. *Gage*, 1 Show. 81). The property in any particular beast did not vest in the lord before selection of it (*Abington* v. *Lipscomb*, 1 Q. B. 776). See further, as to heriots, 2 Watk. Cop. c. 6; Cruise

heriot custom;

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

Dig. tit. X., c. 4, ss. 49—63; Com. Dig. Copyhold (K. 18), (K. 27); Scriven, Cop. 244, 7th ed.; Elton, 198, 2nd. ed; and as to compensation for their extinguishment on the abolition of copyhold and customary tenure, Part VI., and Sched. 13 of L. P. Act, 1922.

In a case of heriot service, a manor had been settled on A for life, remainder to B. In 1824 a heriot became due to A which was not paid. In 1847, B's remainder having fallen into possession, it was held that his right to seize another heriot was not barred by sects. 2 and 3, owing to the non-payment of the heriot in 1824 (*Chichester* v. *Hall*, 17 L. T. (o.s.) 121). In *Zouch* v. *Dalbiac* (L. R. 10 Ex. 172), a case of heriot custom, where it was admitted that more than twenty years before the heriot in question became due, a previous heriot had become due which the lord had not seized, the lord's right of seizure was not barred under this statute. Opinions were expressed that neither heriot custom nor heriot service were within sects. 2 and 3 (*ibid.*, 182); and that if rent did anywhere in the statute include heriots, it might be in sect. 42 (*ibid.*, 179). Bramwell, B., doubted whether it was the general intention of the statute to bar not merely the right to a particular heriot, but the title generally (*ibid.*, 180). See the relation of the statute to heriots discussed in *Owen* v. *De Beauvoir*, 16 M. & W. 566; *De Beauvoir* v. *Owen*, 5 Exch. 166; Darb. & Bos. Stat. Lim. 2nd ed. 280.

negligence in exacting fines and quit rents.

In the absence of evidence adverse to the lord, the Court would not presume enfranchisement of land shown to have been copyhold more than a century ago, from mere negligence by the lords in exacting small fines. It was said not to be a case to which any stat. lim. applied (*Turner* v. *West Bromwich*, 9 W. R. 155; *Chichester* v. *Hall*, 17 L. T. (o.s.) 121). See the enfranchisement presumed in *Re Lidiard*, 42 Ch. D. 254; *Ecc. Commrs.* v. *Parr*, [1894] 2 Q. B. 432. The lord's right to a single fine was barred in six years (*Monckton* v. *Payne*, [1899] 2 Q. B. 63), and his right to a copyhold quit rent as a whole was barred in twelve years (*Howitt* v. *Harrington*, [1893] 2 Ch. 497).

"Services and suits for which distress may be made."

Different kinds of rents:

(*h*) A rent (*reditus*) is properly a sum of money, or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising (2 Bl. Comm. 31; Gilb. on Rents, 9, &c.). There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck (Litt. s. 213).

rent-service;

Rent-service is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feodal oath of fidelity (Co. Litt. 142). And for these, in case they be in arrear, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands, after the lease or particular estate of the lessee or grantee is expired (Litt. s. 215).

rent-charge;

A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress if the rent be in arrear. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it (Co. Litt. 143; see *Re Gerard and Beecham*, [1894] 3 Ch. 308). A rent for equality of partition is not a rent-service, but a rent-charge of common right, and may

rent-seck;

be distrained for (Litt. s. 253). *Rent-seck* (*reditus siccus*), or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress (2 Bl. Comm. 42; see *Dodds*

v. *Thompson*, L. R. 1 C. P. 133). Either a rent-service disconnected from the reversion (*Ards* v. *Watkin*, Cro. Eliz. 637, 691) or a rent-charge might be divided by will or by deed operating under the Statute of Uses (repealed by L. P. Act, 1925, *post*), so as to make the tenant liable without attornment to several distresses by the devisees or *cestuis que use*. It seems that since the stat. 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind (*Rivis* v. *Watson*, 5 M. & W. 255; see *Colborne* v. *Wright*, 2 Lev. 239).

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor (2 Inst. 19), which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents (*reditus capitales*); and both sorts are indifferently denominated *quit-rents* (*quieti reditus*), because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation (Co. Litt. 143 b; see *Bradbury* v. *Wright*, Dougl. 627, n. 1).

other rents.

The above are the general divisions of rent; but the difference between them (in respect of the remedy for recovering) is now abolished. By the Landlord and Tenant Act, 1730, s. 5, the same remedy was given by distress, in cases of rents-seck, rents of assize, and chief rents, as in case of rent reserved upon lease. Unless the case was brought within this section, a rent-seck could not formerly be recovered by distress (*Bradbury* v. *Wright*, Dougl. 627; *Musgrave* v. *Emerson*, 10 Q. B. 326). A rent-charge granted by deed containing no power of distress is within sect. 5 (*Dodds* v. *Thompson*, L. R. 1 C. P. 133). Whenever land is sold reserving a rent, that rent may properly be called a rent-charge, for under sect. 5 the right of distress is incident to it (*Re Gerard and Beecham*, [1894] 3 Ch. 311).

Remedy by distress for recovering rents-seck given by 4 Geo. 2, c. 28, s. 5.

Now by L. P. Act, 1925, s. 121, *post*, where an annual sum is, by an instrument coming into operation after 1881, charged on land or the income thereof, whether by way of rent-charge or otherwise, and which annual sum is not a rent incident to a reversion, such annual sum can be recovered by means of (1) a distress, (2) an entry, (3) a demise of the land charged.

Distress for rents.

As a general rule, a person who has parted with the reversion cannot distrain (*Parmenter* v. *Webber*, 8 Taunt. 593; *Langford* v. *Selmes*, 3 K. & J. 226; *Lewis* v. *Baker*, [1905] 1 Ch. 46; see as to a mortgage, *Trent* v. *Hunt*, 9 Exch. 14). So a lessee who has parted with his whole term (which amounts to an assignment, *Beardman* v. *Wilson*, L. R. 4 C. P. 57; *Hyde* v. *Warden*, 3 Ex. D. 83; *Lewis* v. *Baker*, *supra*), reserving a rent, cannot distrain (——— v. *Cooper*, 2 Wils. 375). Under certain circumstances, however, the rent reserved may amount to a rent-charge (see *Williams* v. *Hayward*, 1 E. & E. 1040), to which, apparently, the Landlord and Tenant Act, 1730, s. 5, would apply.

It is laid down in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money"; and that for these things there may be a distress. So in Co. Litt. 96 a, it is said, "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number and sometime a lesser number there; and yet this uncertainty being referred to the manor, which is certain, the lord may distrain for this uncertainty." So in

3 & 4 Will. 4, c. 27, s. 1.

Litt. s. 137, it is laid down, that if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it (*Doe* v. *Benham*, 7 Q. B. 982). The keeping up of a grindstone upon land for the convenience of the parish, was held not rent, or "profits of land" within the third section of the Act (*Doe* v. *Hinde*, 2 M. & Rob. 441; *Doe* v. *Benham*, 7 Q. B. 978).

"RENT."

Right of executors to distrain.

As to the powers of executors and administrators in regard to distress, see sect. 26 of the Administration of Estates Act, 1925, *post*.

Since the Landlord and Tenant Act, 1709, s. 6, rent accruing before the expiration of a tenancy can be distrained for within six months after the tenancy expires, and while the tenant continues in occupation.

Action of debt for rent-charge.

Since the abolition of real actions, a rent-charge in fee may be recovered in an action of debt from the terre-tenant entitled to a freehold interest, either under a covenant binding him (*Varley* v. *Leigh*, 2 Exch. 446), or independently of one (*Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn, Ex parte Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519; *Swift* v. *Kelly*, 24 L. R. Ir. 107); and that, whether he has or has not received rents and profits equal to the amount of rent-charge claimed (*Pertwee* v. *Townsend*, [1896] 2 Q. B. 129). A road authority was liable in such an action (*Foley* v. *Dudley*, [1910] 1 K. B. 317), but not a tenant for years (*Re Herbage Rents, Charity Commrs.* v. *Green*, [1896] 2 Ch. 811); nor a liquidator (*Graham* v. *Edge*, 20 Q. B. D. 683). The rule as to suing the freeholder does not apply when the land is situate out of England (*Whitaker* v. *Forbes*, 1 C. P. D. 51). See as to the old law, *Webb* v. *Jiggs* (4 M. & S. 112).

Rents not in general issuable out of incorporeal hereditaments;

Rent cannot as a general rule issue out of an incorporeal hereditament, so as to warrant a distress (*Gardiner* v. *Williamson*, 2 B. & Ad. 339). A rent cannot, strictly speaking, be reserved out of an advowson in gross, tithes, or any other *incorporeal* hereditament (Co. Litt. 47 a, 142 a; Gilb. on Rents, 20, 22; *Re Alms Corn Charity*, [1901] 2 Ch. 759). Nor can a rent be reserved out of a rent (2 Roll. Abr. 446; Keilw. 161); but part of a rent may be granted (2 Ves. sen. 178). Nor, at common law, can a rent be reserved by a subject out of a mere privilege or easement in land (*Buzzard* v. *Capel*, 8 B. & C. 141; *Re Gerard and Beecham*, [1894] 3 Ch. 315; see *Gardner* v. *Hodgson's Co.*, [1901] 2 Ch. 217; *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 268); but payment of money in respect of an easement may be secured by covenant (*Hastings* v. *N. E. Ry.* [1898] 2 Ch. 674), and such a payment may sometimes be called rent (*Att.-Gen.* v. *Emerson*, [1891] A. C. 659). And see L. P. Act, 1925, s. 122.

exceptions to the rule;

The King, however, may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant (Co. Litt. 47 a; 2 Inst. 132; 5 Rep. 4; Gilb. on Rents, 22). And the grantee of fee-farm rents from the Crown might exercise the same power (*Att.-Gen.* v. *Coventry*, 1 P. Wms. 306). And a subject may, by statute, reserve a rent out of an easement (*Re Gerard and Beecham*, [1894] 3 Ch. 315). A rent may be reserved upon a grant of an estate in remainder or reversion, for the remedy by distress will arise when the lessee comes into possession (Co. Litt. 47 a) for all the arrears (2 Roll. Abr. 446).

lease of tithes.

A lease by a bishop of *tithes only*, rendering the ancient rent, was void against the successor, because there was no remedy by distress or assize (*Tanlintine* v. *Denton*, Cro. Jac. 111; *Windsor* v. *Gover*, 2 Wms. Saund. 230). But by 5 Geo. 3, c. 17, all leases for one, two, or three lives, or for any term not exceeding twenty-one years, of any tithes, tolls, or other incorporeal hereditaments

without any lands by any bishop, college or hall, dean and chapter, precentor, prebendary, hospital, or any other person who is enabled by statute to make such leases of any *corporeal* hereditaments, are as effectual against the lessors and their successors as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. In point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only (*Gardiner* v. *Williamson*, 2 B. & Ad. 336).

3 & 4 Will. 4, c. 27, s. 1.

"Rent."

By stat. 32 Hen. 8, c. 2, s. 4 (10 Car. 1, sess. 2, c. 6, Irish), no person should make any avowry or cognisance for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or cognisance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estates he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognisance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created by deed (Co. Litt. 115 a; 8 Rep. 64), or by Act of Parliament (*Faulkner* v. *Bellingham*, Cro. Car. 80), or by will (*Collins* v. *Goodall*, 2 Vern. 235). As to such rents there was no prescribed period of limitation, either at law or in equity (*Cupit* v. *Jackson*, M'Clel. 495; 13 Price, 721; see *White* v. *James*, 4 Jur. (N.S.) 1214; *Foster's Case*, 8 Rep. 128; *De Beauvoir* v. *Owen*, 19 L. J. Exch. 182). So that arrears for any number of years might have been recovered unless there was evidence to raise a presumption of payment (*Stackhouse* v. *Barnston*, 10 Ves. 467). Mere length of time, short of the statutory period of fifty years, was not sufficient ground to presume a release of a quit rent (*Eldridge* v. *Knott*, Cowp. 214). A lost grant, however, was presumed when a quit rent had for 120 years been paid by a person not apparently liable (*Bomford* v. *Neville*, [1904] 1 I. R. 474; compare *Foley* v. *Dudley*, [1910] 1 K. B. 317). And a release of rent secured by covenant in a long lease was presumed from non-payment for thirty-five years (*Tennent* v. *Neil*, I. R. 5 C. L. 418; see *Lefroy* v. *Walsh*, 1 Ir. C. L. R. 311; *Gibson* v. *Doeg*, 2 H. & N. 615; *Gibbon* v. *Payne*, 23 T. L. R. 250).

Old limitation Act as to rents.

(*i*) An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor (2 Bl. Comm. 40). The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, and the latter on the real (Co. Litt. 2 a; 114 b, 20 a). There may, however, be a personal annuity secured by a special charge on particular land (*Re Trenchard, T.* v. *T.*, [1905] 1 Ch. 82).

Annuities:

An annuity not charged upon land and given by will is a legacy (*Re Ashwell*, Johns. 112). Lord St. Leonards thought that such an annuity would be extinguished if no payment were made for twenty years (R. P. Stat. 138, 2nd ed., and see the opinion of Wood, V.-C., in *Re Ashwell*, *supra*). But the contrary view has been expressed in *Dower* v. *Dower* (15 L. R. Ir. 275; see Darb. & Bos. Stat. Lim. 171, 182, 2nd ed.). And it seems that twelve years' arrears can be recovered at any time; sect. 42 (*post*) not applying (*Roch* v. *Callen*, 6 Hare, 531, but see *Re Turner*, [1917] 1 Ch. 422). If such an annuity be secured by bond or covenant, time runs, under Civil Procedure Act, 1833, s. 3 (*post*), against each instalment as it becomes due (*Amott* v. *Holden*, 18 Q. B. 593). Six years' arrears were recoverable of a pension given by a benefit society (*Edwards* v. *Warden*, 9 Ch. 505).

Annuities not charged on land;

3 & 4 Will. 4, c. 27, s. 1.

charged on land.

An annuity may be charged on land. If so charged, it is by sect. 1 included in the word "rent" in the Act (*James* v. *Salter*, 3 Bing. N. C. 544), and may be extinguished as a whole by non-payment (*ibid.*; *Jones* v. *Withers*, 74 L. T. 572). So an annuity charged on both real and personal estate (*Dower* v. *Dower*, 15 L. R. Ir. 275; *Re Nugent*, 19 L. R. Ir. 140). Under sect. 42, six years' arrears only of such an annuity can be recovered in a proceeding against the land (*Francis* v. *Grover*, 5 Hare, 39; *Re Nugent*, 19 L. R. Ir. 140). Where such an annuity was secured by specialty, twenty years' arrears could be recovered under the Civil Procedure Act, 1833, s. 3, in an action on the specialty (*Strachan* v. *Thomas*, 12 Ad. & El. 536). For the present law on this point see pp. 230, 231, *post*. A gross sum of money charged upon land, to be paid by yearly instalments, and secured by power of distress, is within R. P. Lim. Act, 1833, ss. 40 and 42 (*Uppington* v. *Tarrant*, 12 Ir. Ch. R. 262).

Raising annuity by distress or sale.

It has been decided, that a distress may be taken for arrears of a rent-charge created by *will*, although the testator does not in terms give a power to distrain, such power being a consequence drawn by law from the rent-charge (*Rodham* v. *Berry*, Watk. Conv. 243, n. (a)). So in the case of annuities charged on land by wills containing no power of distress, the annuitant can distrain under 4 Geo. 2, c. 28, s. 5 (*Buttery* v. *Robinson*, 3 Bing. 392; *Roper* v. *Roper*, 3 Ch. D. 720); and a receiver will not be appointed (*Sollory* v. *Leaver*, 9 Eq. 22); except, perhaps, where the rents are not sufficient, or the annuity has been long in arrear (*Kelsey* v. *Kelsey*, 17 Eq. 500). In the case of an annuity created since 1881, see L. P. Act, 1925, s. 121, *post*. As to raising arrears by sale, see *Re Tucker*, *T.* v. *T.*, [1893] 2 Ch. 323; *Hambro* v. *H.*, [1894] 2 Ch. 564; *Blackburne* v. *Hope Edwards*, [1901] 1 Ch. 419.

Compositions.

(*k*) The "compositions" excepted from the definition of rent were compositions real (*Irish Commission* v. *Grant*, 10 App. Cas. 31).

(4)

Person through whom another claims.

Appointee.

Escheat.

(*l*) As to the meaning and operation of the words "issue in tail" in this clause, see *Abergavenny* v. *Brace*, L. R. 7 Ex. 152, *post*, p. 149. See also *Vandeleur* v. *Sloane*, [1919] 1 I. R. 116.

(*m*) Whether the word "appointee" (in the definition of person through whom another claims) includes the case where the power of appointment is not in substance created by the appointor himself, *quære* (*Re Devon Settled Estates*, [1896] 2 Ch. 572; where Chitty, J., draws a further distinction between a general power and a special power).

(*n*) An *escheat* was in its nature feodal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lords, called a seigniory, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an escheat (*Burgess* v. *Wheate*, 1 Eden, 191).

Escheat was founded on the principle that the blood of the person last seised in *fee* was by some means utterly extinct and gone; and since none could inherit his estate but such as were of his blood and consanguinity, it followed as a regular consequence that the inheritance must fail (2 Inst. 64; Wright's Ten. 115). Escheat might happen from default of heirs, as where the tenant died without any relations on the part of any of his ancestors, or where he died without any relations on the part of those ancestors from whom the estate descended, or where, until the Inheritance Act, 1833, s. 9 (see *post*), he died without any relations

of the whole blood. An escheat also arose from the corruption of the tenant's blood, consequent upon an attainder for treason or felony, by which he became incapable of inheriting, and of transmitting anything by heirship (see the Inheritance Act, 1833, s. 10, and note, *post*). On the subject of escheat, see 2 Bl. Comm. 241—257; Cruise's Dig. tit. XXX.; Harg. Co. Litt. 18 b, n. (2); *Henchman* v. *Att.-Gen.* (2 Sim. & Stu. 498; 3 M. & K. 492); Intestates' Estates Act, 1884, s. 4; *Re Wood, Att.-Gen.* v. *Anderson*, [1896] 2 Ch. 596; *Re Hartley*, [1899] P. 40; and the note to *Att.-Gen.* v. *Sands*, Tudor, L. C. Conv., 4th ed. 211. Escheat is abolished in the case of deaths after 1925 by Administration of Estates Act, 1925, s. 45 (1) (d), *post*, p. 470. **3 & 4 Will. 4, c. 27, s. 1.**

(5) Persons.

(*o*) The poor of a parish are a class of persons within the meaning of the word "person" in this section, in a case where the rents of property are applicable for the benefit of such poor (*Magdalen College* v. *Att.-Gen.*, 6 H. L. C. 189). The Attorney-General, whether suing *ex officio*, or at the relation of others, is not a "person" having a right to bring an action or suit in equity to recover land within the meaning of this Act; he is only part of the machinery by which the rights of others are sought to be enforced (*ibid.*; see *Att.-Gen.* v. *Magdalen College*, 18 Beav. 223; sect. 24, *post*). A statutory corporation was held to fall within the definition of "person" (*Jones* v. *Withers*, 74 L. T. 572). Where tenants holding leases under a parish vestry had occupied and enjoyed the soil of a lane for more than a century, it was held that the above statute vested the title in the churchwardens and overseers under 59 Geo. 3, c. 12, s. 17 (*Haigh* v. *West*, [1893] 2 Q. B. 19).

(6) Crown, when bound by Acts of Parliament.

Where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King is bound, though not particularly named (Plowd. 136, 137; 11 Rep. 68 b; 5 Rep. 14; 7 Rep. 32; see Bac. Abr. Prerogative (E.)). But where a statute is general, the King having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used whether affirmatively or negatively in a statute (11 Rep. 68), is not bound in his public capacity by the general words of the statute, unless named (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall* v. *Maule*, 4 Ad. & Ell. 284; *R.* v. *Wright*, 1 Ad. & Ell. 434; *Re Cuckfield Board*, 19 Beav. 153, and the cases cited in the note thereto; *Re Bevan*, 14 W. R. 147).

Thus the Crown is not bound by the R. P. Lim. Act, 1883 (*Att.-Gen.* v. *Magdalen College*, 18 Beav. 246), or by the Lim. Act, 1623 (*Rustomgee* v. *The Queen*, 1 Q. B. D. 491, 496; *Re J.*, [1909] 1 Ch. 547; *Works, &c. Commrs.* v. *Pontypridd*, [1920] 2 K. B. 233; and see *Att.-Gen.* v. *Howley*, [1914] 1 Ir. R. 124; see, however, *Att.-Gen.* v. *Smith*, 76 J. P. 253, as to actions by the Attorney-General suing at the relation of individuals), or by sect. 3 of the Prescription Act (*Perry* v. *Eames*, [1891] 1 Ch. 618), or by the Real Estate Charges Act, 1854 (*Dacre* v. *Patrickson*, 1 Dr. & Sm. 191), or by the Companies Act, 1862 (*Re Henley*, 9 Ch. D. 481. But see now as to Crown debts in liquidation, *Re Wood & Co.*, [1922] 2 Ch. 369), or by the Locomotives Act, 1865 (*Cooper* v. *Hawkins*, [1904] 2 K. B. 164; *Chare* v. *Hart*, 88 L. J. K. B. 833), or by the Apportionment Act, 1870 (*Rochester* v. *Lefanu*, [1906] 2 Ch. 518), or by sect. 150 of the P. H. Act, 1875 (*Hornsey* v. *Hennell*, [1902] 2 K. B. 73), or by sect. 35 of the Trustee Act, 1893 (*Re Taylor*, [1904] 2 Ch. 741; see *Re*

3 & 4 Will. 4, c. 27, s. 1.

Pratt, 55 L. T. 313), or by sect. 1 of the Land Transfer Act, 1897 (*Re Hartley*, [1899] P. 40). On the other hand, the Crown being named is within the Tithe Act, 1832, and also within sects. 1 and 2 of the Prescription Act, 1832 (*Wheaton* v. *Maple*, [1893] 3 Ch. 64), and the Trustee Act, 1925, sect. 1 (4) and (5) of the S. L. Act, 1925, and, subject to the exceptions named in sect. 208, within the L. P. Act, 1925, *post*.

Statutes of limitation as to rights of Crown to realty.

21 Jac. 1, c. 2.

9 Geo. 3, c. 16.

Nullum Tempus Act.

By stat. 21 Jac. 1, c. 2, the King was disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of Parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced (see Co. Litt. 119 a, n. (1); 3 Inst. 188). And by the Crown Suits Act, 1769, it is provided that the King shall not sue, &c., any persons, &c., for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record; and the subject shall quietly enjoy against the King, and all claiming under him, by patent, &c. This statute was extended to Ireland by 48 Geo. 3, c. 47, as to which see *Tuthill* v. *Rogers*, 6 Ir. Eq. R. 429; 1 J. & Lat. 36. It applies to N. S. Wales (*Att.-Gen. for N. S. Wales* v. *Love*, [1898] A. C. 679; where the provision as to rents being in charge is explained; and see 3 Inst. 189). In the case of tithes where none had been received, it was held, that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil*, were sufficient proof that they had been "duly in charge" (*Att.-Gen.* v. *Eardley*, 8 Price, 73). This was doubted (*Tuthill* v. *Rogers*, 1 J. & Lat. 82) and was corrected by the Crown Suits Act, 1861, s. 1, which provided that the Crown shall not sue for real property (other than liberties or franchises) of which the profits have been taken by the space of sixty years, by reason only that the rents have been in charge to the Crown, or stood *insuper* upon record within the said space of sixty years. The Crown shall not be deemed to have been answered the rents of real property by reason only of the same real property having been parcel of any manor of which the rents shall have been answered to the Crown, or of any manor which shall have been duly in charge to the Crown or stood *insuper* of record (sect. 3). See as to Ireland, Nullum Tempus (Ireland) Act, 1876. The last-mentioned Acts were said not to apply in case of a quit rent (*Re Maxwell*, 28 L. R. Ir. 356). But this has been altered as to Ireland (Crown Lands Act, 1906, s. 9).

24 & 25 Vict. c. 62.

Adverse possession against the Crown.

Where a manor has been in charge to the Crown within sixty years, acts done in different parts of it by different persons, although continued for sixty years, do not displace the title of the Crown to the district (*Doe* v. *Roberts*, 13 M. & W. 520). Adverse possession was established against the Crown (*Att.-Gen. for British Honduras* v. *Bristowe*, 6 A. C. 143).

The Crown Suits Act, 1769, extinguishes the Crown's title and transfers it to the subject (*Tuthill* v. *Rogers*, 1 J. & Lat. 62). But possession of Crown lands for less than sixty years was not sufficient to support the plaintiff's title in ejectment (*Goodtitle* v. *Baldwin*, 11 East, 495; see *Riddifard* v. *R.*, [1905] A. C. 147).

21 Jac. 1, c. 14.

By stat. 21 Jac. 1, c. 14, s. 1, it was in effect provided that a person who had been in adverse possession of Crown lands for twenty years might, on information of intrusion, plead the general issue, and might retain possession until trial. Although the King can never be put out of possession in point of law by the wrongful

entry of a subject, yet there may be an adverse possession *in fact* against the Crown. After such an adverse possession for twenty years, the Crown could only recover by information of intrusion, and ejectment would not lie at the suit of the grantee of the Crown (*Doe* v. *Morris*, 2 Bing. N. R. 189). See further as to intrusion, 28 & 29 Vict. c. 104, s. 31 *et seq.*; 3 Chitty's Statutes, 6th ed., 700 *et seq.* 3 & 4 Will. 4, c. 27, s. 1.

Practice in Crown suits.

The title of the Crown may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the Crown (*Att.-Gen.* v. *Parsons*, 2 M. & W. 23). As to inquests of office, see now 28 & 29 Vict. c. 104, s. 52. See, as to evidence in Crown suits, *Doe* v. *Roberts*, 13 M. & W. 520.

Chose in action vested in the Crown.

Although the Stat. Lim. does not bind the Crown, yet where the claim of the Crown is only a derivative right it must stand in the same situation as its principal. Therefore, the statute may be pleaded to a *scire facias* issued by the Crown against the drawer of a bill of exchange, which was barred in the hands of the Crown debtor (*R.* v. *Morrall*, 6 Price, 24). But where a right has vested in the Crown before the statute has run against the former owner, the rights of the Crown are not barred or affected by the statute, as the Crown is not within its operation (*Lambert* v. *Taylor*, 4 B. & C. 138). See *Taylor* v. *Att.-Gen.*, 8 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the Crown; see also *Re Robson*, 2 Phil. 64; *Re De Bode*, *ibid.* 85. And as to petitions of right and the orders thereon, see Petition of Right Act, 1860; Seton, 7th ed. 381—3.

With respect to the personal estate of a deceased, proceedings on the part of the Crown cannot now be instituted, nor can a petition of right be presented, except within the same time, and subject to the same rules of law and equity, as in the case of an action by or against a subject (Administration of Estates Act, 1925, s. 30 (2), *post*).

Claim of Crown to duties.

Under the Customs Act, 1889, ss. 12 and 14, the claim of the Crown to legacy and succession duty in specified cases cannot be enforced after specified periods. These sections have been made applicable to estate duty by the Finance Act, 1894, s. 8 (2).

Statutes of Limitation to rights of Duke of Cornwall.

The Stat. Lim. which affect the rights of the Duke of Cornwall are 7 & 8 Vict. c. 105, ss. 71—88; 23 & 24 Vict. c. 53; and Crown Suits Act, 1861; as to which, see Darb. & Bos. Stat. Lim. 523, 2nd ed.; Brown's Law of Limitation, 251, 415.

Presumption of grants from the Crown.

But though the Crown is not bound by the ordinary Stat. Lim., yet a grant from it may be presumed from great length of possession, not because the Court really thinks a grant has been made, but it presumes the fact for the purpose and from a principle of quieting the possession (*Hull* v. *Horner*, Cowp. 102, 215). Thus grants of lands from the Crown have been presumed after an uninterrupted enjoyment of twenty years (*Goodtitle* v. *Baldwin*, 11 East. 490; *Holcroft* v. *Heel*, 1 Bos. & Pull, 400; *Campbell* v. *Wilson*, 3 East, 294). So a grant by the Crown of a several fishery in tidal waters was presumed (*Goodman* v. *Saltash*, 7 App. Cas. 633), and of a manor (*Merttens* v. *Hill*, [1901] 1 Ch. 851); and see *Att.-Gen.* v. *Wright*, [1897] 2 Q. B. 318. The right of a corporation to discharge sewage into a tidal river was based by the H. L. on a lost grant by the Crown of a licence exercisable over the foreshore (*Somersetshire* v. *Bridgwater*, 81 L. T. 732). It was said to be immaterial that the grant was not of record (*ibid.*). So an enfranchisement of a copyhold might be presumed against the Crown (*Roe* v. *Ireland*, 11 East, 280). So where the title of a family to an advowson was evidenced by deeds for nearly 140 years, and there had been three presentations by them

3 & 4 Will. 4, c. 27, s. 1.

and none by the Crown, a grant from the Crown might be presumed (*Gibson* v. *Clark*, 1 Jac. & W. 159; see 3 T. R. 158). Letters patent from the Crown have been presumed (*Picking* v. *Stamford*, 2 Ves. jun. 282). A grant from the Crown of undefined shares in land will not be held void for uncertainty after long modern possession, for a supplementary grant may be presumed (*Des Barres* v. *Shey*, 29 L. T. 592). Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held conclusive proof of ownership against the Crown (*Att.-Gen.* v. *Hotham*, 1 T. & R. 210; see *Haigh* v. *West*, [1893] 2 Q. B. 19). An objection to a title that two fee-farm rents created by letters patent by James I., were not shown to have been extinguished, was overruled, it being proved that no claim had been made by the Crown of the rent from the year 1706, and no proof of any previous claim (*Simpson* v. *Gutteridge*, 1 Madd. 609; see *Flower* v. *Hartopp*, 12 L. J. Ch. 507). A lost surrender to the Crown of one of two differing charters was presumed in *Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 716. In a case where Charles I. had granted the soil between high and low-water marks, but the Crown remained in possession for 150 years after the grant, this created a presumption against the grant (*Parmeter* v. *Att.-Gen.*, 1 Dow. 316). A grant from the Crown will not be presumed where it would have been against a statutory provision of a public nature (*Goodtitle* v. *Baldwin*, 11 East, 495). Nor where the enjoyment has been, not against the Crown itself, but against a lessee from the Crown (*Wheaton* v. *Maple*, [1893] 3 Ch. 62; see *ibid.* 56 as to modern enjoyment against the Crown). It would seem that a Crown grant to an intruder will not be presumed where he has only been in possession long enough to bar a private owner (*Riddiford* v. *Rex*, [1905] A. C. 159).

Presumption of inrolments and registration.

Where port duties are claimed under a Crown grant alleged to have been inrolled, but not produced, such grant ought not to be presumed upon mere evidence of usage (*Brune* v. *Thompson*, 4 Q. B. 543; as to the presumption that a claim for port duties had a legal origin, see *Foreman* v. *Whitstable*, L. R. 4 H. L. 266, and cases there cited). There seems to be no instance of presuming inrolment of a deed which was made essential by statute (*Doe* v. *Waterton*, 3 B. & Ald. 149, 151; *Wright* v. *Smythies*, 10 East, 409). It might be otherwise if foundation were laid for raising a presumption by showing that there was a chasm in the records (*Allen* v. *Walker*, 1 Jac. & W. 619). The registry of a deed of lands in a register county will not be presumed (*Doe* v. *Hirst*, 11 Price, 475). However, where the usage of paying tithe was shown, an inrolment of a decree directing such payment was presumed (*Macdougall* v. *Purrier*, 4 Bligh, (N.S.) 433; see *R.* v. *Buckby*, 7 East, 45; *Hebbert* v. *Purchas*, L. R. 3 P. C. 643; *Att.-Gen.* v. *Moor*, 20 Beav. 119; *Haigh* v. *West*, [1893] 2 Q. B. 31). As to presuming the inrolment at Quarter Sessions of a certificate of justices, see *Leigh Council* v. *King*, [1901] 1 Q. B. 755, but this case was disapproved in H. L. (*Cahabé* v. *Walton-upon-Thames*, [1914] A. C. 102).

Presumption of an Act of Parliament.

After long possession the Court will even presume an Act of Parliament in order to protect a right (*Att.-Gen.* v. *Evelme Hospital*, 17 Beav. 366), but not the passing of an Act of Parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can be found (*R.* v. *Exeter*, 12 Ad. & Ell. 532, 533). Jessel, M.R., refused to presume an Act of Parliament as an origin for an alleged right (*Chilton* v. *London*, 7 Ch. D. 735). See *Neaverson* v. *Peterborough Council*, [1902] 1 Ch. 574; *Lopez* v. *Andrew*, 3 M. & R. 329.

37 & 38 Vict. c. 57, s. 1.

2.—*Period of Limitation fixed, and when Right first accrues.*

[*Sect. 2 of R. P. Lim. Act,* 1833, *has been repealed and the following substituted, viz.:*]

[*R. P. Lim. Act,* 1874, *s.* 1.] After the commencement of this Act [Jan. 1, 1879] no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

No land or rent to be recovered but within twelve years after the right of action accrued.

By sect. 9 of the R. P. Lim. Act, 1874 (*post*), sect. 1 of the last-mentioned Act has been substituted for sect. 2 of R. P. Lim. Act 1833; and under the same 9th sect. the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections), are to be construed together with the R. P. L. Act, 1874. Sect. 1 of R. P. Lim. Act, 1874, fixes the period of limitation at twelve instead of twenty years, and expressly includes "suits," but in other respects is identical with sect. 2 of the Act of 1833, which has accordingly been omitted.

The following note embodies the decisions under both sections.

(1) *Effect of the section*...147.
(2) *Old law and adverse possession*...149.
(3) *Nature of possession necessary to give title under the section*...152.

(1) Effect of section.

The words "to recover any land" mean "to obtain any land by judgment of the Court." They are not limited to obtaining possession (*Williams* v. *Thomas,* [1909] 1 Ch. 730).. The words apply accordingly not only to ejectment, but to an action for foreclosure (*ibid.; Harlock* v. *Ashberry,* 19 Ch. D. 539; *Hugill* v. *Wilkinson,* 38 Ch. D. 480; compare *Re Stead,* 2 Ch. D. 718; *Re Witham,* [1922] 2 Ch. 413). But the words did not apply to actions for the assignment of dower or to an action for partition where plaintiff was in possession; such actions being proceedings to obtain a delimitation of parcels under which for the first time a title to specific land will be obtained (*Williams* v. *Thomas,* [1909] 1 Ch. 722, 726). The words did include a partition action where plaintiff was out of possession for twelve years (*ibid.* 731; *Thornton* v. *France,* [1897] 2 Q. B. 143; see sects. 1 and 12).

Where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce this (*Magdalen Hospital* v. *Knotts,* 8 Ch. D. 727). Speaking generally, time does not commence to run against a man until he is put to his right of entry (*Re Nisbet and Potts,* [1906] 1 Ch. 401). But, unless an entry be made within the statutory period, from then this right is taken away (*Holmes* v. *Newlands,* 11 Ad. & El. 44; 8 Q. B. 679).

37 & 38 Vict. c. 57, s. 1.

This section governs cases not included among instances in section 3.

James v. *Salter.*

Sect. 2 of R. P. Lim. Act, 1833, was held to govern cases which fell within its general words, even though not included among the instances given in sect. 3 (*James* v. *Salter*, 3 Bing. N. C. 553; *Pugh* v. *Heath*, 7 App. Cas. 235). A testator charged a life annuity on land, with a power of distress. The testator died in 1804, and in 1835 the annuitant distrained for twenty-nine years' arrears, the right to make a distress having first accrued in April, 1805. The claim was held barred. Tindal, C.J., said "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second" (*James* v. *Salter*, 3 Bing. N. C. 553; approved, *Irish Commission* v. *Grant*, 10 App. Cas. 27; see *Magdalen Hospital* v. *Knotts*, 8 Ch. D. 727). In such a case it was not merely the right of the annuitant to arrears that was barred. His title to the annuity as a whole was extinguished (see 3 Bing. N. C. 555; *Jones* v. *Withers*, 74 L. T. 572; *Langton* v. *L.*, 18 Jur. 928).

Landlord and tenant; void lease;

Where a lessee entered under a lease granted by a charitable corporation in 1783 (held to have been void), and in 1876 the corporation sued for possession, the lessees were taken to have been in possession from 1783 without any title whatever, and the rights of the corporation were barred by sect. 2 of the R. P. Lim. Act, 1833 (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; see *Webster* v. *Southey*, 36 Ch. D. 9). In the Courts below, the same lease was treated as voidable only; and according to the Court of Appeal time ran from the granting of the lease (8 Ch. D. 709).

valid lease;

A person must have an effective right to enter in order that time may run against him, and an intended lessor had not such a right where the intended lessee entered under a valid agreement for a lease (*Warren* v. *Murray*, [1894] 2 Q. B. 658).

Where a lessor permitted his lessee during the lease to pay no rent for the statutory period, time ran against the lessor's right to recover the land from the determination of the lease, his right of action accruing under the fourth branch of sect. 3 (*Doe* v. *Oxenham*, 7 M. & W. 131). As to a lessor being barred through a stranger wrongfully receiving the reserved rent, see sect. 9, *post*. The case of a lease being surrendered and renewed is discussed in the note to sect. 2 of R. P. Lim. Act, 1874, *post*, p. 163.

As regards the landlord's right to recover rent reserved, the right to recover proper arrears is not barred by non-payment for however long a time, so long as the relation of landlord and tenant subsists as a legal relation (*Archbold* v. *Scully*, 9 H. L. C. 360; *Grant* v. *Ellis*, 9 M. & W. 113; *Re Turner*, 11 Ir. Ch. R. (N.S.) 304; *Irish Commission* v. *Grant*, 10 App. Cas. 26; see *Blaiberg* v. *Keeves*, [1906] 2 Ch. 182. See, however, as to rents not exceeding one pound per annum, the L. P. Act, 1925, s. 153, (4), (5), *post*). But where a tenant from year to year holds for twelve years without paying rent the landlord loses not only the land but also any right to recover past rent (*Re Jolly, Gathercole* v. *Norfolk*, [1900] 2 Ch. 616).

Rent within this section.

The word "rent" in the above section is confined to rents existing as an inheritance distinct from the land, and for which before 1833 the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like (*Grant* v. *Ellis*, 9 M. & W. 113;

Irish Commission v. *Grant*, 10 A. C. 26; *Jones* v. *Withers*, 74 L. T. 572). The word means in the section rent which is a charge on land (*Paget* v. *Foley*, 2 Bing. N. C. 688). It has been held to include an annuity charged on land by deed (*Hughes* v. *Coles*, 27 Ch. D. 231; but see *Re Jordison*, [1922] 1 Ch. 440, where *Hughes* v. *Coles* was overruled, cited in note to sect. 10 of R. P. Lim. Act, 1874, *post*, p. 243), and interest on land tax redemption money, charged by statute on land, and being distinct from the land, though not itself real property (*Skene* v. *Cook*, [1902] 1 K. B. 682). The word in the section does not include rents reserved on leases for years (*Grant* v. *Ellis*, *supra*), or an additional penal rent payable by a tenant (*Daly* v. *Bloomfield*, 5 Ir. L. R. 65). 37 & 38 Vict. c. 57, s. 1.

The various cases in which the provisions of this section as to rent (as interpreted by sect. 1) have been held to apply are given *ante*, p. 136. As to the use of the word "rent" in the statute generally, see *ibid.*, and *post*, p. 171.

The first section interpreting the person through whom another person is said to claim as meaning any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed "as issue in tail," an ordinary tenant in tail would lose his right after want of possession for the statutory period in the time of his ancestor (*Abergavenny* v. *Brace*, L. R. 7 Ex. 152, 172). But a statutory entail (as that of the Abergavenny estates) is not within these words (*ibid.* 155, 172). Tenant in tail.

An action by a lord of a manor to enforce his right to seize *quousque* was within this section (*Ecclesiastical Commrs.* v. *Parr*, [1894] 2 Q. B. 420; *Re Lidiard*, 42 Ch. D. 254; *Beighton* v. *Beighton*, 64 L. J. Ch. 796). So also a suit by a copyhold tenant to compel admittance by the lord (*Walters* v. *Webb*, 5 Ch. 531). The lord's right to enter for forfeiture was within sects. 3 and 4 (see note to sect. 4, *post*, p. 161). Copyhold fines were dealt with by the Civil Procedure Act, 1833, s. 3 (see *Monckton* v. *Payne*, [1899] 2 Q. B. 603). Copyholds.

As regards a possessory title to land forming part of a manor, a squatter on copyhold land who had acquired a good title under the statute against the copyholder was held to have no title to the freehold against the lord; but time began to run against the lord only from the date at which after proclamation or notice the squatter failed to come in and be admitted (*Ecclesiastical Commrs.* v. *Parr*, [1894] 2 Q. B. 420; see *Re Nisbet & Potts*, [1905] 1 Ch. 400). On the other hand, where A under licence from the lord enclosed waste, and after the expiration of his licence had adverse possession thereof for forty years, the effect of the licence was to give A not a copyhold, but a common law holding, the lord having the freehold reversion; and by adverse possession A acquired a freehold title (*Att.-Gen.* v. *Tomline*, 15 Ch. D. 157). Copyhold and customary tenure were abolished as from January 1, 1926, by L. P. Act, 1922, Part V., Part VI., and Sched. 13, dealing with compensation for fines.

(2) Old law.

By common law there was no fixed period within which it was necessary to commence actions. Afterwards certain events were from time to time selected, as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by stat. 32 Hen. 8, c. 2, which enacted that no person should maintain any writ of right, or make any prescription, title or claim of, to or for any *manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies,* or *other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the 32 Hen. 8, c. 2.

37 & 38 Vict. c. 57, s. 1.

said writ, or next before the said prescription, title or claim so made. Actions upon the *possession* of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the Limitation Act, 1623, and the limitation of time for suing out such writ was fifty years (see *Peircey* v. *Gardner*, 3 Bing. N. C. 748). Dignities were not within the stat. lim. (*Re Willoughby of Parham*, Lords' Journ. vol. 31, p. 350; see 3 Cru. Dig. 202). But offices with fees and profits were within them (Lords' Journ. vol. 36, p. 295). An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin, but upon his grant (Bro. St. Lim. 26; see *ante*, p. 141). So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years (Bro. St. Lim. 33; Bac. Abr. Limitation of Actions (B)).

Limitation of right of entry.

21 Jac. 1, c. 16.

The Limitation Act, 1623, ss. 1 and 2 (repealed by 26 & 27 Vict. c. 125), limited the period for all writs of formedon to twenty years, and enacted that no persons should make any entry into any lands, tenements, or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same. [The provisions of the statutes 32 Hen. 8, c. 2, and the Limitation Act, 1623, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, s. 6.]

As to the rights of issues in tail under the Lim. Act, 1623, see *Tolson* v. *Kaye*, 3 Brod. & B. 217; 3 B. & A. 738; 6 M. & G. 536; *Doe* v. *Woodroffe*, 16 M. & W. 769.

Under the Lim. Act, 1623, the period of twenty years ran against the rights of persons entitled in possession from the time when the *wrongdoer* acquired possession *adversely* to the owner; and in many cases it was very difficult to ascertain what would constitute such possession.

Adverse possession necessary under above statutes.

To constitute adverse possession, it was formerly necessary that there should be an ouster of the seisin in one of five modes, called disseisin, abatement, intrusion, discontinuance, and deforcement. Disseisin is where the person in possession of the freehold is evicted. Abatement is where a wrongdoer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. Intrusion is where a wrongdoer enters on the vacant possession, after the death of the tenant for life, instead of the remainderman or reversioner. Discontinuance was where a tenant in tail in *possession* aliened by a tortious conveyance, as feoffment or fine, which did not bar the entail. Deforcement was considered to include the other four terms, and any holding over after the determination of an estate, or other wrongful withholding of the freehold from the right owner (see 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173). When a party entered by colour of a *void* grant, he was a *disseisor* (*Buckler's Case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 388; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316). But where a grant was according to the rules of law, but required to be perfected by a subsequent ceremony, as if a feoffee entered before livery of seisin, he was not a disseisor (2 Rep. 55). Wherever there was a disseisin, the possession of the disseisor was considered *adverse*, and the party was bound to pursue his remedy within twenty years from the act constituting the disseisin (Butl. Co. Litt. 330 b, n). There might be an unlawful possession

Disseisin.

which did not amount to a disseisin (*Doe* v. *Gregory*, 9 Ad. & Ell. 14; 4 Nev. & M. 308; see 2 M. & W. 904). As to disseisin, see *Taylor* v. *Horde*, 1 Burr. 108; *Doe* v. *Lynes*, 3 B. & C. 388; *Williams* v. *Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. Abst. 284 *et seq.* 37 & 38 Vict. c. 57, s. 1.

At the passing of the R. P. Lim. Act, 1833, the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant (note to *Nepean* v. *Doe*, 2 Smith's L. C.; see *Des Barres* v. *Shey*, 22 W. R. 273). If they were, the claimant's interest was reduced to a right of entry; and the Lim. Act, 1623, applied so as to bar such interest in twenty years, the possession being considered adverse. If they were not the Act did not apply, the possession being considered as non-adverse. Question of adverse possession before 3 & 4 Will. 4, c. 27.

The possession of a lessee could not be adverse (1 Wils. 176; 3 Wils. 521; *Roe* v. *Ferrars*, 2 Bos. & P. 542; 2 D. & R. 38), until the end of the tenancy (*Fishar* v. *Prosser*, Cowp. 218). So in the case of a husband of a tenant for life holding on after her death (*Doe* v. *Gregory*, 4 Nev. & M. 308; see *Doe* v. *Blakeway*, 5 C. & P. 563). Joint possession with the real owner was held not adverse (*Reading* v. *Rawsterne*, 2 Ld. Raym. 829; 1 Salk. 242).

Possession was not adverse in some cases if there was a possible explanation consistent with the plaintiff's title; as when possession might have been, under a custom, for a husband to hold for life his deceased wife's copyhold (*Doe* v. *Brightwen*, 10 East, 583); or might have been in respect of dower (*Doe* v. *Haslewood*, 6 Ad. & Ell. 167; see *Doe* v. *Pettet*, 5 B. & Ald. 223; *Doe* v. *Harbrow*, 1 Ad. & Ell. 67, n.; *Doe* v. *Langfield*, 16 M. & W. 497); or might have been under an agreement for partition by deed, which was never executed (*Doe* v. *Millett*, 11 Q. B. 1036). Where a person held land, intended to be but not in fact, conveyed to him on trust, his possession was not adverse while in accordance with the trust (*Doe* v. *Hulse*, 3 B. & C. 757). But where copyholds had been granted to A for the lives of herself and B, and in reversion to C for other lives, and A died, having devised to B, who entered and kept possession for more than twenty years, C could not, after B's death, maintain ejectment, as C's right of possession accrued on the death of A, when his interest terminated, inasmuch as there could be no general occupant of copyhold land (*Doe* v. *Scott*, 4 B. & C. 706). Possession by a woman was held adverse to her brother, who was entitled as heir (*Doe* v. *Lawley*, 13 Q. B. 954). So possession by the mother of the heir was adverse unless it was by his permission (*Doe* v. *Jauncey*, 8 C. & P. 99). Where a party was let into possession with the consent of the owner, and did acts importing that he continued in possession only with the owner's permission, such acts prevented the possession being adverse (see Litt. s. 70). So where a person was let into possession under a contract for purchase, and for some years paid interest on the purchase-money, but never completed, his possession was not adverse (*Doe* v. *Edgar*, 2 Bing. N. C. 498). A woman, living apart from her husband, obtained a demise of property for a term: possession, if adverse to the wife, was adverse to the husband, and not otherwise (*Roe* v. *Wilkins*, 4 Ad. & Ell. 86). The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, was no evidence of a possession not being adverse (*Doe* v. *Edwards*, 5 Ad. & Ell. 95).

If a cottage was built upon waste in defiance of a lord of a manor, and quiet possession had been had of it for twenty years, it was within the Lim. Act, 1623; but if it were built at Adverse possession before 3 & 4

37 & 38 Vict. c. 57, s. 1.

first by the lord's permission, or any acknowledgment had been since made (though it were 100 years since), that statute would not run against the lord (*Doe* v. *Wilkinson*, 3 B. & C. 414; *Doe* v. *Clarke*, 8 B. & C. 717; *R.* v. *Cuddington*, 2 New Sess. C. 10; 14 L. J. M. C. 182; *R.* v. *Woburn*, 10 B. & C. 846). A mere licensee is in this respect on the same footing as a tenant (*Doe* v. *Baytup*, 3 Ad. & Ell. 188). As to licence for an encroachment on a common given by a commoner, see *Harvey* v. *Reynolds*, 1 C. & P. 141; or by the lord, see *Doe* v. *Williams*, 7 C. & P. 332; *Doe* v. *Wilson*, 11 East, 56; *Doe* v. *Heakin*, 6 Ad. & Ell. 495.

Will. 4, c. 27, in the case of encroachments from waste.

Possessory title before 3 & 4 Will. 4, c. 27.

Before R. P. Lim. Act, 1833, if no other title appeared, possession for twenty years was strong presumptive evidence of a fee (*Denn* v. *Barnard*, Cowp. 595); and though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, was a title as against strangers (*Doe* v. *Webber*, 1 Ad. & Ell. 119; *Doe* v. *Parke*, 4 Ad. & Ell. 816); and conferred on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries (see 3 Man. & Ry. 112, n.). Where a plaintiff in ejectment proved twenty years' possession immediately preceding possession for ten years by defendant, the former was entitled to recover, his earlier possession prevailing (*Doe* v. *Cooke*, 7 Bing. 346; see *Stokes* v. *Berry*, 2 Salk. 421). Possession of land for any term less than twenty years by a feoffee was not presumptive evidence of livery of seisin (*Doe* v. *Cleveland*, 9 B. & C. 864; *Doe* v. *Davies*, 2 M. & W. 503).

Non-claim on fines.

4 Hen. 7, c. 24.

By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons if they did not claim within five years after the proclamations made, or after their rights of entry accrued, or after the removal of their disabilities (see *Davies* v. *Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn* v. *Doe*, 5 B. & C. 701; *Doe* v. *Perkins*, 3 M. & S. 271; *Doe* v. *Gregory*, 2 Ad. & Ell. 14). For the case of married women, see *Doe* v. *Pett*, 11 Ad. & Ell. 853; *Doe* v. *Plumtre*, 3 B. & Ald. 474. It seems that the adverse possession necessary to make a fine with proclamations operate by way of bar, was the same as the adverse possession necessary for the purpose of barring a right of entry (note to *Nepean* v. *Doe*, 2 Smith's L. C. 10th ed., 636).

(3) Nature of possession requisite under 3 & 4 Will. 4, c. 27, s. 2.

Shortly after the passing of the R. P. Lim. Act, 1833, the change in the law was thus described by Lord St. Leonards: "Adverse possession is no longer necessary in the sense in which it was formerly used; mere possession may be and is sufficient under many circumstances to give a title adversely; although perhaps now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this Act was passed" (*Ely* v. *Bliss*, 2 D. M. & G. 476, 477; see *Nepean* v. *Doe*, 2 M. & W. 911; *Culley* v. *Doe*, 11 Ad. & Ell. 1008; *Doe* v. *Barton*, 3 P. & Dav. 198; *Jack* v. *Walsh*, 4 Ir. L. R. 254). It has been said that under the present statute all possession is adverse. Thus at the end of the statutory period the possession of a tenant from year to year who pays no rent becomes adverse during the whole time. The landlord retains no right to recover any rent (*Re Jolly, Gathercole* v. *Norfolk*, [1900] 2 Ch. 619).

Some of the principles, however, laid down in the old cases on adverse possession have been acted on in cases since this Act (see *Scott* v. *Scott*, 4 H. L. C. 1085). Thus, in *Thomas* v. *Thomas*, (2 K. & J. 83), where a father, entering on the estate of his infant children, was held to have been in possession as a bailiff for them, Wood, V.-C., applied the principle (*Doe* v. *Brightwen*, 10 East,

583) that possession is never considered adverse if it can be referred to a lawful title (see *Wall* v. *Stanwick*, 34 Ch. D. 763; *Re Hobbs*, *Hobbs* v. *Wade* 36 Ch. D. 553; *Bolling* v. *Hobday*, 31 W. R. 9). Where a purchaser entered into possession of land, an undivided share in which was vested in a trustee for an infant who did not join in the conveyance, the purchaser, having notice of the infant's rights, was treated as a bailiff for the infant (*Young* v. *Harris*, 65 L. T. 45; see *Quinton* v. *Frith*, 2 Ir. Eq. 396; *Allen* v. *Sayer*, 2 Vernon, 368; *M'Mahon* v. *Hastings*, [1913] 1 I. R. 395). *Secus* where a stranger entered who had no notice (*Lambert* v. *Browne*, Ir. R. 5 C. L. 218). Where a father seised of land made a will invalid as to real estate whereby he appointed his brother, to whom he was indebted, executor, and died leaving two infant daughters, and the uncle entered upon the land and paid interest on a mortgage, and laid out sums on improvements, his possession was not adverse to his nieces (*Pelly* v. *Bascombe*, 4 Giff. 394; 13 W. R. 306). As to a person entering on an infant's land being a bailiff for him, see *Crowther* v. *Crowther*, 23 Beav. 305; *Howard* v. *Shrewsbury*, 17 Eq. 398; even after the infant has attained his majority, *Tinker* v. *Rodwell*, 69 L. T. 591. But as against children who had attained majority and left the land time was held to run (*Re Maguire*, [1907] 1 I. R. 383, distinguished in *Rice* v. *Begley*, [1920], 1 I. R. 243). See, further, the note on account of rents in equity, *post*, p. 234. 37 & 38 Vict. c. 57, s. 1.

Possession obtained by a person as trustee cannot be set up as adverse to the *cestui que trust* (*Stone* v. *Godfrey*, 5 D. M. & G. 76). Before the R. P. Lim. Act, 1833, the possession of a *cestui que trust* was not at law adverse to the title of the trustee (*Smith* v. *King*, 16 East, 283); and the same has been held since the Act (*Drummond* v. *Sant*, L. R. 6 Q. B. 763; see *Warren* v. *Murray*, [1894] 2 Q. B. 648). It was said that in the case of a mortgagee the doctrine of adverse possession had been revived by the R. P. Lim. Act, 1837 (*Doe* v. *Eyre*, 17 Q. B. 366). The occupation of a school by a schoolmaster for more than the statutory period did not give him an adverse right against the owner; for his occupation was the occupation of the owner, he being in the situation of a servant (*Moore* v. *Doherty*, 5 Ir. L. R. 449, see *Ellis* v. *Crawford*, 5 Ir. L. R. 404; *Montmorency* v. *Walsh*, 4 Ir. L. R. 254; *Gibson* v. *Wise*, 35 W. R. 409). Charitable trustees, however, acquired title by possession under a void grant, although one of their number was the person entitled to dispute the grant (*Churcher* v. *Martin*, 42 Ch. D. 312; see *Re Lacey*, [1899] 2 Ch. 149). As to the result where possession of leaseholds was taken by the next-of-kin of a deceased leaseholder, see *M'Cormack* v. *Courtney*, [1895] 2 Ir. 97; *Rankin* v. *McMurtry*, 24 L. R. Ir. 297; *Coyle* v. *McFadden*, [1901] 1 I. R. 298; *Smith* v. *Savage*, [1906] 1 I. R. 469; by his representative, *Reed* v. *Fenn*, 35 L. J. Ch. 464; *Re Lacey*, *Royal Association* v. *Kydd*, [1899] 2 Ch. 149; and by a stranger, *Tichborne* v. *Weir*, 67 L. T. 735; *Doe* v. *Evans*, 1 C. B. 717. See further the note as to possession, p. 157, *post*.

Where a husband was in possession of land which really belonged to his wife but was erroneously supposed to belong to the heir of a deceased person, and he accounted for the rents to such heir, the possession was held to be the possession of the heir (*Hounsell* v. *Dunning*, [1902] 1 Ch. 512).

Receipt of rents by agent.

A principal may acquire a possessory title to real estate by receiving the rents through an agent, although that agent is the person really entitled to the estate (*Williams* v. *Pott*, 12 Eq. 149). And see as to receipt of rents by an agent, *Smith* v. *Bennett*, 30 L. T. 100. An owner in fee who had received rents through an agent

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died intestate. The agent, who continued to receive, stating at first that he was receiving for the heir, did not dispossess the heir, who subsequently ratified (*Lyell* v. *Kennedy*, 14 App. Cas. 437). Where a solicitor received the rents of a mortgaged property, his possession was that of the client, and time did not run against the client (*Ward* v. *Carttar*, 1 Eq. 29).

Encroachments by tenant presumed to be annexed to holding.

If a tenant encroaches on land not originally part of his holding, the presumption is, that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit (*Kingsmill* v. *Millard*, 11 Ex. 318; *Doe* v. *Rees*, 6 C. & P. 610). The presumption applied where the encroachment was made with the verbal assent of the landlord (*Whitmore* v. *Humphries*, L. R. 7 C. P. 1); and where the land encroached upon did not belong to the landlord (*Andrews* v. *Hailes*, 2 E. & B. 349; 22 L. J. Q. B. 409—the presumption in that case applying only as between landlord and tenant). It was said that the presumption only applies where the land encroached upon is waste, and is adjacent to the original holding (*Hastings* v. *Saddler*, 79 L. T. 355), and accordingly did not apply where the encroachment was upon enclosed land half a mile distant (*ibid.*). It applied, however, where the encroachment was separated from the original holding by a small river (*Lisburne* v. *Davies*, L. R. 1 C. P. 265), or by a road (*Doe* v. *Jones*, 15 M. & W. 580). The presumption may be rebutted (*Berney* v. *Bickmore*, 8 L. T. 353), *e.g.* by acts done at the time (*Doe* v. *Rees*, 6 C. & P. 610), or by subsequent acts either of the landlord: *e.g.* if there be a subsequent grant by the landlord to the tenant of the original holding which does not include the encroachment (*Att.-Gen.* v. *Tomline*, 15 Ch. D. 160), or of the tenant: *e.g.* if the tenant conveys the encroachment to another person and the conveyance is communicated to the landlord (*Kingsmill* v. *Millard*, 11 Ex. 318). The presumption was applied to the case where two adjoining leasehold properties held under the same landlord were settled on different trusts, and the *cestui que trust* of one property encroached on the other (*East Stonehouse Council* v. *Willoughby*, [1902] 2 K. B. 318). Where a tenant occupied adjoining land belonging to his landlord for twelve years, he was entitled to retain it as part of the holding during the remainder of the term (*Tabor* v. *Godfrey*, 64 L. J. Q. B. 245). See, further, as to the above presumption between landlord and tenant, *Doe* v. *Davies*, 1 Esp. 461; *Brian* v. *Winwood*, 1 Taunt. 208; *Doe* v. *Morris*, 2 Bing. N. C. 189; *Doe* v. *Williams*, 7 C. & P. 332; *Doe* v. *Murrell*, 8 C. & P. 134; and the cases quoted, *ante*, pp. 56, 152.

The owner of A and B, adjacent closes, demised A to a tenant who built upon B without leave of the landlord. The tenant having occupied both A and B for twenty years, paying rent to the landlord under the demise of A, but not expressly in respect of B, could insist, as against the landlord, on a sufficient possession of B within the statute (*Doe* v. *Massey*, 17 Q. B. 373). One who occupies as his own land belonging to another, and afterwards becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire as against his landlord a possessory title to the land first occupied (*Dixon* v. *Baty*, L. R. 1 Ex. 259; compare *Smith* v. *Stocks*, 10 B. & S. 701).

Tenant for life when estopped from disputing his grant or devise.

Where A, who has no title, purports by deed to grant land to B for life with remainder over, and B enters under the deed, and afterwards acquires title by possession against the true owner, B and his privies are estopped as against the remainderman from disputing the validity of the deed (*Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86). The same principle applies where B enters under a devise by a

testator who had a defective title (*Board* v. *Board*, L. R. 9 Q. B. 48; *Hawksbee* v. *Hawksbee*, 11 Hare, 230; *Calder* v. *Alexander*, 16 T. L. R. 294; compare *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Yem* v. *Edwards*, 1 De G. & J. 598; *Molony* v. *Molony*, [1894] 2 I. R. 1). **37 & 38 Vict. c. 57, s. 1.**

The Courts have refused to apply estoppel to the cases where B entered under a devise which was invalid (*Re Stringer*, 6 Ch. D. 10; *Re Anderson, Pegler* v. *Gillatt*, [1905] 2 Ch. 77; *Re Tennent's Estate*, [1913] 1 I. R. 280); or which did not comprise the particular land (*Paine* v. *Jones*, 18 Eq. 320; *contra*, *Anstee* v. *Nelms*, 1 H. & N. 225; 26 L. J. Ex. 5; *Kernaghan* v. *M'Nally*, 12 Ir. Ch. Rep. 89). The last case was considered inconsistent with *Scott* v. *Nixon* (3 Dr. & W. 388) by the C. A. in *Dalton* v. *Fitzgerald*, *supra*; where see also remarks on *Paine* v. *Jones*, *supra*.

Rights of claimant to take possession.

Every claimant who has such a right of possession as would entitle him to maintain ejectment against a wrongdoer is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace (*Taylor* v. *Cole*, 3 T. R. 292; *Taunton* v. *Costar*, 7 T. R. 431; *R.* v. *Wilson*, 8 T. R. 357; *Rogers* v. *Pitcher*, 6 Taunt. 202; *Turner* v. *Meymott*, 1 Bing. 158; Co. Litt. 245 b; 1 M. & R. 221, n. (*c*); 5 Nev. & M. 164; *R.* v. *Newlands*, 4 Jurist, 322; *Perry* v. *Fitzhowe*, 8 Q. B. 757); but he cannot turn out the wrongdoer with violence (*Edwick* v. *Hawkes*, 18 Ch. D. 199). As to damages in case of a forcible entry by the rightful owner, see *Beddall* v. *Maitland*, 17 Ch. D. 174.

A landlord cannot lawfully acquire possession by a forcible entry after the expiration of the term (*Newton* v. *Harland*, 1 M. & G. 644; *Jones* v. *Foley*, [1891] 1 Q. B. 732); even under a licence from the tenant to that effect (*Edwick* v. *Hawkes*, 18 Ch. D. 199).

Cross references.

As to what acts amount to possession, see the note to sect. 3, *post*; as to the effect of certain acts in creating or determining a tenancy at will, see the note to sect. 7, *post*, p. 167; and as to possessory titles under the R. P. Lim. 1833, see the note to sect. 34, *post*, p. 208.

When the right shall be deemed to have first accrued:

3. In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*p*); and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death (*q*); and

in case of an estate in possession,

on dispossession,

on abatement or death,

3 & 4 Will. 4, c. 27, s. 3.

on alienation :

in cases of future estates :

in case of forfeiture or breach of condition.

when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (*r*); and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (*s*); and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken (*t*).

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(5) *Forfeitures and Breaches of Condition*...160.

(1) Dispossession and discontinuance of possession of land.

(*p*) The first branch of sect. 3 deals with cases of dispossession and discontinuance of possession of land and discontinuance of receipt of rent. Dispossession is where a person comes in and drives out the others from possession: discontinuance of possession is where the person in possession goes out and is followed into possession by the other persons (*per* Fry, J., *Rains* v. *Buxton*, 14 Ch. D. 539). To dispossess a former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it (*Leigh* v. *Jack*, 5 Ex. D. 264, 273). As regards equivocal acts the intention is all-important (*Littledale* v. *Liverpool College*, [1900] 1 Ch. 19; *Philpot* v. *Bath*, [1905] W. N. 114). In cases of discontinuance and also of dispossession regard must be had to the nature of the property (*Leigh* v. *Jack*, 5 Ex. D. 272; *Marshall* v. *Taylor*, [1895] 1 Ch. 645). Small acts are sufficient to show there is no discontinuance (*Leigh* v. *Jack*, 5 Ex. D. 272; see *Solling* v. *Broughton*, [1893] A. C. 556; *Re Vernon*, [1901] 1 I. R. 1). There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute (*Smith* v. *Lloyd*, 9 Exch. 562; *Kingston* v. *Kingston*, [1897] A. C. 515; *M'Donnell* v. *M'Kinty*, 10 Ir. L. R.

514; see *Rimington* v. *Cannon*, 12 C. B. 1). And if, before the statutory period has expired, the intruder abandons possession and the possession is vacant, the rightful owner is in the same position in all respects as before the intrusion (*Trustees' Co.* v. *Short*, 13 App. Cas. 793; *Willis* v. *Howe*, [1893] 2 Ch. 554). To bring a case within the statute, possession must be by the person wishing to assert the statute, and not by third persons, or by the custody of the law (*Howlin* v. *Sheppard*, 19 W. R. 253). As to possession by a series of independent trespassers, see the note to sect. 34, *post*, p. 210. And as to the party upon whom the onus lies of proving the commencement of the wrongful possession, see *Poole* v. *Griffith*, 15 Ir. C. L. R. 239, 277. **3 & 4 Will. 4, c. 27, s. 3.**

What possession is sufficient.

Where the soil of a road was vested in A, user of the road by the public on foot was held sufficient enjoyment to preserve A's title to the soil as against acts of ownership committed by B (*Reilly* v. *Thompson*, 11 I. R. Ch. 238). From the last-mentioned case it appears that the Irish decision to the contrary effect in *Tottenham* v. *Byrne* (12 Ir. C. L. R. 376) was reversed on appeal (11 I. R. C. L. 247). The erection and locking of gates was not alone sufficient to show dispossession (*Littledale* v. *Liverpool College*, [1900] 1 Ch. 19). As to possession by the erection of a fence, see *Worssam* v. *Vandenbrande*, 17 W. R. 53.

As to acts constituting possession of a ditch, see *Searby* v. *Tottenham Ry. Co.*, L. R. 5 Eq. 409; *Norton* v. *L. & N. W. Ry. Co.*, 13 Ch. D. 268; *Marshall* v. *Taylor*, [1895] 1 Ch. 645, followed in *Kynoch* v. *Rowlands*, [1912] 1 Ch. 527. Of a boundary wall, *Phillipson* v. *Gibbon*, 6 Ch. 428; *Waddington* v. *Naylor*, 60 L. T. 480; *Stedman* v. *Smith*, 8 El. & B. 1. Of a gravel-pit and road, *Smith* v. *Stocks*, 17 W. R. 1135; 10 B. & S. 701. Of the soil under a highway by means of a tunnel, *Bevan* v. *London Cement Co.*, 67 L. T. 615. Of land over a railway tunnel, *Midland Ry. Co.* v. *Wright*, [1901] 1 Ch. 738. Of a dry river-bed, *Hindson* v. *Ashby*, [1896] 1 Ch. 87; [1896] 2 Ch. 1. Of oyster beds on the foreshore, *Foster* v. *Warblington*, [1906] 1 K. B. 671. Acts constituting possession of the foreshore were considered in *Lord Advocate* v. *Young*, 12 A. C. 553; *Lord Advocate* v. *Blantire*, 4 A. C. 791; *Re Vernon*, [1901] 1 I. R. 10; *e.g.* by granting a lease, *Van Diemen's Co.* v. *Table Board*, [1906] A. C. 92; or by placing piles on the foreshore (*Beaufort* v. *Aird*, 20 T. L. R. 602; *Philpot* v. *Bath*, [1905] W. N. 114). As to possession by overhanging trees, see *Lemmon* v. *Webb*, [1895] A. C. 6. Title to the soil of a lane was acquired by letting the grazing (*Haigh* v. *West*, [1893] 2 Q. B. 31). Acts of the other party which are relied on as negativing possession may be attributed to an easement (*Norton* v. *L. & N. W. Ry. Co.*, *supra*; *Marshall* v. *Taylor*, *supra*; see *Grose* v. *West*, 7 Taunt. 42; *Philpot* v. *Bath*, [1905] W. N. 114). Acts done on part of the land may be evidence of possession of the whole where there is a common character of locality (*Jones* v. *Williams*, 2 M. & W. 326; *Bristow* v. *Cormican*, 3 App. Cas. 641; *Lord Advocate* v. *Blantyre*, 4 App. Cas. 791; *Clark* v. *Elphinstone*, 6 App. Cas. 164; *Lord Advocate* v. *Wemyss*, [1900] A. C. 68). See further as to acts of ownership, *Att.-Gen.* v. *Chambers*, 4 De G. & J. 65, and the cases quoted *ante*, p. 110; also sect. 10, *post*, p. 172.

A title to an underground cellar may be acquired by possession, of which the owner of the surface is ignorant (*Rains* v. *Buxton*, 14 Ch. D. 537). Where a rector built on a piece of land a school, which was placed under a committee of which he was a member, the possession was not such as to give the rector a statutory title to the land as glebe (*Gibson* v. *Wise*, 35 W. R. 409; see *Churcher* v. *Martin*, 42 Ch. D. 312; and compare the title acquired by

3 & 4 Will. 4, c. 27, s. 3.

churchwardens and overseers as trustees for a parish. *Haigh* v. *West*, [1893] 2 Q. B. 31). A stranger may acquire by possession a title to land of a railway company, whether superfluous (*Norton* v. *L. & N. W. Ry. Co.*, 13 Ch. D. 268) or not superfluous (*Bobbett* v. *S. E. Ry.*, 9 Q. B. D. 424), and to the surface of land situate vertically over a tunnel used by the company (*Midland Ry. Co.* v. *Wright*, [1901] 1 Ch. 738; see *Rosenberg* v. *Cook*, 8 Q. B. D. 166). In the last cases the title was acquired not to the surface only, but also *usque ad coelum*. And a possessory title may be acquired even though the true owner is under a statutory prohibition against letting or selling (*Brighton* v. *Brighton Guardians*, 5 C. P. D. 368). No actual possession was acquired of a disused railway (*Re Duffy*, [1897] 1 I. R. 307).

Possession of mines and minerals:

In order to prove possession in an ejectment for mines, it is not sufficient to show that the plaintiff was lord of the manor (*Rich* v. *Johnson*, Str. 1142); or to show a verdict for the plaintiff in trover for lead dug out of a mine (Bull. N.P. 102; Adams on Ejectment, 4th ed., 263). Where title to mines is founded on adverse possession, the title will be limited to the area of which actual possession has been enjoyed (*Clegg* v. *Rowell*, [1909] 1 Ch. 678; a case in which the working and possession of mines under a small area did not give a statutory title to the mines under a larger area; *Lord Advocate* v. *Wemyss*, [1900] A. C. 68). So where a man has taken possession of one seam of coal and by lapse of time has acquired title, the law will not assume that his possession extends to other seams lying under that seam (*Lowmoor Co.* v. *Stanley Coal Co.*, 34 L. T. 186). So possession of a portion of minerals did not justify a presumption of possession of the whole (*M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514). On the other hand, constructive possession of a wider area may in some cases be inferred from actual possession of a limited area (see *Taylor* v. *Parry*, 1 M. & Gr. 615; *Wild* v. *Holt*, 9 M. & W. 675). Thus where a lessor allows his intended lessee to take possession, the latter must be considered as constructively in possession of all which the lessor has bound himself to demise (*Davis* v. *Shepherd*, 1 Ch. 415). So a man who had entered and worked two seams of coal was held to have taken possession of seven seams under the same lands (*Lowmoor Co.* v. *Stanley Coal Co., supra*). But as a general rule, the inference will only be made where it is necessary to give effect to contractual obligations or to preserve the good faith and honesty of a bargain (*Glyn* v. *Howell*, [1909] 1 Ch. 678).

No statutory title arose from the mere wrongful getting of neighbouring coal by a mine owner who worked such neighbouring coal in the *bona fide* belief that he had a title thereto (*Ulleswater Co.* v. *Hickman*, [1907] 1 Ch. 562; *Ashton* v. *Stock*, 6 Ch. D. 726); nor from acts of working coal of which the owner of the coal mine was ignorant (*Dartmouth* v. *Spittle*, 24 L. T. R. 67; compare *Rains* v. *Buxton*, 14 Ch. D. 537).

effect of possession of surface;

When the defendant, being entitled to a right of way over land which adjoined his farm, used for more than twenty years such adjoining land as part of his farm, he acquired by possession of the surface a good title to the subjacent minerals (*Seddon* v. *Smith*, 36 L. T. 168). A lessee, under a lease in which mines were not reserved, who was in possession of the surface, was held to be in possession of the mines (*Keyse* v. *Powell*, 2 Ell. & Bl. 132). But where an owner in fee conveyed the surface to A. excepting the minerals, and reserving liberty to enter and work, and such right of entering had not been exercised for forty years, but no other person had worked the mines, the owner was not barred (*Smith* v. *Lloyd*, 9

where title to surface and minerals is not severed; is severed.

Exch. 562; see *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; *Seaman* v. *Vawdrey*, 16 Ves. 390). 3 & 4 Will. 4, c. 27, s. 3.

Lord St. Leonards was of opinion that the expression "in receipt of the profits of any land," is used in the Act, in conjunction with the words "in possession of the land," to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land (R. P. Stat. 47). By sect. 35 (*post*), the receipt of the rent payable by any tenant from year to year, or other lessee, is, against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land for the purposes of this Act. Compare S. L. Act, 1925, s. 117, sub-s. 1 (xix), *post*; where "possession" includes receipt of rents and profits. As to receipt of rents by agent, see note, *ante*, p. 153. "Receipt of profits of land."

The statutory provisions divesting the rights of an owner of a rent who has discontinued the receipt thereof only apply where such owner, while knowing that payment has not been made, omits to enforce his remedies, and may accordingly be held guilty of some neglect or default (*Adnam* v. *Sandwich*, 2 Q. B. D. 490). Where accordingly land belonging to A which was subject to a fee farm rent in favour of B was, without B's knowledge, conveyed by A to C; and for sixty years A and his successors paid the rent, B's right as against C to distrain on the land was not barred (*ibid.*; *Irish Commission* v. *White*, [1896] 2 I. R. 410; see *Bomford* v. *Neville*, [1904] 1 I. R. 474). A rent-charge is entire and issues out of every portion of the premises charged. Where accordingly an old rent-charge charged on Blackacre and Whiteacre had always been paid by the occupier of Blackacre, and Whiteacre had for more than the statutory period belonged to a separate owner who had never paid the rent, the right to distrain on Whiteacre was not barred (*Woodcock* v. *Titterton*, 12 W. R. 865; *Dublin* v. *Trimleston*, 12 Ir. Eq. R. 251; see *Laybourn* v. *Gridley*, 61 L. J. Ch. 353; *Conolly* v. *Gorman*, [1898] 1 I. R. 20). Discontinuance of receipt of rent: point from which time runs.

Where a party has been in receipt of rent and afterwards discontinues such receipt, the statute fixes the point from which time is to run at the day on which the last payment of rent was made, and such party has not the option of calculating from the time when he discontinued the receipt of rent (*Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Exch. 166; see *Irish Commission* v. *Grant*, 10 App. Cas. 27). Under R. P. Lim. Acts, a person disseised of rent has only twelve years from the last payment; and so, if an annual rent has been paid on the day on which it became due, and afterwards unjustly withheld, the party aggrieved has only eleven years during which he can bring his action or distrain; for during the first year he has no right of distress or action at all (16 M. & W. 565). The case where judgment has been recovered for arrears is dealt with, *Irish Commission* v. *Junkin*, 24 L. R. Ir. 40; *Irish Commission* v. *Ryan*, [1900] 2 Ir. L. R. 565.

Where the rents of mines are reserved by means of payment of produce in specie, time will run under the statute from the receipt and not from the sale of such produce by the lessor (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42; see *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514).

Where a copyhold tenant had not paid his fine, and the lord seized *quousque*, time ran against the tenant from the seizure (*Walters* v. *Webb*, 5 Ch. 531). The statute did not run against the lord's right to seize *quousque* until the time at which, after proclamation and notice, the tenant had failed to come in and be admitted (*Eccl. Commrs.* v. *Parr*, [1894] 2 Q. B. 420; *Beighton* v. *Beighton*, 64 L. J. Ch. 796). As to negligence in exacting fines and quit rents see *ante*, p. 138. Seizure *quousque*.

3 & 4 Will. 4, c. 27, s. 3.

(2) Wrongful possession commencing on death.

(*q*) The second branch of sect. 3 deals with cases where wrongful possession commenced on the death of a rightful owner. "Thus where A, seised in fee in possession dies either intestate, leaving B his heir, or having devised to B in fee or for a less estate (*sed qu.*, *James* v. *Salter*, 3 Bing. N. C. 544), and C, a stranger, first obtains possession after the death of A, the time runs against B from A's death, and not from C's entry" (1 Hayes, Conv. 248).

Lord St. Leonards seems to be of opinion that a rent newly created by will (as in *James* v. *Salter*, 3 Bing N. C. 544) would fall within this second branch of sect. 3 (R. P. Stat. 22). But this opinion is questioned (Darb. & Bos. Stat. Lim., 2nd ed., 308).

A let land to B by parol from year to year, reserving rent payable in March and November. The last payment of rent was in March, 1846: A died in December, 1846; time ran, under sect. 8, from the last payment of rent, and not from A's death, under sect. 3 (*Baines* v. *Lumley*, 16 W. R. 674).

(3) Wrongful possession commencing on alienation by rightful owner.

(*r*) The third branch of sect. 3 deals with cases where wrongful possession commenced on alienation in favour of the claimant by a rightful owner. On the construction of the words "other than a will" in this branch, see *James* v. *Salter*, 3 Bing. N. C. 544.

It was held in the Common Pleas (differing from *Doe* v. *Phillips*, 10 Q. B. 130) that the case of a *cestui que trust* holding land under a trustee does not fall within this clause (*Garrard* v. *Tuck*, 8 C. B. 231).

(4) Future interests.

(*s*) The fourth branch of sect. 3, together with sect. 20, and sect. 2 of R. P. Lim. Act, 1874 (*post*, p. 162), which has been substituted for sect. 5 of R. P. Lim. Act, 1833, deal with future interests. As to these see the note to sect. 2 of the R. P. Lim. Act, 1874 (*post*, p. 163).

(5) Forfeiture or breach of condition.

(*t*) The fifth branch of sect. 3 and sect. 4 deal with rights arising on forfeitures and breaches of conditions, as to which see note to sect. 4.

Continuous running of time.

As to the rule that where when once time has commenced to run against the owner of land the running cannot be suspended, see *Garner* v. *Wingrove*, [1905] 2 Ch. 233; *Johnson* v. *Brock*, [1907] 2 Ch. 533; *Re Bermingham*, 5 Ir. R. Eq. 147, and *post*, p. 179. The rule as regards this in the case of personal estate is stated in the note to sect. 3 of the Lim. Act, 1623, *post*.

When forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

(1) Meaning of section.

The fifth branch of sect. 3 lays down a rule as to forfeitures or breaches of condition which was applied in *Re Orchard St. Schools* (1878), W. N. 211.

3 & 4 Will. 4, c. 27, s. 4.

Sect. 4 is a proviso upon the fifth branch. So if a lessee for years subject to a condition of re-entry breaks the condition, time runs against the reversioner in respect of his right of re-entry from the breach; but a bar to this right of re-entry will not affect the reversioner's right to enter on the expiration of the term (1 Hayes Conv. 252). The words "forfeiture" and "breach of condition" are to be read in their largest sense, and include forfeitures which give a right to land under a conditional limitation. So where land was limited to A in tail with remainder to B, and there was a name and arms clause providing that in the event of a breach (which happened) A's estate should cease, B's right accrued upon A's death without issue, notwithstanding that more than the statutory period had elapsed since the breach (*Astley* v. *Essex*, 18 Eq. 290). Where land was given over to B upon A remarrying and receiving £50, B's right only accrued upon A who had remarried receiving the money (*Connolly* v. *Leahy*, [1898] 2 I. R. 344). Sect. 4 preserves the old law under which a remainderman was not bound to enforce a forfeiture, and his right to enter upon the expiration of the particular estate was not affected by his having failed to do so (*Kemp* v. *Westbrook*, 1 Ves. sen. 278; *Doe* v. *Danvers*, 7 East, 759; *Doe* v. *Blakeway*, 5 Car. & P. 563).

On the question whether notice must be proved of a condition alleged to work a forfeiture, it has been laid down that a person who under a will takes a gift to which a condition is attached cannot plead want of knowledge of the contents of a will as an excuse for not complying with its provisions. A forfeiture will occur whether he has notice or not (*Astley* v. *Essex*, 18 Eq. 290; compare *Re Lewis; L.* v. *L.*, [1904] 2 Ch. 656; *Porter* v. *Fry*, 1 Vent. 199; 1 Mod. 86). It was held in early cases that the rule did not apply to a devisee who was the testator's heir and so could have entered under another title; and that in such a case there must have been notice of the condition before there could be a forfeiture (*Fraunce's Case*, 8 Rep. 89 A; Shepp. Touch. 148; *Mallon* v. *Fitzgerald*, 3 Mod. 29; Skin. 125; *Doe* v. *Beauclerk*, 11 East, 657; *Doe* v. *Crisp*, 8 Ad. & El. 779; *Murphy* v. *Broder*, Ir. Rep. 9 Ch. 123). But the rule has been recently applied where the devisee was the heir (*Horrigan* v. *H.*, [1904] 1 I. R. 271); and see sect. 3 of the Inheritance Act, 1833, *post*, providing that an heir shall take as devisee.

Clause of re-entry for non-payment of rent.

With regard to express clauses of re-entry for non payment of rent, it is settled that in Ireland a landlord is not barred from recovering rent by non-payment for the statutory period (*Cosbie* v. *Surgrue*, 9 Ir. L. R. 17; *Parke* v. *McLoughlin*, 1 Ir. C. L. R. 186; *Spratt* v. *Sherlock*, 3 Ir. C. L. R. 69; overruling *Doe* v. *Bingham*, 3 Ir. L. R. 456). In the case of an English lease containing such a clause, it has been suggested that (so far as the recovery of the land is concerned) a fresh right to re-enter accrues every time a fresh default in payment of rent is made (Darb. & Bos. Stat. Lim. 2nd ed. 338; see *Doe* v. *Bliss*, 4 Taunt. 725; *Macher* v. *Foundling Hospital*, 1 Ves. & B. 191). As to recovering arrears of rent, see sect. 42, *post*.

As regards the construction of clauses of forfeiture in leases, it is settled that even where a clause declares the lease shall be void on breach of condition by lessee, the lease is voidable only at the option of the lessor (*Davenport* v. *R.*, 3 App. Cas. 128). See further the notes to *Dumpor's Case*, 1 Smith, L. C.

Entry for forfeiture of copyholds.

In the case of copyholds, the fifth branch of sect. 3 applied to forfeitures, and the lord's right of entry was barred where the statutory period had elapsed since the forfeiture (*Whitton* v. *Peacock*, 3 M. & K. 325). As regards forfeiture of copyholds generally the rule

3 & 4 Will. 4, c. 27, s. 4.

was that where the lord died before entry or seizure for forfeiture, the reversioner or remainderman could never take advantage of the forfeiture done or committed before their time (*Montagu's Case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe* v. *Hellier*, 3 T. R. 162; see *Doe* v. *Trueman*, 1 B. & Ad. 744; *Doe* v. *Bousfield*, 6 Q. B. 492); unless the act of forfeiture destroyed the estate (3 T. R. 173). As to seizure *quousque*, see *ante*, p. 159; as to fines and quit rents see p. 138; and generally as to the forfeiture of copyholds, see Scriven, 208 *et seq.*, 7th ed., Elton, 223.

[*Sect. 5 of the R. P. Lim. Act*, 1833, *has been repealed and the following substituted, viz.*]

Provision for case of future estates (*i*).

[R. P. Lim. Act, 1874, sect. 2.] A right to make any entry or distress, or to bring an action (*a*) or suit to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion (*β*) or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land (*γ*) or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such lands, or in receipt of such rent (*k*): But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer, and if the right of any such person (*l*) to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person (*m*) afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate

Time limited to six years when person entitled to the particular estate out of possession, &c.

whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent. 37 & 38 Vict. c. 57, s. 2.

(*i*) By sect. 9 of the R. P. Lim. Act, 1874, the above section has been substituted for sect. 5 of the R. P. Lim. Act, 1833; and the case of future estates and interests now depends upon the above section construed together with the fourth branch of sect. 3 and sect. 20 of R. P. Lim. Act, 1833, *ante*, p. 156, *post*, p. 184 (*Re Devon Settled Estates*, [1896] 2 Ch. 567).

Cases within the fourth branch of sect. 3.

The fourth branch of sect. 3 of the R. P. Lim. Act, 1833, must be read with sect. 2 of the R. P. Lim. Act, 1874; as to which see *Johnson* v. *Brock*, [1907] 2 Ch. 538, quoted below. The words of the fourth branch "or other future estate or interest" were said to comprehend all executory devises (*James* v. *Salter*, 3 Bing. M. 554; see *Doe* v. *Liversedge*, 11 M. & W. 517, for a "future estate"). Thus where land is limited to A for life with remainder to B, or to A in fee with an executory limitation in the event of A dying under twenty-one to B, and A dies or dies under twenty-one, time runs against B from A's death (1 Hayes Conv. 251). Executory limitations.

Husband and wife.

If husband and wife, being seised in fee in right of the wife, convey to a purchaser by a conveyance not operative to bind her, the wife, if she survives, and if not, her heir, may, on the husband's death, recover the land notwithstanding the purchaser may have been in possession for forty years. The right of the wife in such a case is within the fourth branch of sect. 3 as being a future estate or interest (*Jumpsen* v. *Pitchers*, 13 Sim. 327; see *Hounsell* v. *Dunning*, [1902] 1 Ch. 512; *Price* v. *Copner*, 1 Sim. & Stu. 347). The case would be different if the husband and wife simply discontinued possession (Sugden, R. P. Stat. 83; see also *Cannon* v. *Rimington*, 12 C. B. 1).

Mortgagees.

Where a mortgagee had an equitable charge on a contingent reversionary interest in land, time ran against his right to foreclose from the date when the interest fell into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 482; see *Re Owen*, [1894] 3 Ch. 220; *Re Conlan*, 29 L. R. Ir. 199; *Re Witham, Chadburn* v. *Wingfield*, [1922] 2 Ch. 413). In a case relating to a second mortgage of land the existence of the first mortgage did not make the mortgagor's interest a "future interest" so that time should run against him only from the satisfaction of the first mortgage (*Johnson* v. *Brock*, [1907] 2 Ch. 537). Even where the first mortgagee took possession (*ibid.*; but see *Re Bermingham*, 5 Ir. R. Eq. 147). *Johnson* v. *Brock* was approved by the C. A. in *Wakefield &c. Bank* v. *Yates*, [1916] 1 Ch. 452. Second mortgagee.

Landlord and tenant.

In the case of leaseholds where a lessee retains possession but pays no rent for the statutory period, the landlord's right to recover the land accrues under the fourth branch of the 3rd section upon the expiration of the term (*Doe* v. *Oxenham*, 7 M. & W. 131). Where a trespasser has obtained possession of demised land, the landlord's right accrues upon the expiration of the term; and if a new lease be subsequently granted to the old lessee, this will not, as between the landlord and the trespasser, affect the running of time in any case where possession is not taken under the new lease (*Kennedy* v. *Woods*, I. R. 1 C. L. 76; 2 C. L. 436). Where during the term a trespasser has obtained possession of demised land, and the lessee surrenders his lease while time is running in favour of the trespasser (as between him and the lessee), the right to recover the land accrues to the landlord upon the surrender (*Eccl. Comrs.* v. *Rowe*, 5 A. C. 741). But where at the date of the surrender, time had run in favour of the trespasser (as between him and the lessee), the right to recover the land did not accrue to the landlord on the surrender, but only on

Effect of surrenders.

Possession at the time by trespasser.

37 & 38 Vict. c. 57, s. 2.

No possession at the time by trespasser.

the expiration of the term (*Walter* v. *Yalden*, [1902] 2 K. B. 304). Where the same trustee held leases of Blackacre and Whiteacre (adjoining properties) on different trusts, and a person entitled as *c. q. t.* to possession of Whitacre and by reason of such possession obtained possession of Blackacre, and during such possession the trustee surrendered the lease of Blackacre and obtained a new lease, it was held that the possession in law of Blackacre at the date of the surrender was in the trustee, and that the surrender and new lease being accordingly valid, the landlord's right to recover only accrued on the expiration of the new lease (*East Stonehouse Council* v. *Willoughby*, [1902] 2 K. B. 318). So where during the existence of a sub-lease (under which the sub-lessee was in possession) the head lease was surrendered and a new head lease was granted (which was valid under the 6th section of the Landlord and Tenant Act, 1730; see now L. P. Act, 1925, s. 150, *post*), the landlord's right to recover the land did not accrue until the expiration of the new head lease (*Eccl. Comrs.* v. *Treemer*, [1893] 1 Ch. 166).

Tenant for life and remainderman.

The provision contained in the fourth branch of sect. 3 of the R. P. Lim. Act, 1833, was applied where there was a tenancy for life during which time did not run against the remainderman (*Gery* v. *Redman*, 1 Q. B. D. 161). So where A, a tenant for life, alienated in fee, time did not run against the remainderman until the death of A (*Doe* v. *Rolfe*, 8 Ad. & El. 850; see *Scott* v. *Scott*, 4 H. L. C. 1084). In one case the effect of a resettlement was considered, and the owner of a new future estate was held to have the same time for suing as the owner of the old estate (out of which the new future estate had been carved) would himself have had (*Doe* v. *Edmonds*, 6 M. & W. 295).

Sect. 2 of R. P. Lim. Act, 1874.

Sect. 5 of the R. P. Lim. Act, 1833, has been replaced by sect. 2 of the R. P. Lim. Act, 1874. The language of the former section has been repeated in the part of the latter section (above) which precedes (*k*), with the addition, however, of the following words in the following places, viz. at (α) "or suit"; at (β) "or remainder or other future estate or interest"; at (γ) "or rent."

Sect. 2 of the R. P. Lim. Act, 1874, deals with the case where the persons interested in the right of action for the recovery of land are more than one; for example, a tenant for life and remainderman. For the purpose of ascertaining in such a case the statutory periods necessary to extinguish the right, the section gives the remainderman or reversioner a separate and distinct right of action. This view is indicated by the marginal note to sect. 5 (repealed), "reversioner to have a new right" (*Johnson* v. *Brock*, [1907] 2 Ch. 538).

Sect. 5 of the R. P. Lim. Act, 1833, was held to apply only to cases where a person other than the reversioner was entitled to the particular estate (*Doe* v. *Mousdale*, 16 M. & W. 689, see p. 698). The saving of the section was applied to a term to secure an annuity (*Re Bermingham*, I. R. 5 Eq. 147).

Proviso in sect. 2.

(*k*) The proviso which follows here did not occur in R. P. Lim. Act, 1833, s. 5. The reversion in fee expectant on a term of years has been held not to be a "future estate or interest expectant on a particular estate" within the meaning of the proviso (*Walter* v. *Yalden*, [1902] 2 K. B. 304). Where A, tenant for life, aliened, and the alienee entered, and seventeen years afterwards A died, and the remainderman brought ejectment more than six but less than twelve years after A's death, the action was not barred. The proviso did not apply, inasmuch as the alienee and not A was held to be "the person last entitled to the particular estate." And under the earlier part of the section the plaintiff had twelve years from A's death (*Pedder* v. *Hunt*, 18 Q. B. D. 565). Land was limited to A

for life, remainder to B for life, remainder in fee to C, whose estate arose under the exercise of a general power of appointment vested in A by the settlement. Possession by a stranger had barred A's title at his death in 1888. B died in 1891 without having recovered possession. In 1896 it was held that C's title was not then barred, the case falling within the above proviso. The Court declined to hold that sect. 1 of the Act of 1874 barred C as being a person claiming under A, or to hold that the general power of appointment was another "right" of A so as to bring the case within sect. 20 of the Act of 1833 (*Re Devon Settled Estates*, [1896] 2 Ch. 562). 37 & 38 Vict. c. 57, s. 2.

(*l*) This seems to mean the person becoming entitled in possession to a future estate or interest.

(*m*) This provision seems intended to apply only to persons claiming under the person barred under the earlier part of the section.

The various cases (1) where the owner of an estate in possession grants out of it a particular estate with reversion or remainders following, after time has commenced to run against him; (2) where the owner of an estate in remainder deals with it after time has commenced to run against the first particular estate; and (3) where a tenant for life and remainderman deal with the estate while time is running against the tenant for life, are discussed in relation to these sections in Darb. & Bos. Stat. Lim. 318 *et seq.*

6. For the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. An administrator to claim as if he had obtained the estate without interval after death of deceased.

(1) *Old Rule*...165.
(2) *Cases on the Section*...165.
(3) *Distinction between Executor and Administrator and Administrator's Rights*...165.

(1) Old rule that time ran from grant of administration.

Under the law before this Act time only ran from the grant of administration. Hence a right to a chattel interest in lands might, notwithstanding adverse possession, have been kept alive to the expiration of the term, however long (see *Stanford's Case*, Cro. Jac. 61; cited in *Cary* v. *Stephenson*, 2 Salk. 421; *S. C.*, Carth. 335; Skinn. 555; 4 Mod. 376; *Fairclaim* v. *Little*, cited in 5 B. & Ald. 214). The object of this section was to make time with respect to chattels real run from the time when the right of entry arose (see 1st Real Prop. Rep. p. 48).

(2) Cases on the section.

As regards leaseholds time runs under this section against the administrator from the death of the intestate (*Davies* v. *Williams*, 34 Ch. D. 558). As regards freeholds vested in an administrator by the Land Transfer Act, 1897, or the Administration of Estates Act, 1925, it seems that the same rule will apply (L. T. Act, 1897, s. 1, sub-s. 1; s. 2, sub-s. 2; Administration of Estates Act, 1925, s. 1, sub-s. 1, *post*). The above section of the R. P. Lim. Act, 1833, applies to cases arising in respect of charges on land, as well as to cases arising under the earlier part of the Act (*Re Bonsor and Smith*, 34 Ch. D. 560, n.).

(3) Distinction between administrator and executor.

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the Probate Court, and has none until administration is granted, and the property and rights of the deceased vest in him only upon the grant (*Woolley* v.

3 & 4 Will. 4, c. 27, s. 6.

Clark, 5 B. & Ald. 744; *Pratt* v. *Swain*, 8 B. & C. 287). The title of an administrator, however, though it does not exist till the grant, relates back to the time of the death of the intestate (*Re Pryse*, [1904] P. 305); so as to entitle him to recover against a wrongdoer who has seized or converted the goods of the intestate after his death in an action of trespass or trover (*Tharpe* v. *Stallwood*, 5 M. & G. 760; *Foster* v. *Bates*, 12 M. & W. 233; *Welshman* v. *Sturgess*, 13 Q. B. 522; see *Hill* v. *Curtis*, 1 Eq. 100). The grant has the effect of vesting leaseholds in the administrator by relation, so as to enable him to sue for all matters affecting such leaseholds subsequent to the death, and to render him liable to account for rent and profits from the death (*R.* v. *Horsley*, 8 East, 410). But this doctrine of relation exists only in cases where the administrator's act is for the benefit of the estate (*Morgan* v. *Thomas*, 8 Exch. 302; see *Re Watson*, 19 Q. B. D. 234). Nor does relation back divest any right legally vested in another between the death and the grant, so as to enable an administrator, who had obtained administration after an execution, issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to 8 Anne, c. 17 (*Waring* v. *Dewberry*, Gilb. Eq. Rep. 223, cited in 1 Str. 97; Fortesc. 360; *S. C.*, Vin. Abr. Executors (Q)).

Where a grant of administration was obtained by suppressing a will containing no appointment of executors and the grant was subsequently revoked, a previous sale of leaseholds by the administratrix was upheld (*Boxall* v. *B.*, 27 Ch. D. 220). But where the suppressed will appointed an executor, a grant of administration was wholly void and dispositions of the assets by the supposed administrator were treated as void also, with the exception of acts which the administrator was compellable to do (*Ellis* v. *Ellis*, [1905] 1 Ch. 613; compare *Craster* v. *Thomas*, [1909] 2 Ch. 348, a decision under the Indian Succession Act, 1865; *Re West*, *West* v. *Roberts*, [1909] 2 Ch. 180). But see now s. 37 of Administration of Estates Act, 1925, *post*.

An executor.

On the other hand an executor derives his title from the will itself, the property vesting in him from the testator's death (*Hickman* v. *Walker*, Willes, 27). An executor before probate can do almost anything incident to his office. But if the legal validity of acts done before probate is challenged, probate must be produced (*Att.-Gen.* v. *New York Co.*, [1898] 1 Q. B. 216; *Re Stevens*, *Cook* v. *Stevens*, [1897] 1 Ch. 429). Probate is only evidence, not the source of an executor's title. Before probate he can even sell property (*Sykes* v. *S.*, L. R. 5 C. P. 118). He can give a good receipt for money (*Re Masonic Co.*, 32 Ch. D. 374; *Re Stevens*, *supra*). He can assign leaseholds (*Re Pawley and London Bank*, [1900] 1 Ch. 64), and can enter on land demised (*R.* v. *Stone*, 6 T. R. 298; see *Fenton* v. *Clegg*, 9 Ex. 680). The power, rights and duties of representatives in respect of chattels real are further stated in the note to L. T. Act, 1897, s. 2, sub-s. 2 (*post*).

An executor or administrator is not deemed to be in possession of things immoveable, as leases for years or houses, before entry (Went. Off. Ex. 228, 14th ed.); although a reversion of a term, which the testator granted *for part* of the term, is in the executor immediately on the testator's death (*Trattle* v. *King*, T. Jones, 170).

Cross references.

As to the running of time under Lim. Act, 1623, in the case of executors and administrators, see *post*, p. 265.

In the case of a tenant at will, the right shall be deemed to

7. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or

distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

3 & 4 Will. 4, c. 27, s. 7.

have accrued at the end of one year.

(1) *Operation of Sect.* 7...167.
(2) *Proviso as to Mortgagors and* cestui que trusts...168.

(1) Tenancies within the section;

This section did not apply to cases where the tenancy at will had been determined before the passing of the Act (*Doe* v. *Page*, 5 Q. B. 767, see p. 772; *Doe* v. *Thompson*, 6 Ad. & Ell. 721; *Doe* v. *Bold*, 11 Q. B. 127). But where the tenancy was subsisting at the passing of the Act, time ran from the expiration of one year after the expiration of the tenancy (*Doe* v. *Moore*, 9 Q. B. 555).

Where a bargainee took possession of land included in an indenture of bargain and sale which was not enrolled, this operated to make the bargainee a tenant at will, and time began to run in his favour from the end of the first year (*Low Moor Co.* v. *Stanley Co.*, 34 L. T. 186). The occupation for twenty-six years by guardians of public offices belonging to a corporation without payment of rent was held to be a tenancy at will, the guardians acquiring a title under this section (*Brighton* v. *Brighton Guardians*, 5 C. P. D. 368; compare *Kingston* v. *K.*, [1897] A. C. 507). Persons were held to occupy as guests of the true owner, not tenants at will within this section (*Peakin* v. *P.*, [1895] 2 I. R. 359).

tenancies of waste.

A tenancy at will of the waste of a manor was held to be created by a licence from the lord (*Att.-Gen.* v. *Tomline*, 15 Ch. D. 150, 157), even where a yearly rent was reserved (*Hodgson* v. *Hooper*, 3 Ell. & Ell. 149; 29 L. J. Q. B. 222); in which last case it was said that each successive payment of rent was a fresh acknowledgment that the land was held by permission of the lord. As to the effect of such a payment consider also sect. 35, *post*. Where a lessee, with the verbal consent of the lessor, enclosed land adjoining his holding (which land was in fact waste belonging to the lessor as lord of a manor), this did not create such a tenancy as is referred to in sect. 7 (*Whitmore* v. *Humphries*, L. R. 7 C. P. 1).

Tenancy determined after expiration of one year;

no new tenancy created;

Where, after the expiration of one year from the commencement of a tenancy at will, the tenancy has been determined, and no new tenancy has been created, time runs not from the determination, but from the expiration of the year (*Doe* v. *Carter*, 9 Q. B. 863; *Doe* v. *Turner*, 7 M. & W. 226). But where a new tenancy has been created time runs from the determination of such new tenancy, or from the expiration of one year after the commencement thereof, without regard to the original tenancy (*Locke* v. *Matthews*, 13 C. B. (N.S.) 753; 11 W. R. 343; *Turner* v. *Doe*, 9 M. & W. 643; see *Doe* v. *Rock*, 4 M. & Gr. 30; *Thorp* v. *Facey*, 35 L. J. C. P. 349).

new tenancy created.

New tenancies were held to have been created in *Locke* v. *Matthews* and *Turner* v. *Doe*, *supra*; and see *Jarman* v. *Hale*, [1899] 1 Q. B. 994. Where time has begun to run after the expiration of one year from the commencement of a tenancy at will, the question of a subsequent determination of the original tenancy is only relevant so far as it may be preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation (*Day* v. *Day*, L. R. 3 P. C. 761; *Wimbledon* v. *Nicol*, 10 T. L. R. 247).

3 & 4 Will. 4, c. 27, s. 7.

Resumption of possession.

Where parish overseers determined a pauper's tenancy at will by turning him out, and he subsequently resumed possession, no new tenancy at will being created, time ran against the overseers from the pauper's subsequent resumption of possession without any regard to the original tenancy (*Randal* v. *Stevens*, 2 E. & B. 641). And where B's occupation of the land began by the permission of the owner A, and A from time to time came on the land and gave B directions as to cutting trees and repairs, it was said that every time A came on the land, time commenced afresh to run against him (*Allen* v. *England*, 3 F. & F. 49; see *Doe* v. *Groves*, 10 Q. B. 486; *Woodhouse* v. *Hooney*, [1915] 1 I. R. 296). On the other hand see *Lynes* v. *Snaith*, [1899] 1 Q. B. 486, where the landlord entered to do repairs, but it was not shown that the repairs were done against the tenant's will and the result was different.

See, as to the creation and determination of tenancies at will, the notes to *Richardson* v. *Langridge* (Tudor, L. C. Conv. 11, 4th ed.); and *Clayton* v. *Blakey* (2 Smith, L. C. 124, 10th ed.); Woodfall, 21st ed., 280; Foa, 6th ed., 651.

(2) Proviso as to mortgagors and *cestui que trusts*.

The proviso as to mortgagors and *cestui que trusts* was introduced to prevent the title of the mortgagee or trustee from being barred in twenty-one years in those cases in which a mortgagor or *c. q. t.* in possession was held to be tenant at will to the mortgagee or trustee.

Relation between mortgagee and mortgagor in possession.

The relation between mortgagee and mortgagor in possession is perfectly anomalous and *sui generis* (*Cholmondeley* v. *Clinton*, 2 Jac. & W. 183). The mortgagor is only like a tenant at will to the mortgagee, his *legal* interest being inferior to that of a strict tenant at will (Doug. 22, 282, 283; but see now L. P. Act, 1925, ss. 85 *et seq.*, pp. 676 *et seq.*, *post*). The mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will (*Birch* v. *Wright*, 1 T. R. 383; see Coote on Mortgages, 7th ed., 679; *Walmesley* v. *Milne*, 7 C. B. (N.S.) 133). "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will" (*Bird* v. *Wright*, 1 T. R. 378; see 4 Bligh, 97; *Partridge* v. *Bere*, 5 B. & Ald. 604; *Hitchman* v. *Walton*, 4 M. & W. 415; *Doe* v. *Olley*, 12 Ad. & Ell. 481). The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such or as a trespasser, at the election of a mortgagee (*Doe* v. *Maisey*, 8 B. & C. 767; see *Wheeler* v. *Montefiore*, 1 Gale & D. 493). And this is so, even where by the mortgage deed the mortgagor attorned to the mortgagee as tenant at a quarterly rent, which was stated to be done for the purpose of securing the principal and interest, and in contemplation and part discharge thereof (*Doe* v. *Tom*, 4 Q. B. 615). A mortgagor may be tenant at will to the mortgagee notwithstanding the reservation of a yearly rent by the mortgage deed (*Doe* v. *Davies*, 7 Exch. 89; *Doe* v. *Cox*, 11 Q. B. 122; *Walker* v. *Giles*, 6 C. B. 662; see the *Metropolitan Co.* v. *Brown*, 4 H. & N. 428). The receipt of rent may prevent the mortgagee from treating the mortgagor as a trespasser (*Doe* v. *Hales*, 7 Bing. 322). The mere receipt, however, of interest from the mortgagor is not a recognition by the mortgagee that the mortgagor is in lawful possession (*Scobie* v. *Collins*, [1895] 1 Q. B. 375; see *Doe* v. *Cadwallader*, 2 B. & Ad. 473). In *Doe* v. *Barton* (11 Ad. & Ell. 314), Denman, C.J., said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each

other in any other terms than those very words; but thus much is established by the cases of *Partridge* v. *Bere* (5 B. & Ald. 604), and *Hitchman* v. *Walton* (4 M. & W. 409), that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner; so that, as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right." 3 & 4 Will. 4, c. 27, s. 7.

A mortgagor in possession may, as against a mortgagee, grant leases in certain cases (L. P. Act, 1925, s. 99, *post*); and where the mortgagee has not given notice of his intention to take possession or enter into receipt of rents, the mortgagor may sue for rent or possession (*ibid.*, s. 98, *post*).

See further, as to the relation between a mortgagee and a mortgagor in possession, the note to *Keech* v. *Hall* (1 Smith, L. C.), and Tudor, L. C. Conv. 13, 4th ed. Laws of England, vol. 10, p. 375, note.

Where a mortgagor in possession fails to pay principal or interest, the rule of limitation is laid down by R. P. Lim. Act, 1837 (*post*), read in connection with the R. P. Lim. Act, 1874, s. 9 (*post*). Under these provisions a mortgagee may bring an action to recover the land within twelve years after the last payment of principal or interest.

Meaning of the proviso as to *cestui que trusts*.

The proviso as to *cestui que trusts* is equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*Garrard* v. *Tuck*, 8 C. B. 231).

Relation between trustee and *cestui que trust* in possession.

According to the decisions before the R. P. Lim. Act, 1833, the possession of the *c. q. t.* was not adverse to the trustee, if such possession was consistent with the deed and the object of the trust (*Keene* v. *Deardon*, 8 East, 248; *Smith* v. *King*, 16 East, 283). And a *c. q. t.* in possession with the acquiescence of the trustee was treated as his tenant at will (4 Bac. Abr. 198; *Smith* v. *Pierce*, 3 Mod. 195; *Focus* v. *Salisbury*, Hard. 400; *Freeman* v. *Barnes*, 1 Vent. 55, 80; 1 Lev. 270; *Pomfret* v. *Windsor*, 2 Ves. sen. 472, 481; *Grce* v. *Rolle*, 1 Lord Raymond, 716). In a case since this Act, a *c. q. t.* let into possession by the trustee became a tenant at will, and while the estate at will remained, time did not run against the trustee (*Garrard* v. *Tuck*, *supra*; see *Jones* v. *Phipps*, L. R. 3 Q. B. 567). Again the proviso applied so as to preserve a trustee's estate in a case where a *c. q. t.* was in possession (*East Stonehouse Council* v. *Willoughby*, [1902] 2 K. B. 318, 334). On the other hand, in *Re Cussons*, 73 L. J. Ch. 296, the legal estate of a bare trustee holding upon an express trust was held to have been destroyed by the possession of the *c. q. t.* for twelve years.

As to the question whether the proviso includes implied trusts, the word "express" which occurs in sect. 25 (*post*) does not occur in the proviso. It was the opinion of Kay, L.J., that the proviso includes implied trusts (*Warren* v. *Murray*, [1894] 2 Q. B. 657). And the proviso was extended to an intended lessee who entered and remained in possession under an agreement for lease, no lease being granted (*Ibid.*; *Drummond* v. *Sant*, L. R. 6 Q. B. 763). The contrary opinion has been held by other judges (*Doe* v. *Rock*, 4 M. & Gr. 32; *Sands* to *Thompson*, 22 Ch. D. 618). Thus, where a mortgage was paid off, but no re-conveyance was executed, and

3 & 4 Will. 4, c. 27, s. 7.

the mortgagor remained in possession for thirteen years, it was held that the legal estate in the mortgagee had been extinguished (*Sands* to *Thompson*, 22 Ch. D. 614). Fry, J., said that the relation of mortgagor and mortgagee no longer subsisted; and further that the mortgagee was not a trustee, and the mortgagor was not a *c. q. t.* within the proviso (*Sands* to *Thompson*, 22 Ch. D. 618; see *Teevan* v. *Smith*, 20 Ch. D. 730).

The doctrine that a *c. q. t.* in possession by the acquiescence of the trustee must be regarded as tenant at will, only applies where the *c. q. t.* is the actual occupant. If he is only allowed to receive the rents of land occupied by a tenant he is merely a bailiff of the trustees. And if the actual occupier holds for the statutory period without paying rent, the trustees lose their title (*Melling* v. *Leak*, 16 C. B. 652). Again where some *c. q. t.* in spite of the trustees and to the exclusion of the other *c. q. t.* received the whole rents the others were barred (*Burroughs* v. *M'Creight*, 1 J. & Lat. 290). So where some beneficiaries held for the statutory period a wrongful possession of the land, the trustees' legal estate was extinguished, and thereby the trusts affecting that estate were also extinguished (*Bolling* v. *Hobday*, 31 W. R. 9).

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)

Cases under this section;

The 8th section applied to tenancies from year to year, created before and existing at the passing of the Act (*Doe* v. *Sumner*, 14 M. & W. 39).

lease in writing;

The lease in writing referred to in this section by which a case would be taken out of its operation, must be not merely an instrument which was evidence of the conditions of holding but one passing an interest (*Doe* v. *Gower*, 17 Q. B. 599).

payment of rent;

The reservation and receipt of any rent, however small, will create the legal relation of tenancy from year to year for the purposes of the Act (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324). The rent may be any service for which distress may be made (sect 1, *ante*), and accordingly includes cleaning the parish church and ringing the bell (*Doe* v. *Benham*, 7 Q. B. 976). Where the tenancy is disputed, the circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land of which he is tenant, that would not be a payment of rent within this section (*Att.-Gen.* v. *Stephens*, 6 D. M. & G. 146). Payment of rent within this section may be proved by parol admission (*Doe* v. *Beckett*, 4 Q. B. 601).

date from which time runs.

Where after the expiration of twenty years during which no rent had been paid, the tenant within five years before action paid some arrears, time ran under this section from the last payment of rent; and sect. 34 did not extinguish the title of the reversioner (*Bunting* v. *Sargent*, 13 Ch. D. 330; see, however, as to this last point, *Sanders* v. *S.*, 19 Ch. D. 373, and cases quoted *post*, p. 210).

Where A let land to B by parol from year to year, reserving rent payable in March and November, the last payment of rent was in March, 1846. A died in December of the same year, and B retained possession. Time ran from the last payment of rent, and not from the death of A (*Baines* v. *Lumley*, 16 W. R. 674). 3 & 4 Will. 4, c. 27, s. 8.

Where a tenant from year to year remains in possession without paying rent, on the expiration of the statutory period the right of the landlord is barred not only to the land, but also to any arrears of rent (*Re Jolly, Gathercole* v. *Norfolk*, [1900] 2 Ch. 618).

As to the creation and determination of a tenancy from year to year, see Foa, "Landlord and Tenant," 118-19, 666 *sq.*, 6th ed.

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent (*charge*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*charge*), subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Where rent amounting to 20*s.* reserved by a lease in writing shall have been wrongfully received, no right to accrue on the determination of the lease.

(1) *Cases under sect.* 9...171.
(2) *Old Law*...172.

(1) Cases under sect. 9.

According to the judgment of Lord Denman, C.J., in *Doe* v. *Angell* (9 Q. B. 356), this section is to be read as if the word "charge" in italics had been interposed as above (see *Baines* v. *Lumley*, 16 W. R. 675).

Doe v. *Angell.*

In *Doe* v. *Angell* (9 Q. B. 328) there was an adverse receipt of rent which would have barred an action under this section. In that case Lord Denman discussed the meaning of the word "rent" in the R. P. Lim. Act, 1833, pointing out that it meant rent-charge in sects. 2, 3, 4, 5, 7, 8 and 9 (see *Baines* v. *Lumley*, 16 W. R. 675).

When time begins to run.

The right to recover land subject to a lease is to be considered under this section as having accrued from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease (*Chadwick* v. *Broadwood*, 3 Beav. 316; see *Cholmondeley* v. *Clinton*, T. & R. 107). There must be payment to a third party (*Archbold* v. *Scully*, 9 H. L. C. 381), and such third party must be properly described as claiming the reversion wrongfully (*Sloane* v. *Flood*, 5 Ir. C. L. 75). The true owner is excluded by wrongful receipt of rent; which does not occur where rent is received by a person claiming to receive on behalf of the true owner (*Lyell* v. *Kennedy*, 14 App. Cas. 460). There was no wrongful claim of the reversion either in the

Wrongful receipt of rent within this section.

3 & 4 Will. 4, c. 27, s. 9.

case of a widow who was presumed to have received on behalf of her children the rent of settled land (*Shaw* v. *Keighron*, I. R. 3 Eq. 574); or where Blackacre and Whiteacre were leased at one rent, and subsequently Blackacre was sold and conveyed without apportionment of the rent, and the whole rent continued to be paid to the owner of Whiteacre (*Laybourn* v. *Gridley*, 61 L. J. Ch. 353). A person claiming without any real title to be entitled to land is a person "wrongfully" claiming within this section, although the claim may be put forward under a mistake, and without improper intention to deprive others of their property (*Williams* v. *Pott*, 12 Eq. 149). For the bearing of this section on the case where there is a lease and a sub-lease and the parties claiming under the sub-lease pay their rent directly to the head landlord, see *Drew* v. *Lord Norbury* (3 J. & Lat. 306; *Hayes* v. *Woodley*, 3 Ir. Ch. R. 142; *Twiss* v. *Noblett*, I. R. 4 Eq. 60). As to the effect of a severance of a reversion with no apportionment of rent, see *Mitchell* v. *Mosley*, [1914] 1 Ch. 438.

(2) Law before the statute.

The rule of law before this statute was, that where there was a subsisting lease, the right of entry was preserved until the determination of the lease although no rent had been received (*Orrell* v. *Maddox*, Runn. Eject. App. No. 1). And the adverse receipt of rent for more than twenty years did not deprive the party of such right of entry (*Doe* v. *Danvers*, 7 East, 299; see *Bushby* v. *Dixon*, 3 B. & C. 304). But in such a case a bill in equity for discovery was dismissed (*Cholmondeley* v. *Clinton*, T. & R. 107). A void lease or an attendant term did not prevent time running (*Taylor* v. *Horde*, 1 Burr. 60).

The mere receipt of rent by a stranger was not evidence of adverse possession, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry (Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith* v. *Parkhurst*, Andr. 324; *Jayne* v. *Price*, 5 Taunt. 326). So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election (*Blunden* v. *Baugh*, Cro. Car. 302). For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election (see *Hovenden* v. *Annesley*, 2 Sch. & Lef. 622; 1 Taunt. 599).

The real property commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil: the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where *no rent* or only a *nominal rent* is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20s. a year may for this purpose be considered nominal" (1 Real Prop. Rep. 47).

On disclaimer of the landlord's title, see Woodfall's L. & T. 387 *et seq.*, 16th ed.

A mere entry not to be deemed possession.

10. No person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.

By the Limitation Act, 1623, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. By the stat. 4 & 5 Ann. c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the Limitation Act, 1623, or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect (see 1 Wms. Saund. 319, n. (1); 10 B. & C. 848).

3 & 4 Will. 4, c. 27, s. 10.

Old law.

The section applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night-time and pronouncing a few words, without any attempt or intention or wish to take possession (*Randall* v. *Stevens*, 2 E. & B. 652; compare *Solling* v. *Broughton*, [1893] A. C. 556, where the entries were made *animo possidendi*).

Cases on section.

The defendant being in adverse possession of a hut and land, the lord of the manor entered, in the absence of the defendant but in the presence of his family, and said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. These acts were not sufficient to disturb the defendant's possession (*Doe* v. *Combes*, 9 C. B. 714). But where the only adverse possession taken by the defendant consisted in the erection of a fence, and the plaintiff entered and wholly destroyed the fence, the defendant's possession was disturbed (*Worssam* v. *Vandenbrande*, 17 W. R. 53).

Acts sufficient to interrupt adverse possession.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

No right to be preserved by continual claim.

Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorised by power of attorney, if made peaceably and repeated once in the space of every year and a day (which was called *continual claim*), was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations (Litt. ss. 414, 415; Runn. Eject. 51, 52, 2nd ed.; Ad. Eject. 101, 3rd ed.; *Ford* v. *Grey*, 1 Salk. 285). Actual entry was sufficient to keep alive the right of a person disseised; but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations (*Hodle* v. *Healey*, 1 Ves. & B. 540).

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.

Possession of one coparcener, &c., not to be the possession of the others.

(1) *Old Law as to Coparceners*...174.
(2) *Cases under sect.* 12...174.
(3) *Occupation by Co-owners*...174.

3 & 4 Will. 4, c. 27, s. 12.

By sect. 34 of the L. P. Act, 1925, *post*, p. 622, an undivided share in land is not capable of being created after 1925, except as provided by the S. L. Act, 1925 (see sect. 36 of that Act, *post*, p. 895), or as provided by sect. 34 of the L. P. Act; and Sched. I., Part 4, of the latter Act (*post*, p. 804) deals with holdings in undivided shares existing at the end of 1925. The following note relates to the law apart from these enactments.

(1) How coparceners, &c., were affected by old statutes of limitation.

Coparceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the Statutes of Limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other (Co. Litt. 243 b. n. (1), 373 b; *Ford* v. *Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868; Burton's Compendium, 395 *et seq*; see *Doe* v. *Keen*, 7 T. R. 386; *Doe* v. *Pearson*, 6 East, 173; *O'Sullivan* v. *M'Swiney*, 1 Long. & T. 111; *Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42). But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other (*Davenport* v. *Tyrrel*, 1 Bl. R. 675).

(2) Effect of sect. 12.

This section makes the possession of one coparcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession (*Culley* v. *Doe*, 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Swiney*, 1 Long. & T. 118, 119; *Doe* v. *Horrocks*, 1 Car. & K. 566). Consequently, the entry of one coparcener cannot have the effect of vesting the possession in the other (*Woodroffe* v. *Doe*, 15 M. & W. 792; 2 H. L. C. 833). One coparcener was held barred by the receipt of the whole rents by another coparcener and his widow for more than the statutory period, although an estoppel enabled him to succeed in another right (*Weeks* v. *Birch*, 69 L. T. 759). Where there was a parol partition and separate possession for more than twenty years it could not be questioned (*Paine* v. *Ryder*, 24 Beav. 151).

Lands were conveyed in trust for five tenants in common. For more than twenty years four had been in the exclusive receipt of the rents, the trustee never having interfered. The title of the fifth was barred; the case not being within the saving of the 25th section (*Burroughs* v. *M'Creight*, 1 J. & Lat. 290; *Bolling* v. *Hobday*, 31 W. R. 9). And where a father was in receipt of the whole rents of a property one undivided share of which belonged to an infant child, and another to an adult child, the adult was barred after the statutory period, although, as regards the infant's share, the father was considered as the infant's bailiff (*Re Hobbs*, *H.* v. *Wade*, 36 Ch. D. 553). A presumption that one tenant in common had accounted to his co-tenant for a share of the rents was raised in *Saunders* v. *S.* (19 Ch. D. 373). This section applies, not only where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also where such tenant has been in possession of the entirety of any portion of such lands (*Murphy* v. *M.*, 11 Ir. C. L. R. 205, where *Tidball* v. *James*, 29 L. J. Ex. 91, is explained). The owner of one undivided moiety of land was barred by the sole possession of the owners of the other (*Thomas* v. *France*, [1897] 2 Q. B. 143). Similarly one tenant in common of minerals was barred by the possession of another to the extent to which such possession had been actual (*Glyn* v. *Howell*, [1909] 1 Ch. 666).

(3) Occupation by co-owners.

Where two persons were in lawful possession of a copyhold, and the title under which they held came to an end, but they continued

3 & 4 Will. 4, c. 27, s. 12.

in possession for twenty-one years, it was decided that they held on as joint tenants; and inasmuch as they had done nothing to sever their tenancy, the interest of the one who died first determined on his death (*Ward* v. *W.*, 6 Ch. 789; *Bolling* v. *Hobday*, 31 W. R. 9; see *Williams* v. *W.*, 2 Ch. 294; *Smith* v. *Savage*, [1906] 1 Ir. R. 469).

Where one tenant in common as tenant at sufferance occupied the whole property after the expiration of a lease granted to him by his co-tenant, he was liable for rent to his co-tenant in an action for use and occupation (*Leigh* v. *Dickeson*, 15 Q. B. D. 60). In partition actions tenants in common have been charged with an occupation rent (*Pascoe* v. *Swan*, 27 Beav. 508; *Teasdale* v. *Sanderson*, 33 Beav. 534; *Hill* v. *Hickin*, [1897] 2 Ch. 579). In general, however, independently of a lease, mere occupation by one of several tenants in common, if unaccompanied by exclusion, did not make him liable for rent (*M'Mahon* v. *Burchell*, 2 Phil. 127; 1 Coop. 457). Nor could an action for money had and received be maintained, the remedy being an action of account under 4 Anne, c. 16, s. 27 (*Thomas* v. *T.*, 5 Exch. 28; *Henderson* v. *Eason*, 2 Phil. 308; 17 Q. B. 701; *Shirton* v. *Richardson*, 13 M. & W. 17; *Gorley* v. *G.*, 1 H. & N. 144; *Murray* v. *Hall*, 7 C. B. 441; *Birkin* v. *Smith*, [1909] 2 K. B. 120; nor in the absence of ouster could trespass be maintained (*Jacobs* v. *Seward*, L. R. 5 H. L. 464). As to the working of minerals by tenants in common, see *Job* v. *Potton*, 20 Eq. 84; *Hexter* v. *Pearce*, [1900] 1 Ch. 341. Where one tenant in common of a wall excluded the other by means of an obstruction, the remedy was to remove the obstruction (*Watson* v. *Gray*, 14 Ch. D. 192).

One tenant in common of a house who spent money in ordinary repairs had no right of action against his co-tenant for contribution (*Leigh* v. *Dickeson*, 15 Q. B. D. 60; *Johnson* v. *Wild*, 44 Ch. D. 146; and see as to the relation between tenants in common, *Kennedy* v. *De Trafford*, [1897] A. C. 180). But on a sale in a partition action the expenses of permanent repairs were borne rateably by tenants in common (*Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461; *Re Cooke, Lawledge* v. *Tyndall*, [1896] 1 Ch. 923). See now, L. P. Act, 1925, ss. 34—36, and notes, *post*.

Possession of a younger brother not to be the possession of the heir.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

The effect of this section is illustrated in the judgment of the Court in *Jones* v. *J.*, 16 M. & W. 712.

Prior state of the law.

If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son (Litt. s. 396; *Sharington* v. *Shrotton*, Plowd. 306). So where a sister entered (*Page* v. *Selby*, Bull. N. P. 102; 2 Stark. on Ev. 220, 2nd ed.; Co. Litt. 242; Plowd. 298, 306; see *Dowdall* v. *Bryne*, Batty's Ir. R. 373).

A was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B was the eldest son of A and his wife. It was held, that although B could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death

3 & 4 Will. 4, c. 27, s. 13.

of his father, yet that the jury might infer that the property belonged to B's mother, and survived to her on the death of his father, and descended to B as heir on her death in 1838 (*Doe* v. *Long*, 9 C. & P. 773; see *Doe* v. *Lawley*, 13 Q. B. 954).

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

(1) *Different sections as to acknowledgments in the Limitation Acts*...176.
(2) *Cases under sect.* 14...177.

(1) Different sections as to acknowledgments in the statutes of limitation.

The requiring an acknowledgment in writing to take a case out of the R. P. Lim. Act, 1833, was by analogy to the Statute of Frauds Amdt. Act, 1828, adopted in this section, in the 42nd section of this Act, in the 5th section of the Civil Proc. Act, 1833, and in sects. 7 & 8 of the R. P. Lim. Act, 1874. A difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party entitled to land or rent, or *his agent*, signed by the person in possession. By sect. 7 of the R. P. Lim. Act, 1874, twelve years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment in writing of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him. By sect. 8 of the R. P. Lim. Act, 1874, money charged upon land and legacies cannot be recovered after the end of twelve years, unless in the meantime some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto, shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42nd section, no arrears of rent or interest are to be recovered but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by whom the same was payable, or his *agent*. In the four cases above mentioned, therefore, the acknowledgment is binding if given *to* the party entitled *or his agent*; but an acknowledgment of title under the 14th section, or of a right to redeem under sect. 7 of the R. P. Lim. Act, 1874, cannot be given *by an agent*; whilst, in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual. The cases as to acknowledgments under the above-mentioned sections, and under the Statute of Frauds Amdt. Act, 1828, are collected in the

subsequent notes. By the 5th section of the Civil Proc. Act, 1833 (limiting the time within which actions on specialties are to be brought), any acknowledgment either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or part satisfaction on account of any principal or interest due thereon, will take a case out of that Act. **3 & 4 Will. 4, c. 27, s. 14.**

(2) By whom acknowledgment must be made under sect. 14.

Sect. 14 of the R. P. Lim. Act, 1833, provides that the acknowledgment must be signed by the person in possession; therefore, an acknowledgment signed by an agent will be insufficient (*Ley* v. *Peter*, 3 H. & N. 101; 27 L. J. Ex. 234). An unaccepted proposal for a lease made by A, who was unable from illness to write, was evidence of an acknowledgment by A (*Dublin* v. *Judge*, 11 Ir. L. R. 9).

To whom.

The acknowledgment must be given to the person entitled or his agent (see *Fursden* v. *Clegg*, 10 M. & W. 572; *Goode* v. *Job*, 28 L. J. Q. B. 1).

What is an acknowledgment.

Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide (*Doe* v. *Edmonds*, 6 M. & W. 295; *Morrell* v. *Frith*, 3 M. & W. 402; but see *Incorp. Soc.* v. *Richards*, 1 D. & War. 290; Sugd. R. P. Stat. 67).

A deed which purported to bear date more than twenty years before action, but which was in fact executed by the defendant within twenty years, and which contained a recital of the plaintiff's title, was a sufficient acknowledgment (*Jayne* v. *Hughes*, 10 Exch. 430). A correspondence by a party in possession of property, by which he professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, was a sufficient acknowledgment (*Incorp. Soc.* v. *Richards*, 1 D. & War. 258). So a proposal to purchase (*Johnston* v. *Smith*, [1896] 2 Ir. R. 82). A letter was a sufficient acknowledgment in *Fursden* v. *Clegg*, 10 M. & W. 572, but not in *Doe* v. *Edmonds*, 6 M. & W. 295. An acknowledgment in an answer sworn to a bill in Chancery filed by the plaintiff in reference to the same property was sufficient (*Goode* v. *Job*, 28 L. J. Q. B. 1). The acknowledgment must be in writing; but where the contents of the written document can properly be proved by parol such parol evidence would not be excluded (*Haydon* v. *Williams*, 7 Bing. 168; *Read* v. *Price*, [1909] 2 K. B. 724).

When time runs after an acknowledgment.

Where a statutory title has accrued by the expiration of the requisite period it cannot be defeated or the extinguished title revived by a subsequent acknowledgment. See note to sect. 34, *post*.

The moment after an acknowledgment of title, within the meaning of the 14th section, is made, the time begins to run against the person to whom it is made (*Burroughs* v. *M'Creight*, 1 J. & L. 304; *Scott* v. *Nixon*, 3 D. & War. 404). See, however, Darb. & Bos. Stat. Lim. 381, 2nd ed.

Where possession is not adverse at the time of passing the Act, the right shall not be barred until the end of five years afterwards.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty

3 & 4 Will. 4, c. 27, s. 15.

years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or *interest* (*u*), at any time within five years next after the passing of this Act (*x*).

(*u*) The word "interest," which is in the Parliament Roll, appears to be a mistake for "rent" (*per* Lord Denman, C.J., *Doe* v. *Angell*, 9 Q. B. 360).

(*x*) For cases on this section, see *Holmes* v. *Newlands*, 11 Ad. & Ell. 44; *Culley* v. *Doe*, 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Sweeny*, 2 Ir. L. R. 95, 96; *Doe* v. *Williams*, 5 Ad. & Ell. 296; *Scott* v. *Nixon*, 3 D. & War. 388; *Incorporated Society* v. *Richards*, 1 D. & War. 289; *Doe* v. *Thompson*, 5 Ad. & Ell. 532; *Ex parte Hasell*, 3 Y. & Coll. 617.

3. *Savings in Case of Disabilities.*

Person under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

16. *Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).*

[*Sect.* 16 *of R. P. Lim. Act*, 1833, *has been repealed and the following substituted, viz.:*]

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

[*R. P. Lim. Act*, 1874, *s.* 3.] If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

[*R. P. Lim. Act, s.* 4.] The time within which such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

37 & 38 Vict. c. 57, s. 3.

No time to be allowed for absence beyond seas.

Legislation.

By sect. 9 of R. P. Lim. Act, 1874, *post*, ss. 3 and 4 of the last-mentioned Act have been substituted for sect. 16 of R. P. Lim. Act, 1833. And under the same 9th sect. the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections) are to be construed together with R. P. Lim. Act, 1874. Sect. 3 of R. P. Lim. Act, 1874, substitutes the period of six years for the period of ten years mentioned in sect. 16 of R. P. Lim. Act, 1833, and does not provide for absence beyond seas, but in other respects is similar to the last-mentioned section. The disability of absence beyond seas is abolished by sect. 4 of R. P. Lim. Act, 1874.

(1) *Cases under the above sections*...179.
(2) *Presumption of death*...180.

(1) Cases under the sections.

Sect. 16 of R. P. Lim. Act, 1833, did not apply to a mortgagor redeeming, such an action not being an action to recover land (*Kinsman* v. *Rouse*, 17 Ch. D. 104; see *Forster* v. *Patterson*, *ibid.*, 132).

Disability of infancy.

As regards infancy, where an infant's property has been in the possession of his parent, such parent has been treated as a bailiff, and time has not run (*Thomas* v. *T.*, 2 K. & J. 79; *Wall* v. *Stanwick*, 34 Ch. D. 763; *Re Hobbs*, *Hobbs* v. *Wade*, 36 Ch. D. 553). Similarly where an uncle has been in possession (*Pelly* v. *Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306). Where a father remained in possession after the infant attained twenty-one, time did not run against the infant until the father's death (*Tinker* v. *Rodwell*, 69 L. T. 591).

Coverture.

As regards coverture. This disability has been abolished in the case of actions falling within M. W. P. Act, 1882, s. 1, sub.-s. 2 (see *Lowe* v. *Fox*, 15 Q. B. D. 667; *Weldon* v. *Neal*, 51 L. T. 289, cases decided under Lim. Act, 1623, s. 7). For cases where such disability depending on the old law was alleged, see *Kennedy* v. *Lyell*, 15 Q. B. D. 498; *Hounsell* v. *Dunning*, [1902] 1 Ch. 517.

Lunacy.

As regards lunacy, see *Fulton* v. *Creagh*, 3 J. & Lat. 329.

Successive disabilities in the same person,

As regards successive disabilities in the same person, it was held under R. P. Lim. Act, 1833, s. 16, that when the person to whom the right to bring an action for the recovery of land accrued was under a disability, and before the removal of that disability the same person fell under another disability, his right to bring an action was preserved until ten years after the removal of the latter disability (*Borrows* v. *Ellison*, L. R. 6 Ex. 128; see *Supple* v. *Raymond*, 1 Hayes, Ir. Rep. 6; 2 Prest. Abstr. 340; Blansh. Lim. 21, 22). But where time had once begun to run no subsequent disability on the part of the person to whom the right first accrued, or of any one claiming under him, would stop the running of time (see *Doe* v. *Jones*, 4 T. R. 310; *Sturt* v. *Mellish*, 2 Atk. 610—614; Str. 556; 1 Wils. 134; *Cotterell* v. *Dutton*, 4 Taunt. 826; *Doe* v. *Jesson*, 6 East, 80; decided under Lim. Act,

37 & 38 Vict. c. 57, s. 3.

1623, s. 2, the wording of which was very similar; and see *Goodall* v. *Skerratt*, 3 Drew. 216). So where time once begins to run against a tenant in tail, and there is not then any disability on his part, it does not cease to run by reason of subsequent disability on his part or on the part of issue in tail claiming under him (*Murray* v. *Watkin*, 62 L. T. 796; *Garner* v. *Wingrove*, [1905] 2 Ch. 233). It was also decided under Lim. Act, 1623, s. 2, that where an estate descended to parceners, one of whom was under a disability, the disability of the one did not preserve the title of the other (*Doe* v. *Rowlston*, 2 Taunt. 441).

For the bearing of the above sections upon the construction of the first branch of sect. 3, see *Owen* v. *De Beauvoir* (16 M. & W. 567); *De Beauvoir* v. *Owen* (5 Exch. 166).

As to successive disabilities in different persons, see sect. 18, *post*, p. 183.

(2) Presumption of death where person has not been heard of for seven years:

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years, a period which has been fixed from analogy to the Statute of Bigamy (1 Jac. 1, c. 11, s. 2; see now 24 & 25 Vict. c. 100, s. 57; *R.* v. *Tolson*, 23 Q. B. D. 168), and the statute concerning leases determinable on lives (19 Car. 2, c. 6). Compare the statutory rule in Scotland (44 & 45 Vict. c. 47). Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*Hopewell* v. *De Pinna*, 2 Campb. 113). Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death (*Doe* v. *Deakin*, 4 B. & Ald. 433; see 2 *Id.* 386). It was held, that where no account could be given of a person within the exception of the Lim. Act, 1623, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him (*Doe* v. *Jesson*, 6 East, 84). It is now settled that if a person has not been heard of for seven years, there is a presumption of law that he is dead (*Re Phene*, 5 Ch. 139; *Nepean* v. *Doe*, 2 M. & W. 894; see *Re Winstone*, [1898] P. 143; *Re Hurlston*, *ibid.*, 27). The presumption of death, however, does not arise where the other circumstances of the case render it probable that he would not be heard of though alive *Watson* v. *England*, 14 Sim. 28; *Bowden* v. *Henderson*, 2 Sm. & G. 360; *M'Mahon* v. *M'Elroy*, I. R. 5 Eq. 1). Further, in order to raise the presumption, there must have been an inquiry and search made for the man amongst those who if he were alive would be likely to hear of him (*Prudential Co.* v. *Edmonds*, 2 App. Cas. 509; *Doe* v. *Andrew*, 15 Q. B. 751; *Re Creed*, 1 Drew, 235). See as to the presumption being made after a less period, *Re Matthews*, [1898] P. 17.

no presumption as to time of death;

But although, if a person has not been heard of for seven years, there is a presumption of law that he is dead; at what time within that period he died is not a matter of presumption but of evidence. And the onus of proving that the person survived any particular period within the seven years lies upon those who claim a right, to the establishment of which that fact is essential (*Re Phene*, 5 Ch. 139, where the cases are collected; see *Nepean* v. *Doe*, 2 M. & W. 894; *Doe* v. *Nepean*, 5 B. & Ad. 86; *R.* v. *Harbourne*, 2 Ad. & Ell. 540; *R.* v. *Twyning*, 2 B. & Ald. 386). Where, accordingly, a legatee has not been heard of for seven years, his death will be presumed. The onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof the legacy will be paid to the residuary legatee, or the next of kin of the testator (*Re Lewes*, 6 Ch. 356; *Re Walker*, 7 Ch. 120). See form of order in *Re Benjamin*, *Neville* v. *Benjamin*, [1902] 1 Ch. 726. See also

Re Green, 1 Eq. 288, a case of next of kin; and *Rhodes* v. *R.*, 36 Ch. D. 586, where the Court remained in doubt whether a fund should be paid to the next of kin ascertained at the beginning or the next of kin ascertained at the end of the period. A legatee for life who survived the testator was held (in the absence of contrary evidence) to have died at the date when he was last heard of (*Re Aldersey, Gibson* v. *Hall*, [1905] 2 Ch. 181). **37 & 38 Vict. c. 57, s. 3.**

effect of circumstances;

After seven years, having got the fact of death, you have a right to look back and inquire into all the circumstances and ascertain when the man died (*Hickman* v. *Upsall*, 4 Ch. D. 149; *Re Beasney*, 7 Eq. 498; and see the judgment of Lush, J., in *R.* v. *Lumley*, L. R. 1 C. C. 196; *R.* v. *Willshire*, 6 Q. B. D. 366).

In *Sillick* v. *Booth* (1 Y. & Coll. C. C. 117), the Court concluded that a party died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of such hurricane months (see also *Webster* v. *Birchmore*, 13 Ves. 362). The Court concluded that a young sailor, who was last seen in the summer of 1840 going to Portsmouth to embark, survived his grandmother, who died in March, 1841 (*Re Tindall*, 30 Beav. 151). A son, first tenant in tail in remainder, left this country on April 11, 1858, and was never afterwards heard of. His father, tenant for life, died on May 30, 1858. The Court concluded, in 1872, that the son survived the father (*Pennefather* v. *P.*, I. R. 6 Eq. 171; see *Lakin* v. *L.*, 34 Beav. 443). Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815; both before and after the testator's death unsuccessful attempts to procure information were made, by inquiries and advertisements. He was presumed to have died before the date of the will (*Rust* v. *Baker*, 8 Sim. 443). The certificate of a master, stating that a legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree (*Lee* v. *Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315; see also 13 Ves. 362). Where a trust was declared by deed in favour of A, A, although he had not been heard of for five years before the date of the deed, was presumed to have been then in existence (*Re Corbishley*, 14 Ch. D. 846). In some doubtful cases the Court has handed over property on security to refund being given (*Dowling* v. *Winfield*, 14 Sim. 277; *Cuthbert* v. *Purrier*, 2 Phil. 199; *Re Mileham*, 15 Beav. 507).

security to refund;

practice in Probate Court;

Before granting probate or administration, the Probate Division requires evidence of the date of the death. And where no direct proof is forthcoming, the practice is to lay the available evidence before the Court on motion, and take its directions. In such cases the rule as to seven years' absence is applied (*Re Howe*, 1 Sw. & Tr. 54; 27 L. J. Prob. 37); but as a rule advertisements are directed (*Re Robertson*, [1896] P. 8; see *Re Saul*, [1896] P. 151). As to the grounds on which the Probate Court will presume the death of parties who embarked in vessels lost at sea or not afterwards heard of, see *Re Norris* (1 Sw. & T. 6); *Re Main* (1 Sw. & T. 11); *Re Smyth* (28 L. J. Prob. 1).

commorientes;

In cases such as that of a testator and his wife being shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again, the question of survivorship was till 1926 matter of evidence, and not of positive regulation and enactment (varying according to the ages and sex of the persons dying in the same shipwreck), as in the French Code, and in the absence of evidence there was no conclusion of law on the subject (*Wing* v. *Angrave*, 8 H. L. C. 183; see, further, *Gen.*

37 & 38 Vict. c. 57, s. 3.

Stanwix's Case, Fearne's Post. Works, 38; *R.* v. *D. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright* v. *Netherwood*, 2 Salk. 593, n.; *Hitchcock* v. *Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw* v. *Toulmin*, 2 Dick. 633; *Mason* v. *M.*, 1 Mer. 308; *Taylor* v. *Diplock*, 2 Phill. Ecc. C. 261; *Re Selwyn*, 3 Hagg. Ecc. R. 741; *Colvin* v. *King's Proctor*, 1 Hagg. Ecc. 92; *Re Alston*, [1892] P. 142; *Re Beynon*, [1901] P. 141; *Re Good*, 24 Times L. R. 493). But as to all deaths in such circumstances on and after January 1, 1926, see sect. 184 of the Law of Property Act, 1925, *post*, p. 772.

As to reduction into possession in cases of this kind, see *Scrutton* v. *Pattillo* (23 W. R. 379); *Wollaston* v. *Berkeley* (2 Ch. D. 213).

In establishing a title upon a pedigree, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists (*Rowe* v. *Hasland*, 1 W. Bl. 404; see Fitz. N. B. 196, A. L.).

presumption of death without issue.

Where a man died long ago and there is nothing to show whether he died with issue or without issue, there is no presumption either way (*Greaves* v. *Greenwood*, 2 Exch. D. 295). Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment (*Doe* v. *Griffin*, 15 East, 293). The Court concluded that a man had died without issue (*Rawlinson* v. *Miller*, 1 Ch. D. 52; see *Re Pople*, 40 Ch. D. 589; *Re Hanby*, 25 W. R. 427); and without leaving a widow (*Re Westbrook* (1873), W. N. 167; see *Re Benjamin, Neville* v. *B.*, [1902] 1 Ch. 726). Letters written from Australia by a son of the testator were held sufficient evidence that the son had predeceased the testator without issue (*Re Jackson, J.* v. *Ward*, [1907] 2 Ch. 354).

But no action, &c., shall be brought beyond forty years after the right of action accrued.

17. *Provided nevertheless, and be it further enacted, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.*

[*Sect.* 17 *of R. P. Lim. Act*, 1833, *has been repealed and the following has been substituted, viz.:*]

Thirty years utmost allowance for disabilities.

[*R. P. Lim. Act*, 1874, *s.* 5.] No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person

claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. 37 & 38 Vict. c. 57, s. 5.

Legislation.

By sect. 9 of R. P. Lim. Act, 1874, *post*, sect. 5 of the last-mentioned Act has been substituted for sect. 17 of R. P. Lim. Act, 1833. And under the same 9th section the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections), are to be construed together with R. P. Lim. Act, 1874. Sect. 5 of R. P. Lim. Act, 1874, substituted the respective periods of thirty years and six years for the periods of forty years and ten years mentioned in sect. 17 of R. P. Lim Act, 1833, but in other respects is similar to the last-mentioned section.

Vendor and purchaser.

Before R. P. Lim. Act, 1833, the period during which a vendor of land on an open contract was bound to show title was sixty years, and sect. 17 of the Act did not alter this rule (*Cooper* v. *Emery*, 1 Ph. 388; *Moulton* v. *Edmonds*, 1 D. F. & J. 250). By V. and P. Act, 1874, s. 1, the period was forty years, and this was the period required where the title was a possessory one (*Jacobs* v. *Revell*, [1900] 2 Ch. 858). But by L. P. Act, 1925, s. 44, *post*, the period has since January 1, 1926, been thirty years.

Husband and wife.

Where a *feme sole* seised in fee married, and she and her husband discontinued possession of land, and more than forty years later the wife's heir brought ejectment, the heir was barred by the 17th section (*Doe* v. *Bramston*, 3 Ad. & Ell. 63). Compare the case of a conveyance by the husband alone (*Jumpsen* v. *Pitchers*, 13 Sim. 327; see *Hounsell* v. *Dunning*, [1902] 1 Ch. 512, quoted in note to sect. 2 of R. P. Lim. Act, 1874, *ante*, p. 163).

Lease by a lunatic.

Where a lease was made by a lunatic for lives renewable for ever, the lessee for more than forty years held part of the land, paying the entire reserved rent, and died in possession, being himself the last life in the lease, it was held, that he had not acquired either the fee-simple, subject to a perpetual rent equal to the rent reserved, or a right to a renewal (*Fulton* v. *Creagh*, 3 J. & Lat. 329).

As to the application of the section to money paid into Court under the Lands Clauses Act, 1845, s. 79, see *Ex parte Chamberlain* (14 Ch. D. 323).

No further time to be allowed for a succession of disabilities.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the

3 & 4 Will. 4, c. 27, s. 18.

said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

37 & 38 Vict. c. 57.

Since 1878 this section is to be read substituting the periods of twelve years and six years respectively for the periods of twenty years and ten years mentioned in the section (R. P. Lim. Act, 1874, s. 9, *post*, p. 214).

Sect. 18.

As to how far sect. 18 was retrospective, see *Devine* v. *Holloway*, 14 Moore, P. C. C. 290. As to successive disabilities in the same person, see note to sect. 16, *ante*, p. 179.

Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this Act.

See sect. 16, *ante*, p. 178, and Mercantile Law Amdt. Act, 1856, s. 12, *post*, p. 280; *Ex parte Hasell*, 3 Y. & Coll. 617; *Battersby* v. *Kirk*, 2 Bing. N. C. 603; *Lane* v. *Bennett*, 1 M. & W. 70; *Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4. No time is now allowed for absence beyond seas (R. P. Lim. Act, 1874, s. 4, *ante*, p. 179).

4. *Concurrent Rights.*

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

Cases on the construction of this section.

This section, so far as applicable to future estates and interests, must be read in connection with the fourth branch of sect. 3 (*ante*, p. 156) and sect. 2 of R. P. Lim. Act, 1874 (*ante*, p. 162, where see note).

This section is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in unâ personâ equum est ac si essent in diversis*" (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368). Under the Lim. Act, 1623, s. 1, a party might have pursued his right of entry twenty years after it attached, although

in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment (*Hunt* v. *Bourne*, 1 Salk. 339; 2 *Id.* 421; 4 Br. P. C. 66). 3 & 4 Will. 4, c. 27, s. 20.

Where A was entitled to a leasehold interest in land for lives as heir of B, and to the reversion fee as heir of C, adverse possession during the lease barred his original right of entry, and he had no new right of entry on the determination of the lease (*Doe* v. *Moulsdale*, 16 M. & W. 689). A testator devised lands to A, with a gift over to B in case either of two events should happen. Both events having happened, sect. 20 deprived the plaintiff of the benefit of the new right of action which accrued on the happening of the second event (*Clarke* v. *Clarke*, I. R. 2 C. L. 395). A general power vested in a tenant for life of appointing the fee in remainder did not fall within the words "other estate, interest, right, or possibility"; so that a barring of the life estate did not affect the claim of the appointee (*Re Devon Settled Estates*, [1896] 2 Ch. 562). Where a mortgagee was also entitled to a beneficial interest in the equity of redemption which gave no right of entry, the barring of the latter interest did not affect her title as mortgagee (*Ludbrook* v. *L.*, [1901] 2 K. B. 100). For a case where the final proviso as to a recovery "in the meantime" was applied, see *Doe* v. *Liversedge*, 11 M. & W. 517.

The above section deals with the case of the same person being entitled to successive interests in real estate. Where a person was entitled to successive life interests in personal estate, and she sued for a breach of trust as regards the *corpus* of the estate, it was held, under sect. 8 of the Trustee Act, 1888 (*post*, p. 283), that she could, in respect of her second interest, maintain the action, although an action in respect of the first would have been barred (*Mara* v. *Brown*, [1895] 2 Ch. 69, 96).

5. *Operation of the Statute in Cases of Estates Tail.*

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred. Where tenant in tail is barred, remainderman whom he might have barred shall not recover.

Land was devised to the father of the plaintiff in tail general. The plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person through whom the defendant claimed. Held, in an action of ejectment brought in 1853, that under this section, since the tenant in tail was barred, the issue in tail were also barred (*Austin* v. *Llewellyn*, 9 Exch. 276). An estate tail was limited to A, remainder in tail to B, remainder to C. A dies, then B dies within twenty years, and C becomes entitled in possession, being at the time under disability. Under the 21st and 22nd sections of this Act time commenced running against C. from the death of A; and, having commenced to run, C was not saved from its operation under the 16th section by being under disability (*Goodall* v. *Skerratt*, 3 Drew. 216). The 21st section does not apply to the case where the tenant in tail has conveyed away his own right to another and put it out of his Cases under this section.

3 & 4 Will. 4, c. 27, s. 21.

power to enter (*Cannon*, dem., *Rimington*, ten., 12 C. B. 1, 18). In this last case the estate of a tenant in tail in possession is considered as coming within this section (12 C. B. 34). But it has been said by Bramwell, B., that the sects 21 and 22 refer only to estates in remainder and reversion, the estate of the tenant in tail which descends to his issue being provided for by sect. 2 (*Abergavenny* v. *Brace*, L. R. 7 Ex. 149, 173). See further, pp. 148, 149, *ante*.

Possession adverse to a tenant in tail shall run on against the remainderman whom he might have barred.

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Under the Lim. Act, 1623, where an estate was limited to one in tail, with remainder to another in fee, the remainderman might, at any time within twenty years after the failure of the issue in tail, have recovered the estate (*Taylor* v. *Horde*, 1 Burr. 60).

[*Sect. 23 of the R. P. Lim. Act*, 1833, *has been repealed and the following substituted, viz.:*]

R. P. Lim. Act, 1874, sect. 6.

In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twelve years after that period at which the assurance, if then executed, would have barred them.

[*R. P. Lim. Act*, 1874, *s.* 6.] When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Sect. 6 of R. P. Lim. Act, 1874, has by sect. 9 of the same Act been substituted for sect. 23 of R. P. Lim. Act, 1833. Sect. 6 of R. P. Lim. Act, 1874, fixes the period of limitation at twelve years, but is in other respects substantially similar to sect. 23 of R. P. Lim. Act, 1833, which has accordingly been omitted. **37 & 38 Vict. c. 57, s. 6.**

As to the law before R. P. Lim. Act, 1833, see *Doe* v. *Pike* (3 B. & Ad. 742); *Woodroffe* v. *Doe* (15 M. & W. 769; 2 H. L. C. 811); *Doe* v. *Woodroffe* (10 M. & W. 608). Old law.

The proposition of the R. P. Commrs. was, "That on any alienation by tenant in tail, by an assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights or interests" (1 Real Prop. Rep. 79, pl. 15; and see *ibid.*, p. 46). Remarks of Real Property Commissioners.

The section applies to cases where (1) a tenant in tail executes a deed enrolled under the Fines and Recoveries Act, 1833, which, for want of the consent of the protector, operates only to create a base fee, and (2) the tenant in tail subsequently acquires the right to bar without any consent. See sect. 1 of the Fines and Recov. Act, 1833, *post*, pp. 306, 307; note on statutory base fees. The "possession by virtue of such assurance," mentioned in the section, must be a possession by virtue of an assurance which turns an estate tail into a base fee. And where a conveyance comprised a base fee and also a preceding life estate, time did not commence to run in favour of the possession taken under such conveyance until the determination of the life estate (*Mills* v. *Capel*, 20 Eq. 692). In the last-mentioned case, Hall, V.-C., referred to the remark of Sugd. R. P. Stat., 2nd ed. 86, that the 23rd section carried into effect the above proposition of the R. P. Commissioners. It was intended, said the V.-C., to legislate for the case of possession under a base fee. "The assurance referred to is the one made by the tenant in tail. The operation of the clause therefore is not strictly to make time a bar but to make time give a full operation to the assurance executed by the tenant in tail" (Sugd. R. P. Stat. 86).

The object of this section was to give effect to acts of a tenant in tail against remainderman and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which show what the operation is as to the issue, and those clauses [*qu.* this clause] seem to be studiously worded so as to be confined only to the case of persons entitled after the expiration of the estate tail (*Penny* v. *Allen*, 7 D. M. & G. 426; *Morgan* v. *Morgan*, 10 Eq. 99). Cases under the above sections.

As to whether the section extends to fines and recoveries previous to the Fines and Recoveries Act, 1833, see 1 Hayes' Conv., 5th ed., 264; Sugd. R. P. Stat. 89; and the argument in *Anderson* v. *A.* (30 Beav. 207).

6. *Limitation of Time as to Suits in Equity.*

24. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore con- No suit in equity to be brought after the time

3 & 4 Will. 4, c. 27, s. 24.

tained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity.

when the plaintiff, if entitled at law, might have brought an action.

Since 1878 the R. P. Lim. Act, 1874, has prescribed fresh periods of limitation, which, by the express terms of the Act, were extended to "suits."

How far Courts of equity bound by Statutes of Limitation.

Prior to the R. P. Lim. Act, 1833, Courts of equity had acted in obedience to the Statutes of Limitation in the case of legal demands, and by analogy to the rules laid down by those statutes in other cases (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 629; *Smith* v. *Clay*, 3 Bro. C. C. 639, n.; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 156; *Baker* v. *Courage*, [1910] 1 K. B. 62). The R. P. Lim. Act, 1833, was intended to put an end to the the discretion of Courts of equity where they had acted by analogy to the time limited at law (*Berrington* v. *Evans*, 1 Y. & C. 439). But sect. 24 only barred equitable rights so far as they would have been barred if legal (*Archbold* v. *Scully*, 9 H. L. C. 360).

Independently of statute, time is a bar in equity to stale demands where there has been improper delay (*Harcourt* v. *White*, 28 Beav. 303; *Forster* v. *Thompson*, 4 Dr. & War. 318; *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Blair* v. *Ormond*, 1 De G. & Sm. 428). An action to foreclose an equitable mortgage of an advowson in gross (which was not "land" within the statute) where no payment had been made for forty-eight years, was barred by laches (*Brooks* v. *Muckleston*, [1909] 2 Ch. 519). See further, *post*, p. 197.

As to the proceedings under the old practice in equity sufficient to prevent the operation of the statute, see *Coppin* v. *Gray* (*supra*); *Purcell* v. *Blennerhassett* (3 J. & Lat. 24); and as to amended bills, see *Byron* v. *Cooper* (11 Cl. & Fin. 556); *Plowden* v. *Thorpe* (7 Cl. & Fin. 164); *Blair* v. *Ormond* (1 De G. & Sm. 428); *Att.-Gen.* v. *Hall* (11 Price, 760).

Foreclosure actions.

A foreclosure action is an action for the recovery of land within sects. 2 and 24 of R. P. Lim. Act, 1833, and not an action for the recovery of the mortgage money within sect. 40 (*Heath* v. *Pugh*, 6 Q. B. D. 340, 7 App. Cas. 235; *Harlock* v. *Ashberry*, 19 Ch. D. 539; following the opinion of Lord St. Leonards in *Wrixon* v. *Vize*, 3 Dr. & War. 104; and R. P. Stat. 121, 2nd ed.; and overruling, on this point, *Dearman* v. *Wyche*, 9 Sim. 570; *Du Vigier* v. *Lee*, 2 Hare, 326; and *Sinclair* v. *Jackson*, 17 Beav. 405). In the case of an equitable charge on a reversionary interest in land, time commences to run against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480; see *Re Owen*, [1894] 3 Ch. 220; *Re Witham, Chadburn* v. *Wilkinson*, [1922] 2 Ch. 413). Where real estate was demised for twenty-one years, the rent for seventeen years being paid in advance, and in the following year mortgaged, the mortgage was held to be of an estate in possession (*Wakefield, &c., Bank* v. *Yates*, [1916] 1 Ch. 452).

A redemption action is not an action to recover land (*Kinsman* v. *Rouse*, 17 Ch. D. 107).

Title deeds.

A bill by the lord of a manor to recover his title deeds and court rolls was barred by this section (*Wells* v. *Doddington*, 2 Coll. C. C. 73).

Partition.

So also the equitable title of a tenant in common suing for partition was barred by this section (*Thornton* v. *France*, [1897] 2 Q. B. 158).

Waste.

As to waste, see *post*, p. 290.

Charities are within the operation of this section (*Att.-Gen.* v. *Magdalen College*, 6 H. L. C. 189; see the note to sect. 25, *post*). **3 & 4 Will. 4, c. 27, s. 24.**

See further the note as to Courts of equity and the Statutes of Limitation, *post*, pp. 287 *et seq.* Charities.

S. L. R. (No. 2) Act, 1890, has repealed formal words which occurred in the following sections of this Act, viz.:—24, 29, 30, 33, 39, 41, 42, and 43, and which have accordingly been omitted in the present edition. Repeal of formal words.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

(1) *Old Law*...189.
(2) *Cases under Sect.* 25...189.
(3) *Running of Time between Trustee and* c. q. t....190.
(4) *Running of Time in case of Charitable Trusts*...192.

In the case of proceedings against trustees commenced after January 1, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888, *post*, p. 283. Trustee Act, 1888.

The following note relates to the law, irrespective of that Act.

(1) Old law.

Before R. P. Lim. Act, 1833, the rule that trusts are not within the Stat. Lim. would not apply where a claim was made after a long time against a trustee by *implication* of law arising upon a doubtful equity (*Townshend* v. *T.*, 1 Cox, 28; 1 Bro. C. C. 550); and where relief would originally have been given upon a constructive trust, it was refused to a party who, after long acquiescence, came into equity to seek relief (*Beckford* v. *Wade*, 17 Ves. 97; *Ex parte Hasell*, 3 Y. & Coll. 622; *Bell* v. *B.*, 1 Lloyd & G. temp. Plunket, 65; see *Bonny* v. *Ridgard*, cited 4 Bro. C. C. 138).

(2) This section applies to express trusts only.

Sect. 25 is confined to express trusts—that is, trusts expressly declared by deed or will or other written instrument. It does not apply to a trust made out by circumstances (*Petre* v. *Petre*, 1 Drew. 393; see *Banner* v. *Berridge*, 18 Ch. D. 263; *Price* v. *Phillips*, [1894] W. N. 213), or to trusts resulting or trusts by operation of law (*Dickenson* v. *Teasdale*, 1 D. J. & S. 59), or to a trust which arises from acts of parties (*Sands* to *Thompson*, 22 Ch. D. 617). Distinguish the trust raised in the case of a purchase of land and treated as an express trust, *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; and see the other cases quoted, *post*, p. 292. "In order to bring a case within the 25th section there must be a trustee in whom the land is vested; there must be an express trust, by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience, a trust arising upon the words of the instrument itself. Therefore these three things must concur—there must be land,

3 & 4 Will. 4, c. 27, s. 25.

there must be a trustee of the land, and there must be a *cestui que trust* for whose benefit in this respect the land is to be held—and all that must be found upon the construction of the instrument" (*per* Lord Cairns, *Cunningham* v. *Foot*, 3 App. Cas. 984).

Who are express trustees;

There was an express trust within this section where a testator devised land upon trust for sale, the proceeds to be considered as part of his personal estate (*Mutlow* v. *Bigg*, 18 Eq. 246; reversed, on other grounds, 1 Ch. D. 385), but not where a testator devised lands to his son and his heirs male in the fullest trust and confidence that he would not defeat subsequent limitations (*Dawkins* v. *Penrhyn*, 4 App. Cas. 51). Where trustees of a will entered on and administered as part of a testator's estate land of which he was held to die intestate, they were not express trustees within this section (*Yardley* v. *Holland*, 20 Eq. 428; see *Churcher* v. *Martin*, 42 Ch. D. 312; *Re Lacy, Royal Association* v. *Kydd*, [1899] 2 Ch. 149). But an express trust for the benefit of an heir-at-law was held to arise as against trustees in the possession of lands devised by a will which did not declare any trust of the surplus rents (*Salter* v. *Cavanagh*, 1 Drury & Walsh, 668). So where the will did not declare trusts of part of the real estate (*Patrick* v. *Simpson*, 24 Q. B. D. 129). And where a person acted as trustee of a will containing express trusts of realty, though the estate was not vested in her, she had placed herself in the position of an express trustee (*Life Association* v. *Siddal*, 3 D. F. & J. 58). One of several tenants in common who entered into possession of the lands and procured a fee-farm grant to himself was not an express trustee within this section for himself and his co-tenants (*Re Dane*, I. R. 5 Eq. 498); nor was a purchaser from an executor at an undervalue with notice of the trusts of the will (*Pyrah* v. *Woodcock*, 24 L. T. 407; see, as to a purchaser with notice from an express trustee, *Young* v. *Harris*, 65 L. T. 47; *Att.-Gen.* v. *Magdalen College*, 18 Beav. 223; 6 H. L. C. 189). A *c. q. t.* of real estate under a will was discharged in 1825 under the Insolvent Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the legal estate from the trustee, in trust for the creditors under the bankruptcy; held, that the legal estate thereby became vested in the assignee upon an express trust within this section—viz., the trust declared by the will, the benefit of which belonged to the creditors under the insolvency (*Sturgis* v. *Morse*, 3 De G. & J. 1). A deed of direction was held to constitute receivers and the trustee of rents of realty express trustees for the benefit of certain annuitants (*Knight* v. *Bowyer*, 2 D. G. & J. 421). But a mortgagee was not an express trustee for the mortgagor, even where the mortgage was in the form of a trust for sale (*Locking* v. *Parker*, 8 Ch. 30; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284). Where the mortgagee was paid off, see *Sands* to *Thompson*, 22 Ch. D. 617; *Teevan* v. *Smith*, 20 Ch. D. 730. Under sects. 1 & 2 of the L. T. Act, 1897, the legal personal representative is an express trustee of real estate, and the R. P. Lim. Act, 1874, does not run in his favour (*Toates* v. *T.*, [1926] 2 K. B. 30).

land;

(3) Time no bar between *c. q. t.* and trustee:

where trustee in possession;

In the case of a direct or express trust, as where an estate is conveyed to the use of A and his heirs in trust for B and his heirs, no time, as between the trustee and *c. q. t.*, can bar the equitable right of the latter (Barnard, C. R. 449; *Townshend* v. *T.*, 1 Bro. C. C. 551). The possession of the trustee is the possession of the *c. q. t.*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 633). In the case of a strict trustee, it is his duty to take care of the interest of his *c. q. t.*, and he is not permitted to do

anything adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them (*Cholmondeley* v. *Clinton*, 2 Jac. & W. 190; see *Latter* v. *Dashwood*, 6 Sim. 462; *Faussett* v. *Carpenter*, 5 Bligh (N.S.) 75). But where any doubt arises as to the existence of a trust, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust (*Att.-Gen.* v. *Fishmongers' Co.*, 5 M. & C. 18). Where estates were devised upon trust to sell and pay debts, and subject thereto for infant children, and the surviving trustee retained possession of one of the estates in satisfacton of debts which he alleged himself to have paid, the testator being insolvent: on a bill for an account and conveyance of the estate forty-five years after the death, inquiries were directed whether the children had notice, whether they had released, and whether the trustee had advanced money to the value of the estate (*Chalmer* v. *Bradley*, 1 Jac. & W. 51, where numerous cases on this subject are cited).

3 & 4 Will. 4, c. 27, s. 25.

Where for more than the statutory period trustees in possession of land paid by mistake the whole rents to a stranger, the right of the actual *c. q. t.* was not barred (*Lister* v. *Pickford*, 34 Beav. 576; see *Churcher* v. *Martin*, 42 Ch. D. 312). So where the trustees paid the whole rents to some *c. q. t.'s* to the exclusion of another, the latter was not barred (*Knight* v. *Bowyer*, 2 De G. & J. 421; see *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 465). Distinguish the case where, the trustees not acting, some *c. q. t.'s* received the whole rents to the exclusion of others, and the others were barred (*Burroughs* v. *McCreight*, 1 J. & Lat. 290).

For a case where the trustee remained in possession and paid the rents into Court, and a beneficiary mortgaged his share but no principal or interest was paid in respect of the mortgage for twelve years, and the mortgagee was held barred, see *Re Hazeldine*, [1908] 1 Ch. 34; *Re Fox* [1913] 2 Ch. 75.

Where the same trustee held leases of Blackacre and Whiteacre (adjoining properties) on different trusts a person who was entitled as *c. q. t.* to possession of Whiteacre, and by reason of such possession obtained possession of Blackacre, and retained the same for more than the statutory period, was held to be a person claiming through the trustee otherwise than by purchase for value, and time did not run in her favour (*East Stonehouse Council* v. *Willoughby*, [1902] 2 K. B. 318, 335).

As to the effect of fines formerly between trustee and *c. q. t.*, see Gilb. Ch. 62; *Bell* v. *B.*, 1 Ll. & G. temp. Plunket, 59; *Earl Pomfret* v. *Lord Windsor*, 2 Ves. sen. 472, 281; *Reynolds* v. *Jones*, 2 Sim. & Stu. 206; 1 Sand. on Uses, 3rd ed., 291; 5 Cruise, Dig. 208—213.

where *c. q. t.* in possession;

The case where the *c. q. t.* is in possession is dealt with in the note to sect. 7, *ante*, p. 169.

where stranger in possession time bars both trustee and *c. q. t.*;

The rule that a trust is not barred by length of time does not apply between a *c. q. t.* entitled in possession and his trustees on the one side and strangers on the other. Therefore, where a *c. q. t.* entitled to a present estate and his trustee have been both out of possession for the time limited, the trespasser has a good bar against both (*Llewellyn* v. *Mackworth*, Barnard, C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; see *Townshend* v. *Townshend*, 1 Br. C. C. 550; *Melling* v. *Leek*, 16 C. B. 652; *Clay* v. *Clay*, 3 Br. C. C. 639, n.; *Hercy* v. *Ballard*, 4 Br. C. C. 469; *Harmood* v. *Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 629). In a

3 & 4 Will. 4, c. 27, s. 25.

colonial case, however, *c. q. t.'s* entitled in possession could, under a colonial Act, enforce their rights even where their trustees were barred (*Williams* v. *Papworth*, [1900] A. C. 563).

The question is more difficult whether a trespasser's possession which bars a trustee also bars a *c. q. t.*, who, if his estate had been legal, would have had further time, as being an infant, or as being only entitled to a future estate. In the case of a *c. q. t.* entitled to a future estate, a strong opinion was expressed by the L. C. of Ireland that he would be barred by the trustee being barred (*Cooper* v. *Warre*, 18 Ir. Jur. 24, 28). A similar opinion was expressed in the case of a *c. q. t.* under disability (*Re Scott*, 8 Ir. Ch. R. 323; compare *Wych* v. *E. India Co.*, 3 P. W. 309). And a *c. q. t.* who was not himself barred was held barred by the trustee's bar (*Bolling* v. *Hobday*, 31 W. R. 9; see as to the proceeds of sale in that case being land, *Kirkland* v. *Peatfield*, [1903] 1 K. B. 759). Lewin seems to think that such a *c. q. t.* would be barred (12th ed., 1130; and see 51 Sol. J. 155). The contrary view is suggested by Darb. & Bos. Stat. Lim. 420, referring to *Scott* v. *S.*, 4 H. L. C. 1065; and by Lightwood, Time Limit, 80.

where trustee alienates for value.

The 25th section renders lapse of time unimportant in all cases within it, that is, between the *c. q. t.* and his trustee, until the trust is disturbed; and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property held in trust (*Law* v. *Bagwell*, 4 Dru. & War. 408). In such a case a lapse of the statutory period from the date of the conveyance will bar the *c. q. t.*; but it seems that if at the date of the conveyance the rights of the *c. q. t.* are reversionary, or he be under disability, the running of time will be postponed accordingly (*Thompson* v. *Simpson*, 1 Dru. & War. 489; *Att.-Gen* v. *Magdalen College*, 6 H. L. C. 215).

(4) Charities; law before the statute:

Before the R. P. Lim. Act, 1833, time did not run against charities in a Court of equity, neither were charities bound to the times expressed in the statutes 32 Hen. 8, c. 2, and Lim. Act, 1623 (Duke, 161; *Att.-Gen.* v. *Coventry*, 3 Madd. 368; 2 Vern. 399; *Att.-Gen.* v. *Christ's Hospital*, 3 M. & K. 344; *Att.-Gen.* v. *Bristol*, 2 Jac. & W. 321; *Att.-Gen.* v. *Poulden*, 8 Sim. 472; *Att.-Gen.* v. *Smythies*, 2 M. & K. 749; *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; Shelford on Charities, p. 563). At law the old Stat. Lim. operated against all claimants, although they held in trust for charities; but in Chancery, unless in the case of a purchaser for value, they had no operation (43 Eliz. c. 4; Sugd. V. & P. 944, 11th ed.).

present law;

The R. P. Lim. Act, 1833, does not contain any saving in favour of charities, and they are within its provisions (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324). Where the Attorney-General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred (*Att.-Gen.* v. *Magdalen College*, 18 Beav. 223; 6 H. L. C. 189).

Where a testator charged land in Ireland with a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged, time did not run against the gift until a schoolmaster was appointed (*Att.-Gen.* v. *Persse*, 2 Dru. & War. 69).

express trusts for charities;

Property given upon express trust for a charity is within sect. 25 (*Commrs. of Donations* v. *Wybrants*, 2 J. & Lat. 182). The section barred relief where charity land had not been aliened in fee, but had been held under a lease granted in breach of trust for 500 years at a rent which had been regularly paid (*Att.-Gen.* v.

Davey, 4 De G. & J. 136; *Att.-Gen.* v. *Payne*, 27 Beav. 168; see *Magdalen Hospital* v. *Knotts*, 8 Ch. D. 728). 3 & 4 Will. 4, c. 27, s. 25.

Length of time would not formerly protect a purchaser with notice of charitable trusts (*Att.-Gen.* v. *Christ's Hospital*, 3 M. & K. 344; see *Att.-Gen.* v. *Bristol*, 2 Jac. & W. 321; *Att.-Gen.* v. *Poulden*, 8 Sim. 472). But time will now, it seems, run in his favour from the conveyance (*Att.-Gen.* v. *Magdalen College*, 6 H. L. C. 189; see *Att.-Gen.* v. *Flint*, 4 Hare, 147; *Att.-Gen.* v. *Davis*, 18 W. R. 1132). As to the length of time during which an account of rents will be directed in the case of trustees for charities, see the note to sect. 42, *post*, p. 235. purchasers with notice of charitable trusts.

The principle of sect. 25 has now been extended to personal estate by Jud. Act, 1873, s. 25, sub-s. 2, *post*, p. 291 (see *Banner* v. *Berridge*, 18 Ch. D. 262). Jud. Act, 1873, s. 25 (2).

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed. In cases of fraud, no time shall run whilst the fraud remains concealed.

(1) *Cases under Sect.* 26...193.
(2) *Cases in Equity as to Fraud*...195.

(1) Pleading concealed fraud.

Before the Jud. Acts, a case of concealed fraud might have been set up in equity on an ejectment bill (*Chetham* v. *Hoare*, 9 Eq. 571); but not on petition (*Ex parte Breach*, 12 W. R. 769).

Since the Jud. Acts, it has been held that concealed fraud must be pleaded with the utmost particularity (*Riddell* v. *Strathmore*, 3 Times Rep. 329; *Lawrance* v. *Norreys*, 15 App. Cas. 210). The circumstances alleged must lead to the reasonable inference that fraud was the cause of the deprivation, and exclude other possible causes (*Lawrance* v. *Norreys*, *supra*). On the argument of a demurrer to a bill raising a case of concealed fraud, the Court had then nothing to do with the probability or improbability of the plaintiff's ultimate success at the hearing (*Vane* v. *Vane*, 8 Ch. 395). The same point was discussed on an application to strike out under Ord. 25, r. 4 (*Boaley* v. *Holder*, 54 L. T. 298). On the whole materials before it, the Court struck out as vexatious a claim raising concealed fraud (*Lawrance* v. *Norreys*, 39 Ch. D. 213; 15 App. Cas. 210).

To bring a case within the section there must have been (1) fraud, (2) which must have deprived the claimant or his predecessors in title of the estate, (3) and which was concealed, and (4) which concealment could not with reasonable diligence have been discovered sooner (*Willis* v. *Howe*, [1893] 2 Ch. 551). What is concealed fraud within this section.

3 & 4 Will. 4, c. 27, s. 26.

The fraud must be the fraud of the person setting up the statute, or some person through whom he claims (*Re McCallum, M.* v. *M.*, [1901] 1 Ch. 143, C. A.; Rigby, L.J., *dissentiente*; see *Thorne* v. *Heard*, [1895] A. C. 495).

Mere ignorance does not prevent the operation of the statute (*Dawkins* v. *Penrhyn*, 6 Ch. D. 324). Thus the occupation of an underground cellar without the knowledge of the owner of the surface was not concealed fraud within this section (*Rains* v. *Buxton*, 14 Ch. D. 537). The husband of a woman married before 1882 was held not to be guilty of concealed fraud in entering after her death into possession of freeholds of which she could not dispose by will, though he was trustee of her will (*Re Coole*, [1920] 2 Ch. 536). This section does not mean the case of a party entering wrongfully into possession, but it applies to designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving the right, and who by means of such concealment is enabled to enter and hold (*Petre* v. *P.*, 1 Drew. 397; see *Dean* v. *Thwaite*, 21 Beav. 621). It points to some contrivance by which the real owner has been not merely deprived, but defrauded; in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter (*Willis* v. *Howe*, [1893] 2 Ch. 552). Where the grantor never disclosed the deed to the grantees, possibly thinking it non-effective till disclosure, there was no concealed fraud (*Re Levesley*, 60 S. J. 142; and see *Re McCallum, M.* v. *M.*, [1901] 1 Ch. 147, 164; compare *Le Lievre* v. *Gould*, [1893] 1 Q. B. 500). The word "concealed" seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts if known would enable the real owner to recover (*Willis* v. *Howe*, [1893] 2 Ch. 552). As regards concealment, compare *Bulli Co.* v. *Osborne*, [1899] A. C. 363, and other decisions (*post*, p. 258), to the effect that in cases of concealed trespass it is not necessary, for the purpose of avoiding the statute, to show active concealment.

An allegation that, with a view to deprive the true owner of his right, the person in possession conspired with his solicitors to destroy the deeds, was a sufficient allegation of concealed fraud within this section (*Lawrance* v. *Norreys*, 39 Ch. D. 224; see 15 App. Cas. 213). As to whether preventing information as to the title from reaching the true owner would amount to concealed fraud, see 39 Ch. D. 228; 15 App. Cas. 215. Bringing up an eldest son in the belief that he was a younger son was concealed fraud within this section (*Vane* v. *V.*, 8 Ch. 383). So the procuring instruments of conveyance and devise to be executed by a person of unsound mind (*Lewis* v. *Thomas*, 3 Hare, 26; as to a conveyance by a lunatic, see *Price* v. *Berrington*, 3 Mac. & G. 486). But where lunacy was not proved but only dulness of intellect, the Court refused after eighty years to set aside a compromise of an action to recover land (*Manby* v. *Bewicke*, 3 K. & J. 342). The omission from the Schedule of an insolvent of an estate to which he was entitled, was treated in a suit commenced twenty-eight years later as having been a concealed fraud (*Sturgis* v. *Morse*, 24 Beav. 541; 2 De G. & J. 1). In another case the Court refused after twenty-two years to assume that there had been any concealment of assets by contributories negotiating a compromise with a liquidator (*Watt* v. *Assets Co.*, [1905] A. C. 317).

In a case before this statute, fraud relating to a sale, discovered thirty-seven years after conveyance, furnished an answer to the objection of lapse of time. It was said that it is the duty of the Court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances, and to consider what

evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, time has no effect (*Charter* v. *Trevelyan*, 11 Cl. & Fin. 740). **3 & 4 Will. 4, c. 27, s. 26.**

As to what constitutes reasonable diligence in the discovery of concealed fraud, see *Chetham* v. *Hoare* (9 Eq. 571) and the judgment of Malins, V.-C., *Vane* v. *V.* (8 Ch. 390, n.); *Willis* v. *Howe* (43 L. T. 375). Reasonable diligence.

A purchaser for value is not entitled to the protection of this proviso, if his agent who negotiated the purchase had in the course of the transaction actual knowledge of the fraud, or had reason to believe that a fraud has been committed (*Vane* v. *V.*, 8 Ch. 383). Proviso as to *bona fide* purchasers.

(2) Cases in equity as to fraud.

When time bars in cases of fraud.

Though equity will interpose to prevent those mischiefs which would result from persons being allowed at any distance of time to disturb the possession of another; yet as its interference proceeds upon principles of conscience, it will not in any manner protect the abuse of confidence, and therefore no length of time will bar a fraud (1 Fonbl. Eq. 331; *Cotterill* v. *Purchase*, Forrest, 61; *Alden* v. *Gregory*, 2 Eden, R. 230; *Whalley* v. *Whalley*, 1 Mer. 436; *S. C.*, 3 Bligh, 1; as to length of time being no bar in cases of fraud, see also *Deloraine* v. *Browne*, 3 Bro. C. C. 633; *Smith* v. *Clay*, *ibid.*, 639 n.; *Hercy* v. *Dinwoody*, 4 Bro. C. C. 258; 2 Ves. jun. 87; *Yate* v. *Moseley*, 5 Ves. 480; *Moth* v. *Atwood*, 5 Ves. 845; *Purcell* v. *Macnamara*, 14 Ves. 91; *Beckford* v. *Wade*, 17 Ves. 87; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607, 630; *Moore* v. *Blake*, 1 Ball & B. 62; *Medlicott* v. *O'Donnell*, *ibid.*, 156; *Gould* v. *Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse* v. *Royal*, 12 Ves. 355; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272; *Byrne* v. *Frere*, 2 Molloy, 176; *Hatch* v. *H.*, 9 Ves. 292). An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time (*Gordon* v. *G.*, 3 Swanst. 400). As to the construction of deeds of compromise, see *Cloutte* v. *Storey*, [1911] 1 Ch. 18. As to fraud in the case of levying fines, see *Langley* v. *Fisher* (9 Beav. 90).

A Court of equity refused to impeach a transaction on the ground of fraud, where the facts had been within the knowledge of the party many years; but held that every new right of action in equity must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 637; see *Redgrave* v. *Hurd*, 20 Ch. D. 13). According to the law before this Act, where a party was constituted a trustee by a Court of equity on the ground of fraud, his possession was adverse, and time ran from the discovery of the fraud (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank* v. *Smith*, 2 Y. & Coll. 58; *Blennerhasset* v. *Day*, 2 Ball. & B. 118).

See further the note as to Courts of equity and the Statutes of Limitation, *post*, pp. 287 *et seq.*

27. Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act. Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no Acquiescence.

3 & 4 Will. 4, c. 27, s. 27.

objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence (*Leeds* v. *Amherst*, 2 Phil. 123). It may be defined as "quiescence under such circumstances as that assent may be reasonably inferred from it" (*De Bussche* v. *Alt*, 8 Ch. D. 314). Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it (*Pickering* v. *Stamford*, 2 Ves. jun. 280)

imports knowledge.

Parties, however, cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them (*Marker* v. *M.*, 9 Hare, 16). And the doctrine does not apply where there is a common mistake (*Cholmondeley* v. *Clinton*, 2 Mer. 362); *e.g.*, by executors and a legatee as to the construction of a will (*Newton* v. *Ayscough*, 19 Ves. 539; *Brooksbank* v. *Smith*, 2 Y. & C. 59; see *Knatchbull* v. *Fearnhead*, 3 M. & C. 122).

Acquiescence generally.

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was a bar to relief (*Hicks* v. *Cooke*, 4 Dow. 17). Long acquiescence by a party acquainted with the facts is a bar to setting aside a lease, upon the ground of fraud or mistake (*Selsey* v. *Rhodes*, 1 Bligh, (N.S.) 1). An heir-at-law was not entitled to an issue *devisavit vel non* after twenty years' acquiescence in his ancestor's will (*Tucker* v. *Sanger*, M'Clel. 424; 13 Price, 119). An acquiescence of twenty-three years, with a knowledge of the will, is a bar to a claim by a residuary legatee against an executor for an account, on the ground of neglect or misfeasance (*Portlock* v. *Gardner*, 11 L. J. Ch. 313). A wife was bound by the declaration of her husband alone of the uses of a fine levied of her lands after having acquiesced fifteen years from his death (*Swanton* v. *Raven*, 3 Atk. 105). Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by statute they could not impeach such agreement in respect of the public interest (*Gray* v. *Chaplin*, 2 Russ. 126). Acquiescence will not be held to have taken place, so long as the circumstances of undue influence on one side, and distress on the other, continue to operate (*Purcell* v. *Macnamara*, 14 Ves. 106, 121, 122). A claim by mortgagees to make legatees refund was barred after twenty years by acquiescence (*Blake* v. *Gale*, 32 Ch. D. 571).

Acquiescence in breaches of trust.

Length of time, when it does not operate as a statutory bar, operates simply as evidence of acquiescence. A *cestui que trust* is not less capable of giving assent to a breach of trust when his interest is in reversion than when it is in possession. But where the trust is clear, a breach of trust will not be held to have been sanctioned by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession (*Life Association* v. *Siddal*, 3 D. F. & J. 72, 74; see *Brown* v. *Cross*, 14 Beav. 105; *March* v. *Russell*, 3 M. & C. 31).

Acquiescence imports knowledge, for a man cannot be said to have acquiesced in what he did not know; and in cases involving a breach of trust, acquiescence imports full knowledge. A *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed (*Life Association* v. *Siddal*, *supra*). A *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him part only of that to which he is entitled, does not waive his claim to further relief, unless such an intention can be clearly inferred (*Re Cross*, *Harston* v. *Tenison*, 20 Ch. D. 122). In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is ascertained that the *cestui que trust* knew that his trustee had become the purchaser (*Randall* v. *Errington*, 10 Ves. 427, 428; *Morse* v. *Royal*, 12 Ves. 335). If the *cestui que trust*

joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust; and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but the Court must inquire into the circumstances which induced concurrence or acquiescence (*Walker* v. *Symonds*, 3 Swanst. 64). All *c. q. t.'s*, who (being of age and under no incapacity) have had full information of the conduct of their trustees, and openly or tacitly acquiesced in it during a considerable time, are held to have adopted such conduct, and precluded themselves from remedy (*Brice* v. *Stokes*, 11 Ves. 319; *Ryder* v. *Bickerton*, 3 Swanst. 83, n.; *Underwood* v. *Stevens*, 1 Mer. 712; *Trafford* v. *Boehm*, 3 Atk. 444). 3 & 4 Will. 4, c. 27, s. 27.

"Where there is a Statute of Limitations the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period which the law permits delay without losing right, I conceive cannot be any equitable bar" (*Archbold* v. *Scully*, 9 H. L. C. 383). A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years. After her death a bill for their recovery, filed by her executrix, was dismissed on the ground of great laches (*Pattison* v. *Hawkesworth*, 10 Beav. 375). See *Sibbering* v. *Balcarras* (3 De G. & Sm. 737), where the Court refused to entertain a suit for setting aside the sale of a reversionary interest after the lapse of several years; and see *Spackman* v. *Evans*, L. R. 3 H. L. 220. An action to foreclose a mortgage of an advowson was barred by laches (*Brooks* v. *Muckleston*, [1909] 2 Ch. 519). Laches would bar an action for assignment of dower where for twelve years the widow does not claim any right (*Williams* v. *Thomas*, [1909] 1 Ch. 722). Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Lindsay Petroleum Co.*, v. *Hurd*, L. R. 5 P. C. 239; adopted, *Allcard* v. *Skinner*, 36 Ch. D. 163). Laches.

In the case of legal right, Courts of equity will not refuse relief on ground of delay, unless sufficient to create statutory bar (*Three Towns' Co.* v. *Maddever*, 27 Ch. D. 523; *Re Baker, Collins* v. *Rhodes*, 20 Ch. D. 230). So in the case of an injunction to aid a legal right (*Fullwood* v. *F.*, 9 Ch. D. 176).

See further the note as to Courts of equity and the Statutes of Limitation, *post*, pp. 287 *et seq.*

3 & 4 Will. 4, c. 27, s. 28.

7. *Limitation of Time between Mortgagor and Mortgagee.*

A. *As to the Barring of the Rights of Mortgagors.*

[*Sect.* 28 *of the R. P. Lim. Act,* 1833, *has been repealed and the following substituted, viz.:*]

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.

[*R. P. Lim. Act,* 1874, *s.* 7.] When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value

of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. 3 & 4 Will. 4, c. 27, s. 28.

(1) *Operation of the section*...199.
(2) *Acknowledgments*...200.
(3) *Disabilities*...201.

Sect. 7 of R. P. Lim. Act, 1874, has, by sect. 9 of the same Act, been substituted for sect. 28 of R. P. Lim. Act, 1833. Sect. 7 of the R. P. Lim. Act, 1874, fixes the period of limitation for bringing an action for redemption at twelve years, but in other respects is substantially similar to R. P. Lim. Act, 1833, s. 28, which has accordingly been omitted.

CASES AS TO BARRING MORTGAGOR'S RIGHTS.

(1) Effect of section.

A trust for sale of land by way of security for money lent is a mortgage within the section (*Locking* v. *Parker*, 8 Ch. 30). After possession by the mortgagee for the statutory period the mortgagor's rights are barred, not only in the land but also in the purchase-money, whether such money arise under such a trust for sale (*Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284), or under an ordinary power of sale (*Chapman* v. *Corpe*, 41 L. T. 22). Where the trustee under the mortgagor's bankruptcy was barred, the mortgagor was barred also, notwithstanding annulment of the bankruptcy (*Markwick* v. *Hardingham*, 15 Ch. D. 339).

Possession of mortgagee.

A mortgagee in possession of part of the land mortgaged can, under this section, acquire title to such part, although the remaining part is in possession of the mortgagor (*Kinsman* v. *Rouse*, 17 Ch. D. 104: the rule before R. P. Lim. Act, 1833, was different, *Rakestraw* v. *Bruyer*, Moseley, 189). Consider the decision where land and personalty were included in the same mortgage, and, the mortgagee having by possession acquired title to the land, it was held that the mortgagor could not redeem the personalty (*Charter* v. *Watson*, [1899] 1 Ch. 175).

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the statute (*Booth* v. *Purser*, 1 Ir. Eq. R. 33). A solicitor who pays off a mortgage debt due from a client must be taken to act as the agent of the client, and if he receive the rents of the mortgaged property time will not run against the client (*Ward* v. *Carttar*, 1 Eq. 29). Where a mortgagee who had been in possession for six years without making any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer, such possession was not adverse during the life estate (*Hyde* v. *Dallaway*, 2 Hare, 528; *Raffety* v. *King*, 1 Keen, 601). A mortgagee of a life interest who entered into possession under an order of the Court and remained in possession did not become a trespasser by the mortgagor's death (*Hickman* v. *Upsall*, 2 Ch. D. 617). A second mortgagee was held not to have acquired a title by adverse possession (*Thorpe* v. *Holdsworth*, 7 Eq. 139). "I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years" (*per* Lord Cranworth, *Alderson* v. *White*, 2 De G. & J. 109). A claim for accounts by a second against a first mortgagee was held not to bring the action within the C. L. P. (Ireland) Act, 1853, which makes six years the period of limitation for an action of account (*Ocean, &c., Corporation* v. *Collum*, [1913] 1 I. R. 328).

3 & 4 Will. 4, c. 27, s. 28.

Where a man by his will creates particular estates and remainders and then mortgages his estate, and the mortgagee enters, the mortgagor and his devisees have only in common a single period to claim, which runs from the entry (*Browne* v. *Bishop of Cork*, 1 Dru. & Wal. 700; Sugd. R. P. Stat. 38; see *Raffety* v. *King*, 1 Keen, 601). As to redemption of her land by a wife after her husband's death under the old law, see *Price* v. *Copner*, 1 Sim. & Stu. 347.

Where possession of mortgaged land was taken and held by the mortgagee for three years before his death, and after his death was retained by the tenant for life of his real and personal estate for a period sufficient to bar the mortgagor, the land devolved as personal, not real estate (*Re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859. See *Re Woodhead, Cadman* v. *Carr* (1884), W. N. 174). But the share which passed to one of the mortgagee's next of kin who died after the bar passed to him as real estate (*Re Loveridge, Pearce* v. *Marsh*, [1904] 1 Ch. 518).

Welsh mortgages.

A Welsh mortgage is a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits shall be received by the mortgagee without account in satisfaction of interest (see *Talbot* v. *Braddyl*, 1 Vern. 395; *Lawley* v. *Hooper*, 3 Atk. 280; *Yates* v. *Hambly*, 2 Atk. 237). As to whether an account would in such a case be directed, see Coote on Mortgages, 7th ed. 34 (*Fulthorpe* v. *Forster*, 1 Vern. 477; 5 Jarm. Conv., by Sweet, 96, 101). A Welsh mortgagee has no remedy to compel redemption or foreclosure (*Longuet* v. *Scawen*, 1 Ves. sen. 406); but if such a mortgagee be permitted to hold for more than the statutory period after the debt has been paid, the mortgagor would be barred (*Fenwick* v. *Reed*, 1 Mer. 125; 5 B. & Ald. 232; and see 2 Spence on Eq. Jurisd., pp. 616—618). The express inclusion of a power of sale shows that a deed is not intended to operate as a Welsh mortgage (*Re Cronin*, [1914] 1 I. R. 23). As to Welsh mortgages, see further *Teulon* v. *Curtis*, Younge, 610; *Hartpoole* v. *Walsh*, 5 Br. P. C. 267, Toml. ed.; *Balfe* v. *Lord*, 2 Dr. & War. 480.

(2) Acknowledgments:

The acknowledgment must be given "in the meantime," and accordingly an acknowledgment of the mortgagor's title made by the mortgagee after time has run in his favour does not revive the equity of redemption. (See *Sanders* v. *S.*, 19 Ch. D. 373; *Markwick* v. *Hardingham*, 15 Ch. D. 346; disapproving *Stansfield* v. *Hobson*, 3 D. M. G. 620). The old law was different (*Pendleton* v. *Booth*, 1 D. F. & Jo. 81). See as to acknowledgments of the mortgage title under the old law, *Hodle* v. *Healey*, 6 Madd. 181; *Price* v. *Copner*, 1 S. & S. 347.

must be made to the mortgagor or his agent;

The section has been held to operate retrospectively as to acknowledgments (*Batchelor* v. *Middleton*, 6 Hare, 75). An acknowledgment by the mortgagee (in writing signed by himself) of his mortgage title to a third person is not sufficient (*Batchelor* v. *Middleton*, 6 Hare, 83, 84; *Markwick* v. *Hardingham*, 15 Ch. D. 339). When a mortgagor became bankrupt a letter written to him subsequently did not operate as an acknowledgment either of his title or that of the assignee to the equity of redemption (*Markwick* v. *Hardingham*, *supra*). Where a mortgagee in possession conveyed the land to a purchaser, subject expressly to the equity of redemption of the mortgagor, the deed was not a sufficient acknowledgment of the mortgagor's title (*Lucas* v. *Denison*, 13 Sim. 584).

who is agent;

The acknowledgment may be made to an agent of the mortgagor, who need not, however, have at the time an authority to act (*Trulock* v. *Robey*, 12 Sim. 402). A sufficient acknowledgment was

found in a letter to an infant's grandfather, whom she was entitled to treat as her agent (*ibid.*). In the case of a mortgage by a member of a building society to the society, the committee were not the agents of the mortgagor to receive an acknowledgment (*Wilson* v. *Walton Society*, 19 T. L. R. 408); but see *Re Metropolis &c., Society*, [1911] 1 Ch. 698. Letters written by a mortgagee to the mortgagor's solicitor were (apart from their date) a sufficient acknowledgment in *Stansfield* v. *Hobson*, 3 D. M. & G. 620; but insufficient in *Thompson* v. *Bowyer*, 11 W. R. 975. It seems that the keeping of accounts (not signed) by the mortgagee in possession is not an acknowledgment (see *Baker* v. *Whetton*, 14 Sim. 426). In *Re Alison*, *Johnson* v. *Mounsey* (11 Ch. D. 284), where the mortgagor was held barred, accounts had been kept by the mortgagee in possession (compare *Jackson* v. *Ogg*, *post*, p. 261).

3 & 4 Will. 4, c. 27, s. 28.

mortgagee's accounts;

An acknowledgment of a mortgagor's title given by one of two joint mortgagees was inoperative. "The provision in this section as to acknowledgment by some of several mortgagees applies only where they have separate interests either in the money or the land" (*Richardson* v. *Younge*, 6 Ch. 478).

acknowledgment by one of several mortgagees.

(3) Disabilities.

There are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by the section. And the sections as to disabilities (*ante*, p. 178) do not apply; an action to redeem not being "an action to recover land" within these sections (*Kinsman* v. *Rouse*, 17 Ch. D. 104; *Forster* v. *Patterson*, 17 Ch. D. 132).

B. *As to the Barring of the Rights of Mortgagees.*

THE REAL PROPERTY LIMITATION ACT, 1837.

7 Will. 4 & 1 Vict. c. 28.

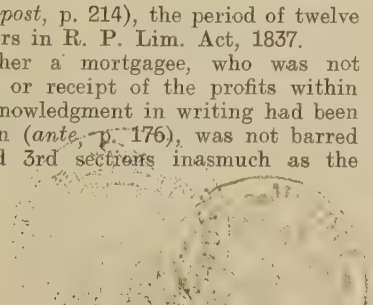
Mortgagees of "land" within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last payment of principal or interest.

Whereas doubts have been entertained as to the effect of a certain Act of Parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," so far as the same relates to mortgages; and it is expedient that such doubts should be removed: It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

By R. P. Lim. Act, 1874, s. 9 (*post*, p. 214), the period of twelve years is substituted for twenty years in R. P. Lim. Act, 1837.

CASES AS TO THE BARRING OF MORTGAGEE'S RIGHTS.

Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section (*ante*, p. 176), was not barred of his ejectment by the 2nd and 3rd sections inasmuch as the



3 & 4 Will. 4, c. 27, s. 28.

mortgagee's right had accrued more than twenty years previously (*Doe* v. *Williams*, 5 Ad. & Ell. 291; see *Thornton* v. *France*, [1897] 2 Q. B. 154). These doubts have been removed by the above enactment.

Foreclosure.

A foreclosure action is an action for the recovery of land within 1 Vict. c. 28 (*Harlock* v. *Ashberry*, 19 Ch. D. 539). And if a mortgagee obtains an order for foreclosure absolute, this is a new title (*Heath* v. *Pugh*, 6 Q. B. D. 360, 361), which accrues within the R. P. Lim. Act, 1833, s. 2, at the date of the order (*Pugh* v. *Heath*, 7 App. Cas. 238).

The R. P. Lim. Act, 1837, does not itself create a bar in any case in which it had not been already created by the Act which it explains. It only declares (in conformity, and with manifest reference to the rule which had before prevailed in equity) that nothing in that Act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal and interest from the person entitled to the equity of redemption within the statutory period before the commencement of any action (*Heath* v. *Pugh*, 6 Q. B. D. 362).

An action to foreclose an equitable mortgage of an advowson in gross (which was not land within the statute) was barred by laches (*Brooks* v. *Muckleston*, [1909] 2 Ch. 519).

Effect on mortgagee's title, where mortgage is followed by adverse possession of stranger.

The R. P. Lim. Act, 1837, is not limited to proceedings between the mortgagee and mortgagor (*Ludbrook* v. *L.*, [1901] 2 K. B. 100). Where the owner of land mortgages it, and an intruder subsequently obtains possession and the mortgage continues to exist, the Act applies in favour of the mortgagee, although as against the mortgagor and those claiming under him the intruder may have acquired a good title (*ibid.*).

In the case of a mortgage executed before the R. P. Lim. Act, 1833, where a stranger was in possession, but such possession was not adverse either at the date of the mortgage or of the passing of the last-mentioned Act, the mortgagee brought ejectment, the mortgagor having within the statutory period paid interest on the mortgage: held, that the R. P. Lim. Act, 1837, preserved to the plaintiff the same right of entry as if the R. P. Lim. Act, 1833, had not passed; and he was entitled to recover, though the mortgagor's right of entry, within the meaning of the R. P. Lim. Act, 1833, had accrued before the mortgage, and was barred under that statute (*Doe* v. *Eyre*, 17 Q. B. 366; *Eyre* v. *Walsh*, 10 Ir. C. L. R. 346; *Ford* v. *Ager*, 2 H. & C. 279; 11 W. R. 1073).

In another case, where there was no adverse possession at the date of the mortgage, the land was subsequently sold and the purchaser paid the mortgage debt, and took a conveyance, in which mortgagor and mortgagee joined; held, that the purchaser was a person "claiming under" a mortgage within the R. P. Lim. Act, 1837; and that under the R. P. Lim. Act, 1833, s. 2, time ran from the paying off of the mortgage (*Doe* v. *Massey*, 17 Q. B. 373). *Quære* whether this decision is consistent with *Heath* v. *Pugh* (*supra*), the mortgage not having continued to subsist (*Thornton* v. *France*, [1897] 2 Q. B. 158).

Where adverse possession of stranger is followed by mortgage.

Where, however, at the date of the mortgage an intruder is in possession holding adversely to the mortgagor, and time has already begun to run in his favour as against the mortgagor, the present Act does not confer a new right of entry on the mortgagee (*Thornton* v. *France*, [1897] 2 Q. B. 158; see *Hemming* v. *Blanton*, 21 W. R. 636).

Where there is possession of mortgagor.

If a mortgagor remains in possession for twelve years without paying principal or interest and without acknowledgment, the mortgagee's title will be extinguished, although a prior mortgage

(under which possession has not been taken) has been in existence during the earlier part of the time (*Kibble* v. *Fairthorne*, [1895] 1 Ch. 219). The puisne mortgagee was also barred where, while time was running against him, a prior mortgagee took possession (*Johnson* v. *Brock*, [1907] 2 Ch. 533; but see *Re Bermingham*, 5 Ir. R. Eq. 147). The effect of the extinguishment was to vest in the mortgagor the legal estate; which might avail for the protection of a person taking a subsequent mortgage from him (*Kibble* v. *Fairthorne, supra*). See now L. P. Act, 1925, s. 85, *post*. **3 & 4 Will. 4, c. 27, s. 28.**

For the case of a mortgage of an equitable interest in land and the proceeds thereof, where the trustees remained in possession, see *Re Hazeldine*, [1908] 1 Ch. 34.

When time begins to run against mortgagee.

Mortgage of estate in possession.

As regards the point from which time runs against a mortgagee in the case of a legal mortgage of an estate in possession in freehold land; if the mortgage deed contains a provision that the mortgagor may retain possession of the land for a time certain, *e.g.* until default on a particular day, and the mortgage deed is executed by the mortgagee, there is in effect a redemise by the mortgagee until the day for payment of the principal, and the mortgagee having no right of entry until that day, time will not run against him until then (*Wilkinson* v. *Hall*, 3 Bing. (N.C.) 508; see *Doe* v. *Goldwin*, 2 Q. B. 143). Where, however, the mortgage deed contains no such provision or has not been executed by the mortgagee, the mortgagee has an immediate right of entry upon execution by the mortgagor of the mortgage deed (*Doe* v. *Lightfoot*, 8 M. & W. 564; *Doe* v. *Day*, 2 Q. B. 147; *Rogers* v. *Grazebrook*, 8 Q. B. 895; *Green* v. *Burns*, 6 L. R. Ir. 173), and time runs against him from that point, not from the day for payment of the principal (*Doe* v. *Lightfoot, supra*). *Quære* as to the dicta to the contrary effect in *Kibble* v. *Fairthorne*, [1895] 1 Ch. 225; *Johnson* v. *Brock*, [1907] 2 Ch. 536.

Where a mortgagee is also tenant for life of the whole of the mortgaged estate, the statute does not begin to run against the mortgage title until his death; and the same rule applies where the mortgagee is entitled for life as tenant in common with others to the mortgaged estate (*Wynne* v. *Styan*, 2 Phil. C. C. 303; see *Topham* v. *Booth*, 35 Ch. D. 607).

Mortgage of estate in reversion.

In the case of an equitable charge on a reversionary interest in land, time runs against the right of foreclosure from the date when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480; *Re Owen*, [1894] 3 Ch. 220; *Powell* v. *Brodhurst*, [1901] 2 Ch. 167; *Henry* v. *Smith*, 2 Dr. & W. 381; *Re Witham*, [1922] 2 Ch. 413; and see *Re Lake*, 63 L. T. 416).

Copyholds.

In the case of a mortgage of copyholds a mortgagee could not maintain ejectment until he had been admitted, but his admittance related back to the date of the surrender (*Holdfast* v. *Clapham*, 1 Term. Rep. 600; *Doe* v. *Webber*, 3 Bing. (N.C.) 922). The mortgagee, however, might commence an action for foreclosure before admittance (*Sutton* v. *Stone*, 2 Atk. 101).

Annuity.

As to whether the R. P. Lim. Act, 1837, applies to the grantor of an annuity charged on land, see argument in *Searle* v. *Colt* (1 Y. & C. C. C. 36).

Payments within R. P. Lim. Act, 1837.

A payment within the R. P. Lim. Act, 1837, must be a payment of principal or interest, and must be made by the mortgagor, or by some person bound to pay principal or interest on his behalf (*Harlock* v. *Ashberry*, 19 Ch. D. 539)—*i.e.*, bound as between himself and the mortgagor (*Bradshaw* v. *Widdrington*, [1902] 2 Ch. 436). Payment by a stranger will not do (*Ellis* v. *E.*, [1905] 1 Ch. 619). The mortgagee's receipt of the surrender value of a policy included in the mortgage was not a sufficient payment

3 & 4 Will. 4, c. 27, s. 28.

(*Re Clifden, Annaly* v. *Agar-Ellis*, [1900] 1 Ch. 774). Where a mortgagor assigned the equity of redemption, and subsequently paid interest, the payment did not prevent time running in favour of the assignee (*Newbould* v. *Smith*, 33 Ch. D. 127). The House of Lords expressed no opinion on the point (14 App. Cas. 423: compare *Adnam* v. *Sandwich*, 2 Q. B. D. 490). Payment of rent made to the mortgagee by a tenant of the land in consequence of notice was not sufficient (*Harlock* v. *Ashberry, supra*; compare *Wrigley* v. *Gill*, [1906] 1 Ch. 165, and cases there quoted); but such payment made by a receiver who was the mortgagor's agent was sufficient (*Berwick* v. *Price*, [1905] 1 Ch. 642; see *Chinnery* v. *Evans*, 11 H. L. C. 115). Time did not run against the mortgagee where the same person was entitled to the interest of the mortgage and the rents of the whole mortgaged land (*Topham* v. *Booth*, 35 Ch. D. 607. For the case where he was only entitled to the rents of part, see *Re Finnegan*, [1906] 1 I. R. 370. See also the case where a wife was entitled to a mortgage on her husband's land, *Re Hawes, Burchell* v. *H.*, 62 L. J. Ch. 463; and the cases quoted *post*, pp. 220, 252). Where estates A, B and C are included in one mortgage, and the owner of A pays interest, the mortgagee's remedy against B and C is preserved (*Chinnery* v. *Evans*, 11 H. L. C. 115; see *Dickenson* v. *Teasdale*, 1 D. J. S. 52. Compare *Lewin* v. *Wilson*, 11 App. Cas. 639).

It was said that the mere laches of the mortgagee to demand interest from the tenant for life of the equity of redemption would not prejudice his claim against those in remainder (*Wrixon* v. *Vize*, 2 Dr. & War. 192; *Loftus* v. *Swift*, 2 Sch. & L. 642). Payment of interest by a tenant for life of the equity of redemption to the right person keeps the mortgage alive so that foreclosure can be had (*Barclay* v. *Owen*, 60 L. T. 222. As to payments keeping alive the remedy on covenant, see *Pears* v. *Laing*, 12 Eq. 41; *Dibb* v. *Walker*, [1893] 2 Ch. 429; *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206; *Thompson* v. *Hurly*, [1905] 1 I. R. 594). But where the tenant for life by deed admitted payment of interest, this was not a sufficient acknowledgment, as against the remainderman, to prevent the statute from operating (*Gregson* v. *Hindley*, 10 Jur. 383). Compare *Re Fitzmaurice* (15 Ir. C. L. R. 445); *Beckett* v. *De la Cour* (11 L. R. Ir. 187). Where the mortgage debt is settled on A for life, remainder to B, B may be barred by non-payment of interest to A where the debt is vested in trustees with power to give receipts (*Barcroft* v. *Murphy*, [1896] 1 I. R. 590).

See, further, the cases as to payments quoted under sect. 8 of R. P. Lim. Act, 1874, *post*, p. 224; and sect. 5 of the Civ. Proced. Act, 1833, *post*, p. 251.

8. *Limitation of Time as to Church Property and Advowsons.*

No lands or rents to be recovered by ecclesiastical or eleemosynary corporation sole, but within two incumbencies and six years, or sixty years.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall

have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years, as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period. 3 & 4 Will. 4, c. 27, s. 29.

Law before the statute.

Before this Act, ecclesiastical corporations, and all ecclesiastical persons seised in right of churches, were not within the Stat. Lim., and could not bar their successors, by neglecting to bring actions for recovery of land within the time prescribed for other persons, although an ecclesiastical person, guilty of such neglect, would himself have been barred (Plowd. 358, 538; 11 Rep. 78 b; 7 Roll. R. 151; 2 Bos. & Pull. 546; see 3rd Real Prop. R. 58—62).

Although the Statute of Fines, 4 Hen. 7, c. 24 (*ante*, p. 152), did not bar the successors of ecclesiastical persons entitled to lands in respect of offices for life, yet each person was bound by a lapse of five years in his own time after the fine had been levied (*Runcorn* v. *Cooper*, 5 B. & C. 696; *Croft* v. *Howel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College Case*, 11 Rep. 67).

The Prescription Act, 1832, extends to any ecclesiastical person, but tithes are excepted from that Act (*ante*, p. 2).

Cases under the section.

Where lands belonging to a spiritual corporation sole became vested in the Eccl. Commrs., this section extended to the commissioners under sect. 57 of the Eccl. Commrs. Act, 1840 (*Eccl. Commrs.* v. *Rowe*, 5 App. Cas. 736); but it does not extend to an ordinary lay successor to a spiritual corporation (*Irish Commrs.* v. *Grant*, 10 App. Cas. 14). See as to the possession required by the section, *Blackett* v. *Ridout*, [1915] 2 K. B. 415, where land had been allotted to a rector by an inclosure award.

30. No person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years, and if the time of such incumbencies shall not together amount to the full period of sixty years then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years. No advowson to be recovered but within three incumbencies or sixty years.

Limitation of the right to

If a stranger present to a benefice, the recovery of that presentation depends on the statutes 13 Edw. 1, c. 5, s. 2, and 7 Anne, c. 18.

3 & 4 Will. 4, c. 27, s. 30.

recover presentations.

"If a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby" (3 Steph. Comm. 531).

Limitation of right to recover advowsons.

The limitation of the right to recover advowsons laid down by R. P. Lim. Act, 1833, s. 30, was in accordance with a suggestion of Blackstone (3 Steph. Comm. 565, where the old law is stated; see *Robinson* v. *Bristol*, 20 L. J. C. P. 208).

The effect of time on an action to foreclose an advowson was considered in *Brooks* v. *Muckleston*, [1909] 2 Ch. 519.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

Lapse.

Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse* (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12). The six months commence from the time the patron has notice of the avoidance (2 Burn, Eccl. Law, 327; see Benefices Act, 1898, s. 5); but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice (*ibid.*, 329). If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron (Com. Dig. Esglise (H. 9)). But where the incumbent is himself patron, a sentence of deprivation is not necessary to render the first living void, the object of such a sentence being to give notice to the patron (*Apperley* v. *Hereford*, 9 Bing. 681). If the bishop should not present within six months after the lapse to him, then the right to present goes to the archbishop (Com. Dig. Esglise (H. 11)); and if neither the bishop nor archbishop present, then to the Crown, which is not confined to any time (Cro. Car. 335; Plowd. 498). It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse (3 Moore & Scott, 114). So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted (Hutt. 24; Hob. 152, 154; 2 Inst. 273). So after a lapse to the King, if the patron's clerk be presented, instituted, and inducted, and die incumbent, before the King has taken advantage of the lapse, his right is gone (Owen, 2—5; Cro. Eliz. 44, 119; 7 Rep. 28). Advowsons donative, which were abolished by the Benefices Act, 1898, s. 12, were not subject to lapse (Co. Litt. 344 a; see *Fairchild* v. *Gayre*, Cro. Jac. 63; *Britton*

v *Wade, ibid.* 515), unless augmented by Queen Anne's bounty (1 Geo. 1, stat. 2, c. 10, ss. 6, 14; *Mutter* v. *Chauvel*, 1 Mer. 475; 11 East, 478). 3 & 4 Will. 4, c. 27, s. 31.

When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the King, and is called a *prerogative* presentation. This right of the Crown was formerly doubted (*Wentworth* v. *Wright*, Owen, 144), but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the Crown is lost (2 Bl. Rep. 770; *R.* v. *London*, 1 Show. 464; *S. P.*, Show. P. C. 185; Com. Dig. Esglise (H. 6); *Armagh* v. *Att.-Gen.*, 2 Br. P. C. 514). If after a grant of the next presentation to a living the incumbent be made a bishop, by which the living becomes vacant, and the King is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the King's presentee (*Calland* v. *Troward*, 2 H. Bl. 324; 8 Br. P. C. 71). The right of the Crown to present to an English benefice upon the appointment of the incumbent to a bishopric, is not barred by the Crown having before such appointment granted the advowson to a subject. But no such right exists in the case of an appointment to the bishopric of Christchurch, in New Zealand (*R.* v. *Eton College*, 8 Ell. & Bl. 610). Prerogative presentation.

The right of presentation given to the universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Will. & M. c. 26, s. 2, and 13 Anne, c. 13, s. 1 arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter (*Edwards* v. *Exeter*, 5 Bing. (N.S.) 652; see *Cottington* v. *Fletcher*, 2 Atk. 155). By statute 13 Anne, c. 13, the presentation to any benefice by any Roman Catholic is void (see *Boyer* v. *Norwich*, [1892] P. 41; [1892] A. C. 417). And by the Church Patronage Act, 1737, s. 5, every grant made of advowson or right of presentation, collation, nomination or donation, by any Roman Catholic, or by his mortgagee or trustee, is void unless made for valuable consideration to a Protestant (see Religious Disabilities Act, 1846). Universities.

The Pluralities Act, 1838, ss. 1—13, applies generally to all persons and benefices without distinction of value; see also Pluralities Acts Amendt. Act, 1885, s. 13. By the 11th section of the Pluralities Act, 1838, institution into a second benefice *ipso facto* avoids the first. See *Storie* v. *Winchester*, 9 C. B. 62; *Ex p. Bartlett*, 12 Q. B. 488, as to avoidance by non-residence under ss. 54, 58 of the same statute, when the clerk is in prison. Pluralities.

32. In the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly. When person claiming an advowson in remainder, &c., after an estate tail, shall be barred.

33. Provided always, and be it further enacted, that no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the No advowson to be recovered after 100 years.

3 & 4 Will. 4, c. 27, s. 33.

expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title.

There is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least (1 Dart, V. & P., 6th ed., 334). An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. See 3 Bl. Comm. 250; Co. Litt. 115 a.

9. *Final Extinction of Right.*

At the end of the period of limitation the right of the party out of possession to be extinguished.

34. At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.

Effect of section.

There is a marked distinction between the old Statutes of Limitation and the present one. The former statutes only barred the remedy but did not touch the right. Under the present Act when the remedy is barred, the right and title of the real owner are extinguished (*Incorp. Society* v. *Richards*, 1 Dr. & War. 289; *Re Alison, Johnson* v. *Mounsey*, 12 Ch. D. 296). Where a tenant from year to year remained in possession for the statutory period without paying rent, the title of the landlord was barred, not only to the land, but also to the arrears of rent (*Re Jolly, Gathercole* v. *Norfolk*, [1900] 2 Ch. 616). The above cases related to land. The effect of the statute is different as regards the personal remedy for a mortgage debt; in which case the debt is not extinguished (*Kibble* v. *Fairthorne*, [1895] 1 Ch. 224).

Cases as to the fee simple in freeholds.

As regards land, it is now settled, at least in England, that the effect of this section is to extinguish the title of the dispossessed owner, not to transfer it to the statutory owner (*Tichborne* v. *Weir*, 67 L. T. 735; *Re Nisbet and Potts*, [1905] 1 Ch. 399). For the view of the Irish judges, see the cases as to leaseholds quoted below. Accordingly it is impossible to read literally certain earlier dicta in cases relating to the fee simple in freeholds; *e.g.*, where it was said by Parke, B., that the effect of the Act was to make a "Parliamentary conveyance" to the intruder (*Doe* v. *Sumner*, 14 M. & W. 42), or where it was said by Lord St. Leonards, "The statute has executed a conveyance" (*Scott* v. *Nixon*, 3 Dr. & War. 407; *Burroughs* v. *McCreight*, 1 J. & L. 303; *Incorp. Society*

v. *Richards, supra*; and see *Sanders* v. *Sanders*, 19 Ch. D. 379). The effect of the section was thus described by Mr. Hayes (1 Hayes Conv., 5th ed., 269): "We must not confound the negative effect of the statute with the positive effect of a conveyance. . . . The wrongdoer must be considered according to the principle of the old law as claiming generally, and therefore as claiming the absolute property (unless indeed he expressly qualify his claim) and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance." And these words have been quoted with approval by Bowen, L.J., in *Tichborne* v. *Weir* (*supra*). See Williams on Seisin, p. 7; 11 Jur. (N.S.) 151, part 2. 3 & 4 Will. 4, c. 27, s. 34.

When the owner of land entered into restrictive covenants and was subsequently dispossessed, it was held that the right of the covenantee (which was in the nature of an equitable easement) was not affected by the statutory extinguishment of the title of the dispossessed owner. For the only rights extinguished by the section were those of persons who during the statutory period might by themselves or by some one representing them have brought an action to recover the land (*Re Nisbet and Potts*, [1906] 1 Ch. 388, 410).

As to leaseholds.

In the case of a leasehold interest, it was held by the Court of Appeal in England that occupation for the statutory period did not transfer the lease to the occupier so as to render him liable to be sued after the expiration of the term on repairing covenants (*Tichborne* v. *Weir*, 67 L. T. 735; see *Walter* v. *Yalden*, [1903] 2 Q. B. 309). On the other hand, the Irish judges have adopted the view that the title by possession is limited by rights yet remaining unextinguished, and is commensurate with the interest which the rightful owner lost by the operation of the statute and has the same legal character (*O'Connor* v. *Foley*, [1906] 1 I. R. 39). And they have in effect held that in such a case there has been a transfer of the estate in the term (*Rankin* v. *McMurtry*, 24 L. R. Ir. 297; *Mulcaire* v. *Lane Joynt*, 32 L. R. Ir. 683; *MacCormick* v. *Courtney*, [1895] 2 I. R. 97; *Re Hayden*, [1904] 1 I. R. 1; see *Re McClure and Garrett*, [1899] 1 I. R. 225; *Doyle* v. *Foley*, [1903] 2 I. R. 95; *Coyle* v. *McFadden*, [1901] 1 I. R. 298). Compare effect of Nullum Tempus Act, *ante*, p. 144.

In a case, where *Tichborne* v. *Weir* was discussed, the Irish Court of Appeal held that an intruder for the statutory period on leasehold land was subject to the statutory incidents of the tenancy, which included a disability to assign created by the Irish Act, 7 Geo. 4, c. 29 (*O'Connor* v. *Foley*, [1906] 1 I. R. 20).

As to copyholds.

In the case of copyholds, it has been held that a squatter on copyhold land who had acquired a good title under the statute against the copyholder, had no title to the freehold against the lord; but that time began to run against the lord only from the date at which after proclamation or notice the squatter failed to come in and be admitted (*Eccl. Comm.* v. *Parr*, [1894] 2 Q. B. 420; *Re Nisbet and Potts*, [1905] 1 Ch. 400; see *Att.-Gen.* v. *Tomline*, 15 Ch. D. 158).

Land held on trust.

The effect of sect. 34 in the case of land settled on trust, where possession for more than the statutory period has been held by (1) the trustee, or (2) the *c. q. t.*, or (3) a stranger, is discussed in the notes to sects. 25 and 7, *ante*.

In *Re Hazeldine*, [1908] 1 Ch. 34, land devised on trust for sale was retained by the trustees who paid the rents into Court. A beneficiary conveyed his share in the land and proceeds thereof by way of mortgage, and the mortgagee remained for twelve years without any payment or acknowledgment. On a summons dealing

3 & 4 Will. 4, c. 27, s. 34.

with the rents in Court, the Court of Appeal held that the title of the mortgagee was extinguished by sect. 34. *Sed qu.* as to the effect of the trustee's possession. See also *Re Fox, Brooks* v. *Marston*, [1913] 2 Ch. 75.

Right of trespasser before time has run.

A person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner (*Perry* v. *Clissold*, [1907] A. C. 79; where *Doe* v. *Barnard*, 13 Q. B. 954, is disapproved). He has, even before time has run in his favour under this statute, a devisable interest (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Keeffe* v. *Kirby*, 6 Ir. C. L. R. 591; *Clarke* v. *Clarke*, I. R. 2 C. L. 395; *Calder* v. *Alexander*, 16 T. L. R. 294; see under the old law, *Doe* v. *Birchmore*, 9 Ad. & Ell. 662).

Possession by succession of independent trespassers.

A continuous adverse possession for the statutory period by a succession of persons not claiming under one another bars the true owner (*Willis* v. *Howe*, [1893] 2 Ch. 553). In such a case it has been suggested that at the end of the period the last trespasser has a good title (*Dixon* v. *Gayfere*, 17 Beav. 430), but this has been disapproved (*Asher* v. *Whitlock*, L. R. 1 Q. B. 4). And the better view seems to be that at the end of the statutory period the first trespasser has a right to the possession and may maintain ejectment against a subsequent trespasser by whom he has been expelled (see *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 90; *Asher* v. *Whitlock*, L. R. 1 Q. B. 4; *Doe* v. *Martin*, 1 Car. & M. 32; *Doe* v. *Dyball*, 3 C. & P. 610). If before the statutory period has expired the trespasser abandons possession, and the possession is vacant, the rightful owner is in the same position in all respects as before the trespass (*Trustees Co.* v. *Short*, 13 App. Cas. 798). This does not mean that there is any suspension of the right of action, but that the right of action in respect of the old intrusion is gone; and if there is a fresh intrusion, there is a fresh right of action (*Johnson* v. *Brock*, [1907] 2 Ch. 538).

Old law.

Before this statute twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years, provided they were less than twenty (*Doe* v. *Cooke*, 7 Bing. 346; see *ante*, p. 151).

Rents and heriots.

The section would, it seems, extinguish the right to rent-charges, *Hanks* v. *Palling* (6 E. & B. 659; Sugd. R. P. S. 9). But it is doubtful whether either heriot service or heriot custom (as to which see *ante*, p. 137) are within the section (*Zouche* v. *Dalbiac*, L. R. 10 Ex. 172).

Extinguished title cannot be revived.

When a title has been extinguished by the statute, the old title cannot be restored by a subsequent acknowledgment (*Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; *Sanders* v. *S.*, 19 Ch. D. 379; *Re McClue and Garrett*, [1899] 1 I. R. 225; *Beamish* v. *Whitney*, [1908] 1 I. R. 38; see also *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 296; *Markwick* v. *Hardingham*, 15 Ch. D. 346; *Lyell* v. *Kennedy*, 18 Q. B. D. 796); or by subsequent re-entry (*Bryan* v. *Cowdal*, 21 W. R. 693; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297). The law before this statute was different (*Pendleton* v. *Rooth*, 1 D. F. & J. 81). The law as to simple contract debts under the Lim. Act, 1623, and Stat. of Frauds Amdt. Act, 1828, is also different (*Spickernell* v. *Hotham*, Kay, 669); see pp. 268, 274, *post*, as well as the law as to money charged on land, *post*, p. 226.

In a case which was held to fall within R. P. Lim. Act, 1833, s. 8, after the expiration of twenty years, during which no rent had been paid, the tenant, within five years before action, paid some arrears. It was held that under sect. 8 time ran from the last payment of rent, and that sect. 34 had not

extinguished the title of the plaintiff who was the reversioner (*Bunting* v. *Sargent*, 13 Ch. D. 330; see, however, *Sanders* v. *S.*, 19 Ch. D. 379; *Re Hobbs, H.* v. *Wade*, 36 Ch. D. 557, and other cases above cited). See also *Nicholson* v. *England*, [1926] 2 K. B. 93. **3 & 4 Will. 4, c. 27, s. 34.**

The Court has compelled a purchaser to take a title depending upon parol evidence of adverse possession under this statute (*Scott* v. *Nixon*, 3 Dru. & War. 388; *Games* v. *Bonnor*, 54 L. J. Ch. 517, applied in *Re Atkinson and Horsell*, [1912] 2 Ch. 1; see *Kirkwood* v. *Lloyd*, 12 Ir. Eq. R. 598; *Moulton* v. *Edmonds*, 1 D. F. & J. 250; *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89). So where the rights of the Crown were barred under 48 Geo. 3, c. 47 (*Tuthill* v. *Rogers*, 6 Ir. Eq. R. 441). But the above are cases where objections apparent on the face of the title as shown were held covered by the possession. The Court did not compel the purchaser to take a leap in the dark (*Re Nisbet and Potts*, [1905] 1 Ch. 401). Where the contract is an open one, a possessory title, to be sufficient, must be shown for forty years (*Jacobs* v. *Revell*, [1900] 2 Ch. 858), reduced to thirty years by the L. P. Act, 1925, s. 44, *post*. Purchaser compelled to accept title depending on the statute.

10. *Receipt of Rent.*

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act. Receipt of rent to be deemed receipt of profits.

11. *Abolition of Real and Mixed Actions, &c.*

[*Sect.* 36 *contained a list of the names of the old writs in real and mixed actions. By the operation of that section, and sect.* 26 *of the C. L. P. Act*, 1860, *real and mixed actions* (*except ejectment*) *and plaints in the nature of such actions were abolished.*]

An *ejectment* was a possessory action, wherein the title to land might be tried, in all cases where the party claiming title had a *right of entry*, whether such title was to an estate in fee, fee tail, for life or for years (see 2 Archbold's Pr., by Prentice, 825—883, 13th ed.). This relief is now obtained by means of an action for the recovery of land (see R. S. C., Ord. 18, r. 2, and note thereto in Annual Practice). Ejectment.

[*Sects.* 37 *and* 38, *which contained provisions as to saving rights in respect of real actions, have been repealed by S. L. R. Act*, 1874.]

39. No descent cast (*f*), discontinuance (*g*), or warranty (*h*), which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land. No descent, warranty, &c., to bar a right of entry.

(*f*) A mere entry is not possession. Continual or other claim will no longer preserve any right of entry, or distress or action (*ante*, sects. 10, 11, p. 173). By the common law, descents of corporeal inheritances in fee simple took away the entry of the party who had right (Litt. s. 385); as if a disseisor died seised, Descent cast.

3 & 4 Will. 4, c. 27, s. 39.

and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim (Litt. s. 414), and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right was in the disseisee (*Smyth* v. *Tyndall*, 2 Salk. 685). See also as to rights of entry sect. 4, sub-sect. 3 of the Law of Property Act, 1925, *post*, p. 605. The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry (Litt. l. 3, c. 6); nor did it affect copyhold or customary estates, where the freehold is in the lord (*Doe* v. *Danvers*, 7 East, 299); nor cases where the party had not any remedy but by entry as a devisee (Co. Litt. 240 b; 7 East, 321. On the descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F) (G) (H); Com. Dig. Descent (D); Roscoe on Real Actions, 81—87; Adams on Ejectment).

Discontinuance.

(*g*) *A discontinuance* of estates in lands and tenements is defined by Lord Coke to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter" (Co. Litt. 325 a). At common law, an estate might be discontinued five ways:—1. By feoffment. 2. By fine. 3. By common recovery. 4. By confirmation: and 5. By release of warranty. A grant by deed or fine, of such things as lie not in livery (Litt. s. 618; Co. Litt. 332 a), did not work any discontinuance. A feoffment made after October 1, 1845, had no tortious operation (Real Prop. Act, 1845, s. 4. By L. P. Act, 1925, s. 51, p. 647, *post*, feoffments are abolished).

A discontinuance of an estate tail could only be made by a tenant in tail in possession (*Doe* v. *Jones*, 1 B. & C. 243; *Trevilian* v. *Lane*, Cro. Eliz. 56; see 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a). But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance (*Doe* v. *Finch*, 1 Nev. & M. 130). As to a prior estate by the curtesy, see *Anderson* v. *Anderson*, 30 Beav. 209; see further the notes to *Doe* v. *Finch*, *supra*, where much learning on the subject of discontinuance, &c., is collected (*S. C.*, 4 B. & Ad. 283). As to discontinuance, see Bac. Abr. and Com. Dig. *Discontinuance*; Co. Litt. 325 a; 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe* v. *Ross*, 7 M. & W. 125.

Warranty.

(*h*) As to the law of warranty, see Com. Dig. *Guaranty*; Co. Litt. 365 a; 393 b, and notes by Butler; Bac. Abr. *Warranty*; Shepp. T. 181—203; *Doe* v. *Jones*, 1 Crompt. & Jerv. 528.

[*Sections* 41—42 *of this Act are inserted p.* 228, *post. As to section* 40, *see p.* 216, *post.*]

3 & 4 Will. 4, c. 27, s. 43.

12. *Limits of the Act.*

Act to extend to the spiritual courts.

43. No person claiming any tithes, legacy or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

The mode in which personal legacies were recovered in the ecclesiastical Courts is stated in 3 Hagg. Eccl. R. 161, 162. By the Court of Probate Act, 1857, s. 23, the Court of Probate, to which the jurisdiction of the ecclesiastical Courts has been transferred, shall entertain no suit for legacies.

Act not to extend to Scotland nor to advowsons in Ireland.

* *Lege* present.

44. Provided always, and be it further enacted, that this Act shall not extend to Scotland; and shall not, so far as it relates to any right to permit* to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland.

The provisions of the R. P. Lim. Act, 1833, relating to advowsons, &c., were extended to Ireland by Grand Juries (Ireland) Act, 1843, and 7 & 8 Vict. c. 27, and the words of this section excluding Ireland have been repealed (S. L. R. Act, 1874). See 32 and 33 Vict. c. 42.

The colonies.

This Act applies to New South Wales (*Day* v. *Day*, L. R. 3 P. C. 751; *Trustees Co.* v. *Short*, 13 App. Cas. 793); and to New Zealand (*Plimmer* v. *Wellington*, 9 App. Cas. 708), but does not apply to Jamaica (*Pitt* v. *Dacre*, 3 Ch. D. 295). Where a Hindoo banker claimed as a creditor in an English administration action, the English statute applied (*Finch* v. *Finch*, 35 L. T. 235). But the Indian statute was held to govern the case of money in an English Court representing land in India (*Re Peat*, 7 Eq. 302). As to which statute, see also *Hay* v. *Gordon* (21 W. R. 11). See also the questions raised as to bonds charged on the revenues of Oudh in *Doss* v. *Secretary, &c., of India* ((1875), W. N. 59); and as to the Bombay Civil Service Fund, in *Edwards* v. *Warden* (1 App. Cas. 281). By the law of Lower Canada, the period of prescription is thirty years (*Herrick* v. *Sixby*, L. R. 1 P. C. 436; *Macdonald* v. *Lambe, ibid.*, 539; see *Labrador Co.* v. *The Queen*, [1893] A. C. 104). As to adverse possession in Nova Scotia, see *Des Barres* v. *Shey* (22 W. R. 273); and in Ceylon, see *Clark* v. *Elphinstone* (6 App. Cas. 164). See as to the period of limitation in New Brunswick, *Lewin* v. *Wilson*, 11 App. Cas. 639; in British Columbia, *Kirby* v. *Cowderoy*, [1912] A. C. 599; *Wilson* v. *Delta Corporation*, [1913] A. C. 181; in Ceylon, *Corea* v. *Appuhamy*, [1912] A. C. 230; *John* v. *Dodwell*, [1918] A. C. 563. See also *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.*, [1912] A. C. 555 (claim against trustees in Newfoundland), and *Taylor* v. *Davies*, [1920] A. C. 636 (similar claim in Ontario).

37 & 38 Vict. c. 57, s. 9.

THE REAL PROPERTY LIMITATION ACT, 1874, ss. 9, 11, 12.

37 & 38 Vict. c. 57.—*An Act for the further Limitation of Actions and Suits relating to Real Property.*

[7th August, 1874.]

Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent and of charges thereon (*a*). Be it enacted, &c.

(*a*) The preamble did not prevent sect. 8 from operating as a bar to an action on a covenant for payment of a mortgage debt (*Sutton* v. *S.*, 22 Ch. D. 520).

[*Sect.* 1, *reducing the period of limitation for the recovery of land or rent, will be found ante, p.* 147.

Sect. 2, *containing provisions for the case of future estates in the case of land or rent, will be found ante, p.* 162.

Sects. 3, 4, *&* 5, *containing provisions as to disabilities in the case of land or rent, will be found ante, pp.* 178, 182.

Sect. 6, *containing provisions as to possession under an assurance by a tenant in tail which shall not bar the remainders, will be found ante, p.* 186.

Sect. 7, *containing provisions as to the barring of the rights of a mortgagor, will be found ante, p.* 198.

Sects. 8 *&* 10, *containing provisions as to money charged on land, will be found post, pp.* 215, 241].

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with

7 Will. 4 & 1 Vict. c. 28, to be read with this Act.

this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years. 37 & 38 Vict. c. 57, s. 9.

11. This Act may be cited as the "Real Property Limitation Act, 1874." Short title.

12. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine. Commencement of Act.

As to the application of the Statutes of Limitation to registered land, see sect. 75 of the Land Registration Act, 1925, *post*. Registered land.

II. Limitation of Time for the Recovery of Money charged on Land, Legacies, Personalty of Intestates, Arrears of Dower, Rent, and Interest.

A. *Limitation for Recovery of Money charged on Land and Legacies, The Real Property Limitation Act*, 1874, *s.* 8, *R. P. Lim. Act*, 1833, *s.* 40...215.

B. *Limitation for Recovery of Personal Estate of Intestates, Law of Property Amendment Act*, 1860, *s.* 13...227.

C. *Arrears of Dower, R. P. Lim. Act*, 1833, *s.* 41...228.

D. *Arrears of Rent or of Interest in respect of Money charged on Land or in respect of Legacies, R. P. Lim. Act*, 1833, *s.* 42...228.

E. *Time not enlarged by Express Trusts, R. P. Lim. Act*, 1874, *s.* 10...241.

A. *Limitation for Recovery of Money charged on Land and Legacies.*

THE REAL PROPERTY LIMITATION ACT, 1874.

(37 & 38 Vict. c. 57, s. 8.)

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

37 & 38 Vict. c. 57, s. 8.

acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

37 & 38 Vict. c. 57, s. 8.

From January 1, 1879, the above section of R. P. Lim. Act, 1874, was by sect. 9 of the same Act substituted for sect. 40 of R. P. Lim. Act, 1833. The latter section fixed the period of limitation for the recovery of money charged upon land and legacies at twenty years; but the wording being in other respects similar to the R. P. Lim. Act, 1874, s. 8, sect. 40 has not been printed here at length. The decisions under the two sections have been arranged together in one note.

(1) *Mortgages*...216.
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(1) Mortgages.

A foreclosure action was held not to be an action to recover the mortgage money within sect. 40, but an action to recover land within sects. 2 and 24 of R. P. Lim. Act, 1833 (*Harlock* v. *Ashberry*, 19 Ch. D. 539; *Heath* v. *Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235). A claim for payment out of money in Court made by mortgagees holding a mortgage on a reversionary interest in real estate, was held barred by sect. 40 (*Humble* v. *H.*, 24 Beav. 535). But a claim by a legal mortgagee for principal and interest in a suit for the administration of the real and personal estate of a deceased owner of the equity of redemption was held to be within sect. 8 of this Act, so that an acknowledgment could be relied on (*Re Lloyd's Estate*, [1911] 1 I. R. 153).

Sect. 8 of the R. P. Lim. Act, 1874, barred after twelve years the personal remedy of a mortgagee to obtain payment of principal from his mortgagor, whether on a collateral bond given by him (*Fearnside* v. *Flint*, 22 Ch. D. 579), or on his covenant in the mortgage deed (*Sutton* v. *S.*, 22 Ch. D. 511); even where the property charged was a reversionary interest in land, which had not fallen in (*Kirkland* v. *Peatfield*, [1903] 1 K. B. 756). In *Sutton* v. *S.*, Cotton, L.J., referring to *Hunter* v. *Nockolds* (1 Mac. & G. 640; in which Lord Cottenham had held that in actions on covenant or specialty, sect. 42 of the R. P. Lim. Act, 1833, was controlled by sect. 3 of Civil Proced. Act, 1833, *post*, p. 246), said, it might be right in the case of an Act passed in 1833, to read it as explained by an Act passed only three weeks later; but in the case of an Act passed in 1874, there was no such necessity to explain it by an Act passed in 1833 (22 Ch. D. 519; see *Re Frisby*, 43 Ch. D. 110). The section, however, did not bar an action which was brought, not against the mortgagor himself, but against a surety, who had covenanted for payment by the mortgage deed (*Re Frisby, Alison* v. *F.*, *per* Kay, J., and Bowen, L.J., Cotton, L.J., differing, 43 Ch. D. 106); or who had given a promissory note (*Re Wolmershausen*, 62 L. T. 541). An action on a bond given by a surety for a mortgagor to recover from the surety an indemnity against the non-payment by the mortgagor of the mortgage debt, is not within this section (*Re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291).

Sutton v. *Sutton*.

Presumption of payment before 3 & 4 Will. 4, c. 27.

Before R. P. Lim. Act, 1833, if the mortgagor continued in possession, and there had been neither payment nor demand of any principal nor interest for twenty years, this was sufficient to raise the presumption of payment (1 Ch. R. 59, 105;

Trash v. *White*, 3 Br. C. C. 289; *Christopher* v. *Sparke*, 2 Jac. & W. 228; *Cooke* v. *Soltau*, 2 Sim. & Stu. 154; *contra Joplis* v. *Baker*, 2 Cox, 118; *Leman* v. *Newnham*, 1 Ves. sen. 51); but such presumption was liable to be rebutted, and payment of interest on part of the debt kept the whole alive (*Loftus* v. *Smith*, 2 Sch. & Lef 642). 37 & 38 Vict. c. 57, s. 8.

(2) JUDGMENTS.

Sect. 40 of the R. P. Lim. Act, 1833, applied to a case in which a judgment was sought to be enforced against the personal estate, as well as to a case in which it was sought to be enforced against the land of the debtor (*Watson* v. *Birch*, 15 Sim. 523; *Jay* v. *Johnstone*, [1893] 1 Q. B. 190; *Henry* v. *Smith*, 2 Dru. & War. 391). Where an action of debt is brought on a judgment and judgment recovered, time runs against the former judgment from its own date (*Watters* v. *Lidwill*, 9 Ir. L. R. 362; *Kealy* v. *Bodkin*, *ibid.*, 383).

Sect. 8 of the R. P. Lim. Act, 1874, applies to judgments generally, not merely judgments which operate as a charge on land (*Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124; *Jay* v. *Johnstone*, [1893] 1 Q. B. 189; *Taylor* v. *Hollard*, [1902] 1 K. B. 676). It barred after twelve years the right of a judgment creditor to obtain an adjudication in bankruptcy against the judgment debtor (*Ex parte Tynte*, 15 Ch. D. 125).

Revivor.

Proceedings to revive a judgment (as to which see C. L. P. Act, 1852, ss. 128—134; 19 & 20 Vict., c. 97, s. 10) were also held within this section (*Watters* v. *Lidwill*, 9 Ir. L. R. 362; *Williams* v. *Welch*, 3 Dowl. & L. 565; *Wall* v. *Walsh*, I. R. 4 C. L. 103). As to the effect of such proceedings on the running of time, see *Farrell* v. *Gleeson* (11 Cl. & Fin. 702); *Farran* v. *Beresford* (10 Cl. & Fin. 319); *Re Blake* (2 Ir. Ch. R. 643); see Darb. & Bos. Stat. Lim. 176. And as to what lands were bound by the proceedings, see *Murray* v. *Clarke* (4 Ir. C. L. R. 610); *Kirkwood* v. *Lloyd* (11 Ir. Eq. R. 561; 12 Ir. Eq. R. 585); *Re Bodkin* (12 Ir. Ch. R. 61); *Ryan* v. *Cambie* (2 Ir. Eq. R. 328); *Franks* v. *Mason* (9 Ir. Eq. R. 358).

The above-mentioned sections of the C. L. P. Act, 1852, have now been repealed; and where time has elapsed since the date of a judgment which it is desired to enforce, the practice is now regulated by R. S. C. Ord. XLII., rr. 22, 23. An order for leave to issue execution made under the latter rule would seem not to affect the running of time (*Evans* v. *O'Donnell*, 16 L. R. Ir. 452).

Leave to issue execution.

Decree in equity.

A decree in equity for payment of a specific sum was a "judgment" within sect. 40 (*Dunne* v. *Doyle*, 10 Ir. Ch. R. 502).

Judgment on *post obit* bond, when time begins to run.

Time does not run against a judgment on a *post obit* bond, until the death (*Barber* v. *Shore*, 1 Jebb. & S. 610; *Tuckey* v. *Hawkins*, 4 C. B. 655; *Gilman* v. *Chute*, 11 Ir. L. R. 442; *Kennedy* v. *Whaley*, 12 Ir. L. R. 54). As to the running of time in the case of judgments entered on bonds, see *Re Kingston* (I. R. 3 Eq. 485); *Re Keay* (I. R. 3 Eq. 659).

Presumption of satisfaction of judgments before 3 & 4 Will. 4, c. 27.

Before R. P. Lim. Act, 1833, if a judgment creditor had lain by for twenty years without any effort to enforce his judgment, and it had not been acknowledged, it was presumed to be satisfied (Peake's Ev. 25, n.; see 4 Anne, c. 16, s. 12; *Kemys* v. *Ruscomb*, 2 Atk. 45; *Willaume* v. *Gorges*, 1 Campb. 217; *Grenfell* v. *Girdlestone*, 2 Y. & C. 662; *White* v. *Parnther*, 1 Knapp, 228, 229).

(3) LIENS.

As regards liens, in the case of a contract to sell a reversionary interest in stock, the purchaser was entitled to enforce a lien for his deposit after a long lapse of time, no Statute of Limitations

37 & 38 Vict. c. 57, s. 8.

directly applying (*Levy* v. *Stogdon*, [1898] 1 Ch. 487; [1899] 1 Ch. 5).

A vendor's lien for unpaid purchase-money was held to be within sect. 40 of the R. P. Lim. Act, 1833 (*Toft* v. *Stephenson*, 7 Hare, 1; 1 D. M. & G. 28). As to when time commences to run, see *Toft* v. *Stephenson*, 5 D. M. & G. 735.

General note as to vendor's lien.

As regards a vendor's lien generally, it is settled that where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be conveyed (*Chapman* v. *Tanner*, 1 Vern. 267; *Pollexfen* v. *Moore*, 3 Atk. 272; and see 1 Bro. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth* v. *Symmons*, 15 Ves. 329), and a receipt is endorsed on the conveyance (*Coppin* v. *C.*, 2 P. W. 291; 3 Russ. 488), or be not conveyed (*Smith* v. *Hibbard*, 2 Dick. 730; *Charles* v. *Andrews*, 9 Mod. 152), and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold (*Winter* v. *Anson*, 3 Russ. 488), gives the vendor a lien on the land for the money. The lien extends to interest (*Re Stucley, S.* v. *Kekewich*, [1906] 1 Ch. 76). The doctrine applies in the case of other property besides land, *e.g.*, a share in proceeds of sale of leaseholds (*Davies* v. *Thomas*, [1900] 2 Ch. 462; see *Levy* v. *Stogdon*, [1898] 1 Ch. 478), or a reversionary interest in trust funds (*Re Stucley, S.* v. *Kekewich*, [1906] 1 Ch. 76). But the application of the doctrine depends upon the intention of the parties (*Re Albert, &c. Co.*, 11 Eq. 179).

When lost.

Where a vendor took a mortgage of part of the estate, his lien over the rest of the estate was held to be excluded (*Capper* v. *Spottiswoode*, Taml. 21); and where he took a mortgage of the whole estate for part of the unpaid purchase-money his lien for the balance was lost (*Bond* v. *Kent*, 2 Vern. 281; see 1 Sch. & Lef. 135). So there is no lien where the vendor takes a mortgage of another estate (6 Ves. 760), or a charge upon stock (*Nairn* v. *Prowse*, 6 Ves. 752); nor where the consideration for the conveyance was expressed to be the covenant for the payment of an annuity and a sum in gross in the event of the purchaser's marriage (*Clark* v. *Royle*, 3 Sim. 499; see *Stuart* v. *Ferguson*, 1 Hayes, 452; *Parrott* v. *Sweetland*, 3 M. & K. 655; *Dixon* v. *Gayfere*, 21 Beav. 118; 1 De G. & J. 655; *Matthew* v. *Bowler*, 6 Ha. 110; *Buckland* v. *Pocknell*, 13 Sim. 406); nor where land was purchased under the Lands Clauses Act, and the consideration was a yearly rent-charge (*Jersey* v. *Briton Ferry Co.*, 7 Eq. 409); nor where the purchase-money of lands sold to a company was expressed to be payable out of moneys to be received by the company on sale of shares (*Re Brentwood Co.*, 4 Ch. D. 562); nor as against the mortgagees of the purchaser where vendor joined in the mortgage (*Cood* v. *Pollard*, 9 Price, 544; *Smith* v. *Evans*, 28 Beav. 59). For the lien in the case of purchases with trust money, see *White* v. *Wakefield* (7 Sim. 401); *Muir* v. *Jolly* (26 Beav. 143). Vendors were held to have lost their lien by permitting the purchaser to register his conveyance with a view to a sub-sale (*Kettlewell* v. *Watson*, 26 Ch. D. 501; see *Ex p. Parker*, 1 Glyn. & J. 228).

When not lost.

The lien, however, may subsist notwithstanding a personal security is given for the money, whether by bill of exchange (*Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Grant* v. *Mills*, 2 Ves. & B. 306; *Ex p. Peake*, 1 Mad. 346); or promissory note (*Gibbons* v. *Baddall*, 2 Eq. Cas. Abr. 682, n. b; *Ex p. Loaring*, 2 Rose 79); or bond (*Winter* v. *Anson*, 3 Russ. 488; *Collins* v. *Collins*, 31 Beav. 347). Nor is the lien lost by an improper payment to the vendor's solicitors (*Wrout* v. *Dawes*, 25 Beav. 369).

Enforcement.

The lien can be enforced by sale or mortgage (*Re Stucley, S.* v. *Kekewich*, [1906] 1 Ch. 76).

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Against whom it prevails.

The lien prevails against the purchaser and his heir; against volunteers claiming under him; against sub-purchasers with notice; sometimes against sub-purchasers without notice (*Rice* v. *R.*, 2 Drew. 85; Sugd. V. & P. 682, 14th ed.); and against assignees whether in bankruptcy or claiming under an assignment for the benefit of creditors (*Fawell* v. *Heelis*, Amb. 724); and against a person appointed under the Lunacy Act, 1890, s. 116, to get in a lunatic's estate (*Davies* v. *Thomas*, [1900] 2 Ch. 464).

Is assignable.

The lien is assignable by parol (*Dryden* v. *Frost*, 3 M. & C. 670), but the assignee will take it subject to any prior incumbrances created by the vendor (*Lacy* v. *Ingle*, 2 Ph. 413).

In the case of sales to a railway company.

A vendor of land to a railway company who have entered and used it for the purpose of their railway, is entitled to the same lien on land for the unpaid purchase-money and the same remedies for enforcing it as an ordinary vendor (see *Munns* v. *Isle of Wight Ry. Co.*, 5 Ch. 414, where an order was made for a receiver, and the cases there quoted: *Wing* v. *Tottenham Co.*, 3 Ch. 740, where the vendor was held entitled to a sale). The company will not be restrained from running trains over the land until the sale (*Lyatt* v. *Stafford Co.*, 13 Eq. 261). The vendor has no lien for the costs of an arbitration under the Lands Clauses Consolidation Act (*Ferrers* v. *Stafford Co.*, 13 Eq. 524).

Real Estate Charges Acts.

The word "mortgage" in Real Estate Charges Act, 1854, has been extended so as to include the lien, both in the case of testators and intestates (see R. E. C. Acts, 1867 and 1877, *post; Broadbent* v. *Groves*, 24 Ch. D. 94). As to a lien on real estate for an unpaid legacy, see *Barker* v. *B.* (10 Eq. 438).

At common law.

An unpaid vendor has not at law any lien on the title-deeds for his purchase-money (*Goode* v. *Burton*, 1 Ex. 189; see also *Hope* v. *Booth*, 1 B. & Ad. 498; *Baker* v. *Dewey*, 1 B. & C. 704; *Lampon* v. *Corke*, 5 B. & Ad. 606; *Oxenham* v. *Esdaile*, 3 Y. & J. 362; *Hooper* v. *Ramsbottom*, 4 Camp. 121; *Harding* v. *Ambler*, 3 M. & W. 279).

Purchaser's lien.

A purchaser may have a lien on the land for the deposit paid by him to the vendor (*Rose* v. *Watson*, 10 H. L. C. 683; *Levy* v. *Stogdon*, [1898] 1 Ch. 478; [1899] 1 Ch. 5; *Whitbread* v. *Watt*, [1902] 1 Ch. 835), which may be lost by his repudiation of the contract (*Cornwall* v. *Henson*, [1899] 2 Ch. 710). He may also have a lien for his costs (*Kitton* v. *Hewett*, [1904] W. N. 21).

(4) Money charged upon or payable out of land.

Under sect. 8 of the R. P. Lim. Act, 1874, the rule is that in the case of simple contract debts charged on land, the remedy against the land is not barred for twelve years (*Re Stephens, Warburton* v. *S.*, 43 Ch. D. 39; *Re Raggi*, [1913] 2 Ch. 206, where there was a gift of residuary realty and personalty on trust for sale and conversion and payment of debts; see *Barnes* v. *Glenton*, [1899] 1 Q. B. 891), although the personal remedy by action is barred in six (*Barnes* v. *Glenton*, [1899] 1 Q. B. 885; compare *Hugill* v. *Wilkinson*, 38 Ch. D. 480; *Powell* v. *Brodhurst*, [1901] 2 Ch. 167; *Firth* v. *Slingsby*, 58 L. T. 483; *Re Witham*, [1922] 2 Ch. 413). *Re Jauncey, Bird* v. *Arnold*, [1926] Ch. 471.

The same section barred after twelve years the right to recover paving expenses made a charge on land by statute (*Hornsey Board* v. *Monarch Society*, 24 Q. B. D. 1); and also an action to recover interest on money paid for redeeming land tax, which by statute was charged on the land (*Skene* v. *Cook*, [1902] 1 K. B. 682). The section applies where money is charged on land, even where there is no personal liability on the part of the owner of the land to pay the money (*ibid.*, 689). The section, however, does not apply to an action on the personal covenant of a lessee in respect of a

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royalty (*Darley* v. *Tennant*, 53 L. T. 257); or in respect of rent reserved (*Donegan* v. *Neill*, 16 L. R. Ir. 309).

A share of the proceeds of land settled on trust for sale was held to be "money payable out of land," within sect. 42 of the R. P. Lim. Act, 1833 (*Bowyer* v. *Woodman*, 3 Eq. 313; see *Pawsey* v. *Barnes*, 20 L. J. Ch. 393; and see the argument, *Re Lloyd, L.* v. *L.*, [1903] 1 Ch. 389, 395, 397). In *Mutlow* v. *Bigg* (18 Eq. 246), land was devised on trust for sale, and part having been sold, but part remaining unsold, an action was brought for execution of the trust. Hall, V.-C., held that sect. 40 had no application, except as regards the part sold.

In the case of a settlement of land the claim of a remainderman to be recouped out of the assets of the life tenant arrears of mortgage interest, which ought to have been kept down by him, but which had in fact been paid by means of a sale of part of the land, was within sect. 40 of the R. P. Lim. Act, 1833, as being a lien or charge on a life estate in land (*Kirwan* v. *Kennedy*, 3 I. R. Eq. 472).

Money due on a bond by an ancestor was not money payable out of land within sect. 40 (*Roddam* v. *Morley*, 2 K. & J. 336; 1 D. G. & Jo. 18; see *Morley* v. *M.*, 5 D. M. & G. 610).

Same hand to pay and receive.

The statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest ought to be paid belongs to the same person who is entitled to the interest (*Burrell* v. *Egremont*, 7 Beav. 206); as where a tenant for life paid off a charge on settled estates (*ibid.*; see *Kensington* v. *Bouverie*, 7 D. M. & G. 144; 7 H. L. C. 557; *Baldwin* v. *B.*, 4 Ir. Ch. R. 501; *Carbery* v. *Preston*, 13 Ir. Eq. R. 455; *secus*, where the tenant for life of realty devised, subject to the life interests on trust for sale, paid debts of the testator (*Re Welch*, [1916] 1 Ch. 375); or where the person entitled beneficially to the rents of land was also entitled to the interest of a mortgage thereon, although the trustees were different (*Topham* v. *Booth*, 35 Ch. D. 607). In these cases payment of interest has been presumed. The same principle was applied where a married woman living with her husband was entitled to the interest of mortgage money charged on her husband's land (*Re Hawes, Burchell* v. *H.*, 62 L. J. Ch. 463; see *Re Dixon, Heynes* v. *D.*, [1900] 2 Ch. 561). There must be a hand to receive as well as a hand to pay, and the party to receive must be capable of giving a discharge (*M'Carthy* v. *Daunt*, 11 Ir. Eq. R. 29; *Carroll* v. *Hargrave*, I. R. 5 Eq. 123). See further, the cases quoted under the R. P. Lim. Act, 1837 (*ante*, p. 204); and under Civil Proc. Act, 1833, s. 5 (*post*, p. 252).

Sect. 40 had no application in the case of an annuity charged on real estate in Jamaica (*Pitt* v. *Dacre*, 3 Ch. D. 295).

(5) Legacies.

Sect. 40 was applicable to legacies payable out of personal estate only (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Sheppard* v. *Duke*, 9 Sim. 569; *Henry* v. *Smith*, 2 Dru. & War. 391; *O'Hara* v. *Creagh*, 1 Long. & T. 65). The section extended to a residue (*Prior* v. *Horniblow*, 2 Y. & Coll. 201); or share of residue (*Christian* v. *Devereux*, 12 Sim. 271); and to an annuity payable out of personalty. (*Re Ashwell*, Johns. 112; see *Dower* v. *Dower*, 15 L. R. Ir. 264). Sect 8 of the R. P. Lim. Act, 1874, barred after twelve years the right to recover legacies or shares in residue which were not held by executors on express trusts (*Re Rowe, Jacobs* v. *Hind*, 61 L. T. 581; *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 119; *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491; see *Rudd* v. *R.*, [1895] 1 Ir. R. 15). But where defendants are sued as trustees of

a fund and not as executors, then apart from the Trustee Act, 1888, no Stat. Lim. applies (*Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 184). So the words in the above section "action to recover a legacy" did not include an action by a residuary legatee against trustees to recover loss from non-realisation of residue (*Re Swain, S.* v. *Bringeman*, [1891] 3 Ch. 233). Or an action to make trustees liable for improperly paying over a settled share (*Re Timmis, supra*). An action for administration brought by a residuary legatee is none the less an action to recover a legacy within sect. 8 by reason of an allegation that the defendant executor had at the time of action brought assets in his hands (*Re Richardson, Pole* v. *Pattenden*, [1920] 1 Ch. 423, where *Re Croydon* (55 Sol. J. 632) was not followed). 37 & 38 Vict. c. 57, s. 8.

Where the person liable for payment of a legacy and the person entitled to receive it are the same, no question of limitation can arise (*Binns* v. *Nicholls*, 2 Eq. 256; see *Blachford* v. *Worsley*, 27 Ch. D. 676). Compare the cases as to charges (*supra*), and as to specialties (*post*, p. 252). As to the effect of an order in lunacy (carrying over funds to a particular account) in preserving the right to recover a legacy, see *Re Walker* (7 Ch. 120); and generally as to the running of time in the cases of actions to recover legacies, see especially the cases as to a present right to receive a legacy, p. 223, *post*.

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such having been barred, it could not be claimed under the charge of debts (*Piggott* v. *Jefferson*, 12 Sim. 26).

Annuities.

An annuity given by will and payable out of personal estate only should, it seems, be treated as a series of "legacies" within the section payable *de anno in annum* (*Dower* v. *D.*, 15 L. R. 264; see *Edwards* v. *Warden*, 9 Ch. 505). In this view non-payment of the annuity for the full statutory period does not extinguish the annuitant's title, but each instalment must be considered separately, having regard to the time at which a present right to receive the same accrued (*ibid.; secus Re Ashwell*, Joh. 117).

Presumption of payment of legacies before 3 & 4 Will. 4, c. 27.

Before the R. P. Lim. Act, 1833, lapse of time was frequently held a bar to a suit for a legacy upon the ground of raising a presumption of payment (*Higgins* v. *Crawford*, 2 Ves. jun. 572; *Pickering* v. *Stamford, ibid.*, 582; *Jones* v. *Turberville, ibid.*, 11; *Montressor* v. *Williams*, 1 Rop. on Leg. 792, 2nd ed.; *Campbell* v. *Graham*, 1 R. & M. 453; 2 Cl. & Finn. 429). Even after the R. P. Lim. Act, 1833, the presumption was applied in the case of an annuity (*Shadbolt* v. *Vanderplank*, 29 Beav. 405). For cases where the presumption was not raised, see *Shields* v. *Rice* (3 Jur. 970); *Lee* v. *Brown* (4 Ves. 362); *Prior* v. *Horniblow* (2 Y. & Coll. 206); *Ravenscroft* v. *Frisby* (1 Coll. 16).

(6) Express trusts —of money payable out of land;

According to the law as it stood before 1879, where an express trust existed, there having regard to sect. 25 of the R. P. Lim. Act, 1833, the claim was not barred by sect. 40. So held where land was vested in trustees upon express trust to secure payment of debts (*Dillon* v. *Cruise*, 3 Ir. Eq. R. 70; *Hunt* v. *Bateman*, 10 Ir. Eq. R. 360; see *Dundas* v. *Blake*, 11 Ir. Eq. R. 138; *Heenan* v. *Berry*, 2 J. & Lat. 303); or of charges (*Young* v. *Waterpark*, 13 Sim. 204; 15 L. J. Ch. 63, distinguished in *Re Power's Estate*, [1913] 1 I. R. 530; *Blair* v. *Nugent*, 3 J. & Lat. 658; *Lawton* v. *Ford*, 2 Eq. 97; see *Burrowes* v. *Gore*, 6 H. L. C. 907); or of legacies or annuities (*Watson* v. *Saul*, 1 Giff. 188; *Ward* v. *Arch*, 12 Sim. 472). On the other hand where an annuity was given by

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will, and real estate was charged with it, and then the estate was simply devised charged with the payment of the annuity, it was not an express trust (*Francis* v. *Grover*, 5 Hare, 39). Compare the case where an annuity was charged on land in favour of a charity, and the devisee being bound to give effect to the gift, was held to be an express trustee (*Commrs. of Donations* v. *Wybrants*, 2 J. & Lat. 182). A devise of realty subject to and charged with legacies did not create an express trust in favour of the legatees (*Proud* v. *P.*, 32 Beav. 234; see also *Re Hazlette*, [1915] 1 I. R. 285). A vendor's lien was not an express trust (*Toft* v. *Stephenson*, 7 Hare, 1; *Dundas* v. *Blake*, 11 Ir. Eq. R. 138; *Henderson* v. *Atkins*, 28 L. J. Ch. 913). Where a testator charged his real estates with his debts, and devised a particular plantation in trust to pay his debts, it was held, that as to the plantation a trust had been created in favour of the creditors, but that as to the other real estates they had a mere charge (*Jacquet* v. *Jacquet*, 27 Beav. 332). On the construction of an entire will, it was held in one case that an express trust arose to secure a legacy (*Thomson* v. *Eastwood*, 2 App. Cas. 215; see *Williams* v. *W.*, [1900] 1 Ch. 152), and in another that there was no express trust to secure annuities (*Cunningham* v. *Foot*, 3 App. Cas. 974; see *Re Lacy, Royal Association* v. *Kydd*, [1899] 2 Ch. 156; *Hanly* v. *Carroll*, [1907] 1 I. R. 166).

Now the R. P. Lim. Act, 1874, s. 10, provides that after January 1, 1879, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, except within the time within which the same would be recoverable if there were not any such trust (see *post*, p. 241).

—of money payable out of personalty.

The case of sums of money secured by an express trust of personalty vested in a trustee, but which sums are not charged upon or payable out of land, appears to be unaffected by the last-mentioned section; and in the case of such sums it was held, previously to the R. P. Lim. Act, 1874, that the trust of personalty prevented the statute from operating as a bar (see *Playfair* v. *Cooper*, 17 Beav. 187; compare the Jud. Act, 1873, s. 25 (2), *Banner* v. *Berridge*, 18 Ch. D. 262). It seems that the last-mentioned rule did not apply to the case where the trust of personalty was one imposed upon an executor (*Cadbury* v. *Smith*, 9 Eq. 42; *Scott* v. *Jones*, 4 Cl. & Fin. 382; *Re Stephens, Warburton* v. *S.*, 43 Ch. D. 45). But the executor might become a trustee (see *Charlton* v. *Durham*, 4 Ch. 433); *e.g.* where he severed a legacy (*Phillipo* v. *Munnings*, 2 M. & C. 309; explained in *Harcourt* v. *White*, 28 Beav. 309; *Tyson* v. *Jackson*, 30 Beav. 384; see *Re Smith. Henderson Roe* v. *Hitchins*, 42 Ch. D. 302); or executed a declaration of trust (*Re Rowe, Jacobs* v. *Hind*, 60 L. T. 599). The executor might become a trustee by assenting to a legacy given to him in trust (*Dix* v. *Burford*, 19 Beav. 412); but not in general by performance of his duties *qua* executor (*Re Mackay, M.* v. *Gould*, [1906] 1 Ch. 31), *e.g.* not by assenting to an absolute legacy (*Re Rowe, supra*); or by signing a residuary account (*Re Rowe*, 61 L. T. 581; see *Tyson* v. *Jackson*, 30 Beav. 384, and *Re Claremont*, [1923] 2 K. B. 718). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees does not prevent the running of time (*Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 124; *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491; see *Re Lacy, Royal Association* v. *Kydd*, [1899] 2 Ch. 149).

Trustee Act, 1888.

In the case of proceedings against trustees, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*post*, p. 283).

37 & 38 Vict. c. 57, s. 8.

(7) Present right to receive.

As regards the meaning of the words "next after a present right to receive the same shall have accrued to some person capable of giving a discharge" (which occur in both the above sections) these words should be compared with the first words in the sections, which suggest that at the time when the present right accrues some "proceeding" can be brought. This view was adopted by Kekewich, J., who interpreted the words "present right to receive" as meaning a right to recover by legal proceedings (*Re Pardoe, M'Laughlin* v. *Penny*, [1906] 1 Ch. 269), and held that where an action could not have been brought, time did not run (*ibid.*; see *Re Blachford, B.* v. *Worsley*, 27 Ch. D. 676, where the legatee was one of the executors). See, however, *Hornsey Board* v. *Monarch Society*, 24 Q. B. D. 6. In the case of next-of-kin, it has been laid down that they have no present right to receive from the administrator a reversionary estate belonging to the intestate before it falls into possession (*Re Johnson, Sly* v. *Blake*, 29 Ch. D. 971). So in the case of a residuary legatee, his claim to recover residuary assets was not barred as to assets received by the executor within the statutory period before the action, but was barred as to assets received previously (*Adams* v. *Barry*, 2 Coll. 290; *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 119; *Bright* v. *Larcher*, 27 Beav. 130; see the form of Decree in *Larkins* v. *Phipps* (1873), W. N. 207). In the case of a pecuniary legatee whose legacy is payable immediately, time runs against him from the death, not from the expiration of a year from the death (*Waddell* v. *Harshaw*, [1905] 1 I. R. 46). It would seem on principle that this rule applies even where the only assets are reversionary, at least where such reversionary assets can be made available for payment of the legacy (see *Bright* v. *Larcher*, 27 Beav. 136; 4 De G. & J. 618; see *contra* the *dicta* of Kay J., *Re Ludlam, L.* v. *L.*, 63 L. T. 332). Where a pecuniary legacy was bequeathed out of a reversionary fund, the present right to receive did not arise until the reversion fell in (*Re Ludlam, L.* v. *L., ibid; Earle* v. *Bellingham*, 24 Beav. 448). As to a reversionary share of residue, the title to which was accelerated, see *Russell* v. *Crowley*, [1907] 1 I. R. 275. In the case of a legacy payable on a future event time ran from the event (*Rudd* v. *R.*, [1895] 1 I. R. 15).

In the case of next-of-kin.

Residuary legatees.

Pecuniary legatees.

Charges.

With respect to charges on land, it has been said that in each case the moment to be looked to is the moment when the charge comes into present operation (*Hornsey Board* v. *Monarch Society*, 24 Q. B. D. 9; *Re Lambert*, [1906] 1 I. R. 231). A present right to receive means an immediate right without waiting for the happening of any future event (*Farran* v. *Beresford*, 10 Cl. & Fin. 334; see *Ryan* v. *Combie*, 2 Ir. Eq. R. 334). Where the tenant for life of land failed to keep down mortgage interest, time did not run against the remainderman's claim to be recouped out of the life tenant's assets until his death (*Kirwan* v. *Kennedy*, 3 I. R. Eq. 472). And where a testator devised all his real estate to A for life and on her death charged the same with money and the devise included a contingent reversionary interest in land which did not fall in until long after the death of A, time as regards such reversionary interest ran against the chargees not from the falling in of the interest but from the death of A, when the money might have been raised by sale or mortgage (*Re Owen*, [1894] 3 Ch. 225; and see *Re Witham*, [1922] 2 Ch. 413).

Where a legacy was charged upon real estate, it was held that a present right to receive the same accrued notwithstanding the existence of prior charges (*Proud* v. *P.*, 11 W. R. 101). See, however, *Faulkner* v. *Daniel*, 3 Hare, 212, where legatees whose legacies were charged on real estate subject to prior charges were not affected

37 & 38 Vict. c. 57, s. 8.

by lapse of time so long as the prior charges subsisted. See also *Ravenscroft* v. *Frisby*, 1 Coll. 22.

In a case before the Court of Appeal the expenses of paving works were charged by statute upon the plots fronting the street upon the completion of such works by the local board, but the amount charged upon each plot was not ascertained by apportionment for several years later; and the Board subsequently sued the owner of one plot to enforce his proportion of the charge. It was held that time ran against the Board not from the apportionment but from the completion of the works when the charge arose (*Hornsey Board* v. *Monarch Society*, 24 Q. B. D. 1). It was said that a "present right to receive" was distinguishable from "a present right to sue" (*ibid.*, 9), an interpretation which should be compared with the cases set out above.

Disabilities.

The present right to receive must accrue to some person capable of giving a discharge for the same; accordingly, where a legacy was bequeathed to an infant, time ran from her majority (*Piggott* v. *Jefferson*, 12 Sim. 26). When time has commenced to run against a legatee and the executor is subsequently found a lunatic, time continues to run (*Boldero* v. *Halpin*, 19 W. R. 320).

(8) Part payment.

The words in sect. 40, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment and the signing of an acknowledgment (*Chinnery* v. *Evans*, 11 H. L. C. 115, 124; see *Harlock* v. *Ashberry*, 19 Ch. D. 539). A payment to take a case out of the statute must be such a payment as amounts to an acknowledgment of liability (19 Ch. D. 548). Compare *Lewin* v. *Wilson*, 11 App. Cas. 639. The whole idea is that the payment is an admission of the right of the person to whom it is paid (*Bradshaw* v. *Widdrington*, [1902] 2 Ch. 436, 450). Payment by a mere stranger will not do (*Homan* v. *Andrews*, 1 Ir. Ch. Rep. 106; *Linsell* v. *Bonsor*, 2 Bing. N. C. 245; *Chinnery* v. *Evans*, 11 H. L. C. 115). The person by whom money is payable means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed (*Toft* v. *Stephenson*, 1 D. M. & G. 40; *Pears* v. *Laing*, 12 Eq. 54). In the case of a mortgage, it is sufficient if there is a payment by the mortgagor, or by a person who as between himself and the mortgagor is bound to pay (*Bradshaw* v. *Widdrington*, [1902] 2 Ch. 436, 450). Payment of interest by a receiver who was the agent of a mortgagor was sufficient (*Chinnery* v. *Evans*, 11 H. L. C. 134; *Berwick* v. *Price*, [1905] 1 Ch. 642; see *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107; *Whitley* v. *Lowe*, 25 Beav. 421). Where on the death of a mortgagor his widow (entitled to dower) took possession of the land with the heir's consent, payment of interest by the widow (who was regarded as the heir's agent) kept the mortgage alive as against him (*Ames* v. *Mannering*, 26 Beav. 583). If estates A, B and C are included in one mortgage, and payments of interest are made out of the rents of A, these payments are sufficient to keep alive the remedy of the mortgagee against B and C (*Chinnery* v. *Evans*, 11 H. L. C. 115). Where a loan was secured by covenant and a mortgage of Blackacre, and the mortgagor died having specifically devised Blackacre to A, and Whiteacre, which also belonged to him, to B, and the mortgagee thirty-five years later claimed to enforce the specialty debt against Whiteacre, payment of interest by A kept alive the mortgagee's right to resort to Whiteacre for payment of his principal. The Court held that being a payment by one of several interested, it bound the others on the principle of *Roddam* v. *Morley*, 1 De G. & J. 1, quoted under the Civil Proc. Act, 1833, s. 5, *post* (*Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 332).

In cases within sect. 8 payment of interest by one co-debtor or co-contractor will preserve the remedy against the other, 19 & 20 Vict. c. 97 not applying (*Re Frisby, Alison* v. *Frisby*, 43 Ch. D. 111; see *Re Powers*, 30 Ch. D. 291; *Baillie* v. *Irwin*, [1897] 2 I. R. 614; *Seager* v. *Aston*, 26 L. J. Ch. 302). For payments on judgments against co-debtors, see *Brew* v. *Brew*, [1899] 2 I. R. 163; *Re Kingston*, I. R. 3 Eq. 485. A mortgagor, however, who assigned the equity of redemption did not by subsequently paying interest prevent time running in favour of the assignee (*Newbould* v. *Smith*, 33 Ch. D. 127; 14 A. C. 423; compare *Lyall* v. *Fluker* (1873), W. N. 208). The mortgagee's receipt of the surrender value of a policy on the mortgagor's life included in the mortgage was not a sufficient payment to entitle the mortgagee to sue on the covenant (*Re Clifden, Annally* v. *Agar-Ellis*, [1900] 1 Ch. 774; see *Re Conlan*, 29 L. R. Ir. 199; *Scott* v. *Synge*, 27 L. R. Ir. 560). But where a mortgagor assigned an annuity to the mortgagee as security and the mortgagee received the annuity to an amount exceeding the money secured, it was held that the surplus was a payment sufficient to keep alive another mortgage held by the same mortgagee from the same mortgagor (*Staley* v. *Barrett*, 26 L. J. Ch. 321; see *Re Irwin*, [1907] 1 I. R. 537). 37 & 38 Vict. c. 57, s. 8.

Where the hand to pay and to receive was the same, payment of interest on a charge has been presumed (see the cases under R. P. Lim. Act, 1837, *ante*, p. 204, and under Civil Proc. Act, 1833, s. 5, *post*, p. 252); as where the person entitled to interest on the charge was also tenant for life of the charged land, and owed a duty to the remainderman (*Burrell* v. *Egremont*, 7 Beav. 236; distinguished in *Re Welch*, [1916] 1 Ch. 375, quoted *ante*, p. 220), *secus* where payment of the money charged was claimed out of the chargor's personal estate under his covenant, and the devisee of the land was absolute owner, and owed no such duty (*Re England, Steward* v. *England*, [1895] 2 Ch. 107). The last decision was affirmed by the Court of Appeal, on the principle that the landowner was not personally liable to the chargee to pay the interest (*ibid.*, [1895] 2 Ch. 825). And this principle appears to have been applied to the case of a tenant for life by North, J., in refusing to presume a payment of interest (*Re Allen, Bassett* v. *A.*, [1898] 2 Ch. 499). Same hand to pay and receive.

Part payment by an administrator out of an asset recovered by him within the statutory period, will not revive the right to sue for general administration, which was barred at the time (*Re Johnson, Sly* v. *Blake*, 29 Ch. D. 964). Payment of interest under an order in a foreclosure action to which infants were parties was considered as made without prejudice to their rights (*Thwaites* v. *M'Donogh*, 2 Ir. Eq. R. 97).

(9) Acknowledgments in writing.

The words of the 8th section of the R. P. Lim. Act, 1874, and sect. 42 of the R. P. Lim. Act, 1833, being nearly the same, most of the decisions as to acknowledgments under these two sections are arranged in one note. As to acknowledgments under the 14th and 28th sections, see *ante*, pp. 177, 200.

Both sections refer to an "agent." An agent need not be authorised in writing (*Coles* v. *Trecothick*, 9 Ves. 250). Nor need the agent have at the time an actual authority to act (*Trulock* v. *Robey*, 12 Sim. 407). Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority (*James* v. *Bright*, 5 Bing. 533; *Foster* v. *Bates*, 12 M. & W. 233). See generally, as to the extent and nature of an agent's authority, *Pole* v. *Leask*, 28 Beav. 562; 9 Jur. (N.S.) 829. In *Toft* v. *Stephenson* (1 D. M. & Who is agent.

37 & 38 Vict. c. 57, s. 8.

G. 28), an inquiry was directed as to the agency of an attorney who had acknowledged a debt.

By whom an acknowledgment may be made.

An acknowledgment is sufficient if signed by the person who represents the estate out of which the money claimed is payable, or by his agent. Thus, where an estate was devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A, an acknowledgment was sufficient where *signed by the trustee* or his agent; but such an acknowledgment will not impose on him any personal liability to pay the debt. The words in sect. 42, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay, but all persons against whom payment might be enforced (*Bolding* v. *Lane*, 1 D. J. & S. 122; *St. John* v. *Boughton*, 9 Sim. 219). An acknowledgment signed by the attorney of the trustees of the will of a deceased purchaser of land who had entered before payment of purchase-money was sufficient (*Toft* v. *Stephenson*, 1 D. M. & G. 28). An acknowledgment by one of two executors and devisees in trust of real estate, even if effectual as regards personal estate, did not prevent the operation of sect. 42 of R. P. Lim. Act, 1833, as regards the real estate (*Astbury v. A.*, [1898] 2 Ch. 111). An acknowledgment by a debtor given after he has transferred his property for the benefit of the creditors is not sufficient (*Lyall* v. *Fluker* (1873), W. N. 208; conf. *Newbould* v. *Gould*, 33 Ch. D. 127). An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage, does not preclude a *puisne* mortgagee from relying on the statute (*Bolding* v. *Lane*, 1 D. J. & S. 122; see *Chinnery* v. *Evans*, 11 H. L. Cas. 115; and *Astbury* v. *A.*, [1898] 2 Ch. 117; where it is suggested that an acknowledgment by an executor will not bind a different person who is devisee of the real estate). In *Re Fitzmaurice* (15 Ir. Ch. R. 445), the tenant for life of the equity of redemption in a mortgaged estate, gave a written acknowledgment to the mortgagee, which kept alive against the remainderman the mortgagee's right to recover more than six years' interest. See *Beckett* v. *De la Cour*, 11 L. R. Ir. 187; *Gregson* v. *Hindley*, 10 Jur. 383; *Barclay* v. *Owen*, 60 L. T. 222.

To whom.

Both the sections require the acknowledgment to be made "to the person entitled" or his agent. But in dealing with this the Court has not restricted itself within narrow limits. If it be made in a schedule, affidavit, or answer, it is sufficient, although it may be said that in those cases it is made to the Court and not to the party. Sugden, L.C., thought the decisions right, and that they proceeded upon a *liberal* but yet a fair and just construction of the statute (*Blair* v. *Nugent*, 3 J. & Lat. 677).

Sufficient acknowledgments have been held to arise from an answer in Chancery (*ibid.*, 673); an affidavit in a suit (*Tristam* v. *Harte* (Long. & T. 186); an insolvent's schedule (*Barrett* v. *Bermingham*, 4 Ir. Eq. R. 537; *Morrough* v. *Power*, 5 Ir. L. R. 494; *Hanan* v. *Power*, 8 Ir. L. R. 505); a debtor's will (*Millington* v. *Thompson*, 3 Ir. Ch. R. 235; see *Re Hoyle, H.* v. *H.*, [1893] 1 Ch. 92; *Scott* v. *Synge*, 27 L. R. Ir. 560). In *Hill* v. *Stawell* (2 Ir. L. R. 302), where the report of the master on an inquiry as to incumbrances was not a sufficient acknowledgment, the creditor was not a party (*Wrixon* v. *Vize*, 3 Dr. & W. 123). A statutory declaration made by a mortgagor in the lunacy of the mortgagee was held, having regard to its terms, to be an insufficient acknowledgment (*Hervey* v. *Wynn*, 22 T. L. R. 93).

What amounts to an acknowledgment.

As to what is a sufficient acknowledgment. An acknowledgment under the present sections need not, it seems, amount to a new promise to pay. It is a withdrawal by virtue of the statutes of the abrogation of the remedy and leaves the old debt still recover-

able (*Re Lacey; Howard* v. *Lightfoot*, [1907] 1 Ch. 345). The personal liability of the party signing the acknowledgment is out of the question (*St. John* v. *Boughton*, 9 Sim. 295). Consider *Holland* v. *Clark* (1 Y. & C. Ch. 151), where a letter written by one of two executors, not for the purpose of charging himself with the payment of a legacy, but of throwing the burden on his co-executor, was held by Knight Bruce, V.-C., not to be a sufficient acknowledgment. And consider the *dicta* in *Grenfell* v. *Girdlestone* (2 Y. & C. Ex. 676, a decision on the law before 1833). A written proposal of terms, adding "this being done, it is hoped the judgment against B. will be satisfied," was a sufficient acknowledgment of the judgment debt (*Vincent* v. *Willington*, Long. & T. 456). A correspondence between the treasurer of a Co. and a person holding a mortgage on works of the Co. was a sufficient acknowledgment (*Jortin* v. *S. E. Ry. Co.*, 6 D. M. & G. 270). The acknowledgment need not state the amount alleged to be due (*St. John* v. *Boughton*, 9 Sim. 225). **37 & 38 Vict. c. 57, s. 8.**

When must the acknowledgment under the section be made.

Sect. 8 of R. P. Lim. Act, 1874, operates only as a suspension of the remedy and not as an extinguishment of the right (*Kibble* v. *Fairthorne*, [1895] 1 Ch. 224). Accordingly an acknowledgment after the statutory period has elapsed is sufficient (*Harty* v. *Davis*, 13 Ir. L. R. 23; *Re Clifden, Annaly* v. *Agar-Ellis*, [1900] 1 Ch. 774; *Waring* v. *W.*, 5 Ir. Ch. R. 6; see *contra*, *Gregson* v. *Hindley*, 10 Jur. 383; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106; *Hervey* v. *Wynn*, 22 T. L. R. 93: compare on this point the rule as to land, *ante*, p. 210, and as to simple contract debts, *post*, p. 268). So a payment after the statutory period (*Beamish* v. *Whitney*, [1908] 1 I. R. 38).

A condition of sale as to evidence of the discharge of a statute barred equitable charge on land was discussed in *Hopkinson* v. *Chamberlain*, [1908] 1 Ch. 853.

B. *Limitation for Recovery of Personal Estate of Intestates.*

Law of Property Amendment Act, 1860, *s.* 13.

Extension of section 40 of 3 & 4 Will. 4, c. 27, to cases of claims to estates of intestates.

The above section, after reciting R. P. Lim. Act, 1833, s. 40, proceeds: "no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given."

It should be observed that sect. 8 of R. P. Lim. Act, 1874, does not extend to claims to estates of intestates. As to

23 & 24 Vict. c. 38, s. 13.

such claims accordingly the period of limitation was still the period prescribed by the above section (repealed by L. P. (Amdt.) Act, 1924).

The above section was retrospective (*Willis* v. *Howe*, 43 L. T. 375; *Re Johnson, Sly* v. *Blake*, 29 Ch. D. 964), and applied to a partial as well as an entire intestacy (*Willis* v. *Howe*, *supra*). An action was barred by this section in *Martin* v. *Beauchamp* (1888, W. N. 247); also in *Re Lacy, Royal Association* v. *Kydd* (1899, 2 Ch. 149). aid *Re M'Causland*, [1908] I. R. 327; where executors were held not to be express trustees for next of kin. Having regard to this section, an action to obtain revocation of an old grant of administration was dismissed as vexatious (*Willis* v. *Beauchamp*, 11 P. D. 59). The section was no bar to a claim made by the next of kin to leaseholds of the intestate which had been occupied for more than twenty years by the administrator (who was also heir-at-law to the intestate), under a belief that the property was freehold (*Reed* v. *Fenn*, 35 L. J. Ch. 464). A widow who had entered into possession on behalf of herself and all the next of kin was held entitled to the benefit of the section, her possession being attributed to her character of administratrix (*Mallon* v. *M'Alea*, [1923] 1 I. R. 30). See also as to lapse of time in the case of claims to an intestate's estate, *Cresswell* v. *Dewell* (4 Giff. 460); *Bermingham* v. *B.*, [1918] 1 I. R. 436.

As to a "present right to receive" the personal estate of an intestate, and as to part payments and acknowledgments in relation thereto, see the cases quoted under sect 8 of R. P. Lim. Act, 1874, *ante*, pp. 223 *et seq.* As to deaths intestate after 1925, see Admon. of Estates Act, 1925, ss. 46 *et seq.*, *post*.

C. *Arrears of Dower.*

R. P. Lim. Act, 1833, *s.* 41.

No arrears of dower to be recovered for more than six years.

41. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

In equity, as at law, there was before this Act no limitation to a claim of the *arrears* of dower (*Oliver* v. *Richardson*, 9 Ves. 222; see *Mordaunt* v. *Thorold*, 3 Lev. 375; *Curtis* v. *C.*, 2 Br. C. C. 620; *Dormer* v. *Fortescue*, 3 Atk. 130; *Tilley* v. *Bridger*, 2 Vern. 519; Prec. in Ch. 252; *Wakefield* v. *Child*, 1 Fonbl. Eq. 159, n.; the Dower Act, 1833, *post*; *Bamford* v. *B.*, 5 Hare, 203; *Marshall* v. *Smith*, 5 Giff, 37; *Williams* v. *Thomas*, [1909] 1 Ch. 713). This section is repealed in the case of all deaths after December 31, 1925, by the Administration of Estates Act, 1925, *post*, s. 45 of which abolishes dower in those cases.

D. *Arrears of Rent or of Interest in respect of Money charged on Land or in respect of Legacies.*

R. P. Lim. Act, 1833, *s.* 42.

No arrears of rent or interest to be recovered for more than six years.

42. No arrears of rent (*a*) or of interest in respect of any sum of money charged upon or payable out of any land or rent (*b*), or in respect of any legacy (*c*), or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due (*d*), or

next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent (*e*): provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. 3 & 4 Will. 4, c. 27, s. 42.

(*a*) As to how far this section was retrospective, see *Paddon* v. *Bartlett* (3 Ad. & Ell. 884); *Peyton* v. *M'Dermot* (1 Dru. & Wal. 198); *Vincent* v. *Willington* (1 Long. & T. 456). The section remains in full force after, as well as before, 1879 (see sect. 9 of the R. P. Lim. Act, 1874, *ante*, p. 214). How far this section retrospective.

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(1) ARREARS OF RENT.

By the Lim. Act, 1623, s. 3, actions of debt for arrears of rent must have been commenced within six years. The section was confined to actions for arrears of rent upon a demise without deed, and did not extend to rent reserved by specialty (*Freeman* v. *Stacey*, Hutton, 109). Old law.

Sect. 42 was held in Ireland to include tithe rentcharge (Eccl. *Commrs.* v. *Sligo*, 5 Ir. Ch. R. 46; *Conolly* v. *Gorman*, [1898] 1 I. R. 20). Only two years' arrears of an ordinary tithe rentcharge can be recovered (54 Vict. c. 8, s. 10, sub-s. 2). As to uncommuted tithes, see 53 Geo. 3, c. 127, and 5 & 6 Will. 4, c. 74 (both repealed except as to uncommuted tithes by S. L. Rev. Acts, 1887 and 1888); *Robinson* v. *Purday* (16 M. & W. 11). Tithe rentcharge and tithes.

As regards rent reserved, the opinion was expressed in 1836 that, having regard to the definition of "rent" in sect. 1 the words "arrears of rent" in sect. 42 did not include a conventional rent reserved on a lease (*Paget* v. *Foley*, 2 Bing. N. C. 688, 690). In 1841, the Court of Exchequer held that "rent" in sect. 2 of the Act did not include such a conventional rent (*Grant* v. *Ellis*, 9 M. & W. 122, approved in *Irish Commission* v. *Grant*, 10 A. C. 26; *Jones* v. *Withers*, 74 L. T. 576; see *ante*, p. 148); but it was suggested by Parke, B., and Rolfe, B., that there was a distinction between "rent" in the earlier sections of the Act and "arrears of rent" in sect. 42 (*Grant* v. *Ellis*, 9 M. & Rent reserved.

3 & 4 Will. 4, c. 27, s. 42.

W. 120, 125). Later on it was laid down by the H. L. (in a case of rent reserved where a remedy against land was being asserted) that sect. 42 prevents the recovery of more than six years' arrears: the House in effect holding (1) that "rent" in the 42nd section did include rent reserved on a lease; and (2) that as against the land the six years' limit applied to rent reserved (*Archbold* v. *Scully*, 9 H. L. C. 375, 382). Where, however, arrears of rent reserved by specialty were sought to be recovered in a personal action on the specialty it was decided that such action might be brought at any time within the twenty years allowed by the Civil Procedure Act, 1833, s. 3, *post*, p. 246 (*Paget* v. *Foley*, 2 Bing. N. C. 679; see *Hunter* v. *Nockolds*, 1 Mac. & G. 653). The last-mentioned rule has not been altered by the R. P. Lim. Act, 1874, s. 8, *ante*, p. 215. See *Darley* v. *Tennant*, 53 L. T. 257; *Donegan* v. *Neill*, 16 L. R. Ir. 309. For the period during which an account of mesne rents will be directed in equity, see *post*, p. 234.

Fee-farm rent.

Arrears of a fee-farm rent were limited by this section to six years (*Humfrey* v. *Gery*, 7 C. B. 567).

Annuities.

An annuity charged on land by will comes within the meaning of the word rent in the 42nd section, as explained by the 1st section; therefore no more than six years' arrears are recoverable (*Ferguson* v. *Livingston*, 9 Ir. Eq. R. 202; *Francis* v. *Grover*, 5 Ha. 39); so also when the annuity is charged on realty and personalty (*Re Nugent*, 19 L. R. Ir. 140). The rule applies even where the property charged is a reversionary interest in land (*Smith* v. *Hill*, 9 Ch. D. 150; approving *Vincent* v. *Going*, 1 J. & Lat. 697; *Sinclair* v. *Jackson*, 17 Beav. 405; see *contra Wheeler* v. *Howell*, 3 K. & J. 198). The 2nd section of the Act provides for the case where the right or title to an annuity is disputed (see *ante*, p. 148). The 42nd section provides for the case where the title to the annuity is *not* disputed, but the distress is made for the arrears due (*James* v. *Salter*, 3 Bing. N. C. 552).

In the case of an annuity charged on land by deed and also secured by covenant, arrears were in a proceeding against the land limited by the 42nd section to six years (*Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Harrison* v. *Duignan*, 2 Dr. & War. 295). But in such a case it was held that an action of covenant might under the 3rd section of the Civil Procedure Act, 1833, be brought within twenty years (*Strachan* v. *Thomas*, 12 Ad. & El. 558); even where the annuity as a charge on land had become extinguished by non-payment for thirty-three years (*Manning* v. *Phelps*, 10 Exch. 59). As to the effect on this ruling of *Sutton* v. *S.* (22 Ch. D. 511), see note on Mortgage Interest, *post*, p. 231. See also *Re Turner*, *Klaftenberger* v. *Groombridge*, [1917] 1 Ch. 432; *Ryott* v. *Bentley*, [1920] 1 I. R. 321.

An annuity bequeathed out of personalty only is neither "rent" nor "interest in respect of a legacy" within this section (*Roch* v. *Callen*, 6 Ha. 531; *Re Ashwell*, Johns. 112); so held contrary to the opinion of Lord St. Leonards (R. P. Stat. 138).

The words "arrears of rent" in the 42nd section were held to include a portion charged by will upon land, and payable by periodical instalments (*Uppington* v. *Tarrant*, 12 Ir. Ch. R. 268, 269).

(2) Arrears of Interest.

(*b*) "Sect. 40 enumerates mortgages, liens, judgments; but sect. 42 adopts the previous general description of money 'charged upon or payable out of land,' a description which includes every security, omitting the enumeration which it was unnecessary to repeat. It is impossible to draw any distinction between the sums of money mentioned in the one section and in the other" (Sugd. R. P. Stat. 139: see *Bolding* v. *Lane*, 4 Giff. 574).

3 & 4 Will. 4, c. 27, s. 42.

(a) On mortgages of land.

The section was applied in the case of a charge on land (*Thompson* v. *Hurley*, [1905] 1 I. R. 588). A mortgagee of canal works was limited under this section to six years' arrears (*Hodges* v. *Croydon Canal Co.*, 3 Beav. 86); and a mortgagee of a reversionary interest in the proceeds of lands devised on trust for sale was similarly limited; the mortgagor's property being held to be "money payable out of land" within this section (*Bowyer* v. *Woodman*, 3 Eq. 313; compare *Re Lambert*, [1906] 1 I. R. 220). But a mortgagee of turnpike tolls (which are not within the Act) was not limited to six years' arrears (*Mellish* v. *Brooks*, 3 Beav. 22). Nor was any such limit applied to the case of a mortgagee of a reversionary interest in trust funds invested on mortgage (*Smith* v. *Hill*, 9 Ch. D. 143; see *Jordan* v. *Young* (1878), W. N. 229); or in pure personalty (*Clarkson* v. *Henderson*, 14 Ch. D. 348; *Mellersh* v. *Brown*, 45 Ch. D. 225, a foreclosure action). A summons by a second mortgagee against the first mortgagee and others interested in surplus proceeds of sale to have it determined whether he is entitled to repayment, and to obtain it, is in substance an action by a beneficiary for execution of the trusts of the surplus proceeds, and not an action or suit for the recovery of interest in respect of money charged on or payable out of land within this section (*Re Thomson's Mortgage Trusts*, [1920] 1 Ch. 508).

Cap. 27, section 42, and cap. 42, section 3.

Hunter v. *Nockolds.*

Sutton v. *Sutton.*

In some cases under R. P. Lim. Act, 1833, s. 42, a difficulty arose in consequence of Civil Proc. Act, 1833, s. 3 (*post*); and the Courts treated the provision of the latter section as an exception out of the former (*Paget* v. *Foley*, 2 Bing. (N.C.) 690; *Strachan* v. *Thomas*, 12 Ad. & E. 558). In *Hunter* v. *Nockolds* (1 Mac. & G. 640) Lord Cottenham (overruling *Du Vigier* v. *Lee*, 2 Hare, 326) laid down that the effect of the conjoint enactment was, that no more than six years' arrears of interest in respect of any sum charged upon or payable out of any land or rent could be recovered by way of distress, action, or suit, other than and except in actions on covenant or debt on specialty, in which case the limitation was twenty years (see *Hughes* v. *Kelly*, 3 Dru. & War. 482). In a later case which fell within the R. P. Lim. Act, 1874, the C. A. held that the personal remedy of a mortgagee (on covenant) to obtain payment from the mortgagor of the principal sum secured by the mortgage was barred in twelve years by sect. 8 of the last-mentioned Act; and they refused to follow Lord Cottenham in treating sect. 3 of the Civil Procedure Act, 1833, as permitting (by way of exception to the R. P. Lim. Acts) an action on covenant to recover a mortgage debt to be brought within twenty years (*Sutton* v. *S.*, 22 Ch. D. 511; see *Macdonnell* v. *Fitzgerald*, [1897] 1 I. R. 568). It should be observed that the section discussed by the C. A. was sect. 8 of the R. P. Lim. Act, 1874, which deals with principal sums secured by mortgage. They did not discuss interest, or sect. 42 of the R. P. Lim. Act, 1833, which remains in full force (see sect. 9 of the R. P. Lim. Act, 1874, *ante*, p. 214). It has, however, been held in Ireland that, having regard to *Sutton* v. *S.*, only six years' arrears of interest on money charged on land can be recovered in an action on covenant (*Thompson* v. *Hurley*, [1905] 1 I. R. 595; and see *Re Turner*, *Klaftenberger* v. *Groombridge*, [1917] 1 Ch. 422).

Arrears of interest to which mortgagee is entitled through foreclosure;

After *Hunter* v. *Nockolds* it was held, in several cases, that in an action to foreclose real estate, a mortgagee could not recover more than six years of interest, although the mortgage debt was secured by covenant (*Sinclair* v. *Jackson*, 17 Beav. 405; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; *Round* v. *Bell*, 30 Beav. 121). It made no difference that the property mortgaged was reversionary (*Vincent* v. *Going*, 1 J. & Lat. 697; *Sinclair* v. *Jackson*, 17 Beav. 405;

3 & 4 Will. 4, c. 27, s. 42.

Smith v. *Hill*, 9 Ch. D. 143; see *contra*, *Wheeler* v. *Howell*, 3 K. & J. 198; *Jordan* v. *Young* (1878), W. N. 229). Compare the large arrears recovered where a contingent reversion was charged (*Re Lambert*, [1906] 1 I. R. 220). Where mortgaged land was taken under the L. C. C. Act, 1845, the money being paid into Court, and the mortgagee petitioned for payment, the proceeding was treated as analogous to an action to recover land, and the mortgagee only recovered six years' interest (*Re Stead*, 2 Ch. D. 713). On the other hand, on the principle of retainer, a mortgagee selling land under his power can retain, out of money in his hands more than six years' arrears (*Re Marshfield; M.* v. *Hutchins*, 34 Ch. D. 721). See in the case of personal estate, *Re Hancock; H.* v. *Berry*, 59 L. T. 199. On the same principle where the executors of a mortgagee sold land and paid the proceeds into Court in a suit to administer the mortgagee's estate, the executors on their petition for payment out were entitled to more than six years' arrears (*Edmunds* v. *Waugh*, 1 Eq. 418).

through retainer.

Arrears payable on redemption.

In redemption actions a mortgagor can only redeem on payment of all arrears of interest, even exceeding six years (*Edmunds* v. *Waugh*, 1 Eq. 421; *Dingle* v. *Coppen*, [1899] 1 Ch. 726; *Powell* v. *Brodhurst*, [1901] 2 Ch. 167). And where A mortgaged to B a share passing under a will in proceeds of sale of land, and in an action to administer the testator's estate the land was sold and the proceeds went into Court; the mortgagor petitioning for payment out was only allowed to recover the fund on payment to the mortgagee of full arrears (*Re Lloyd; L.* v. *L.*, [1903] 1 Ch. 385; see *Re Hazeldine*, [1908] 1 Ch. 34).

Tacking

In *Elvy* v. *Norwood* (5 De G. & S. 240), the heir of a mortgagor who had covenanted for himself and his heirs to pay interest, could not redeem without paying twenty years' interest, as the mortgagee was entitled to tack. Since the Administration of Estates Act, 1833, a mortgagee of freeholds may tack his simple contract debt in a foreclosure suit as against the heir of the mortgagor (*Thomas* v. *Thomas*, 11 Beav. 341). As to a mortgagee of copyholds, see *Rolfe* v. *Chester* (20 Beav. 610). The question of tacking must be raised on the pleadings (*Sinclair* v. *Jackson*, 17 Beav. 405). But see p. 686, *post*.

Effect on mortgage interest of barring of principal.

As regards mortgage interest. A further question may be raised as to the effect upon it of the barring of principal. It has been said that when a mortgage debt has gone, the right to interest has gone also (*Skene* v. *Cook*, [1901] 2 K. B. 15); reference being made to the doctrine that interest is an accessory which falls to the ground with the principal (*Parr's Bank* v. *Yates*, [1898] 2 Q. B. 465). It seems doubtful whether this doctrine applies to the case where a mortgage deed contains separate covenants for payment of principal and interest (see *Parr's Bank* v. *Yates*, *supra*; *Hollis* v. *Palmer*, 2 Bing. (N.C.) 717). And it may be pointed out that, while payment of a statute barred principal debt cannot be enforced, the debt itself is not extinguished (*Smith* v. *Betty*, [1903] 2 K. B. 322); and further that principal and interest are distinct debts and can be sued for separately (*Attwood* v. *Taylor*, 1 Man. & G. 207).

Possession of prior incumbrancer.

Under the exception in this clause, where there are several incumbrances on an estate, and one incumbrancer enters, the right of a subsequent incumbrancer to recover interest during such possession is saved, provided he come within one year after the possession terminates. A judgment creditor who has the first security, and enters, is a prior incumbrancer in possession within this proviso (*Henry* v. *Smith*, 2 Dru. & War. 390). The prior incumbrance referred to in this exception is one which affects the interest upon which the subsequent incumbrance is also a charge (*Vincent* v. *Going*, 1 J. & Lat. 697). An annuitant was able under

3 & 4 Will. 4, c. 27, s. 42.

the exception to recover more than six years' arrears, which accrued during the possession of a prior incumbrancer (*Drought* v. *Jones*, 2 Ir. Eq. R. 303, "a doubtful authority"; Sugd. R. P. Stat. 146, n.). See also *Montgomery* v. *Southwell*, 2 Con. & Law. 263. Where a mortgagor sold the equity of redemption and assigned outstanding charges to a trustee for the purchaser, and the purchaser entered, the land was not in the possession of a prior incumbrancer within this exception (*Chinnery* v. *Evans*, 11 H. L. C. 115; where the nature of this exception is explained by Lord Westbury).

(b) On judgments.

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of this section. In relation to the Stat. Lim., the rights of judgment creditors to arrears of interest, as against the real and personal estates of their debtor, are equal and co-extensive. As far as the statute protects the real estate, to the same extent the personal estate is protected. The interest given by the Debtors (Ireland) Act, 1840, s. 26, is subject to the R. P. Lim. Act, 1833, s. 42 (*Henry* v. *Smith*, 2 Dru. & War. 381; followed in *Re Turner, Klaftenberger* v. *Groombridge*, [1917] 1 Ch. 422; compare *Watson* v. *Birch*, 15 Sim. 523; *Jay* v. *Johnstone*, [1893] 1 Q. B. 190). In the case of an Irish judgment not registered as a mortgage only six years' arrears of interest are recoverable out of the judgment debtor's personal estate (*Macdonnell* v. *Fitzgerald*, [1897] 1 I. R. 556). See as to the Irish judgment creditor's remedy against the land, *Shea* v. *Moore*, [1894] 1 I. R. 158.

1 & 2 Vict. c. 110, ss. 17, 18.

Formerly a judgment did not carry interest, but interest might be recovered at law as damages, by action on the judgment (*Gaunt* v. *Taylor*, 3 M. & K. 302). Now by Judgments Act, 1838, ss. 17, 18 (*post*), every judgment debt carries interest at 4 per cent. from entering up until satisfaction. As to interest on debts generally, see p. 236, *post*.

(c) On unpaid purchase-money of land.

In the case of a contract to sell land the vendor's right to receive interest on the purchase-money did not accrue until completion, and he recovered forty years' arrears (*Toft* v. *Stevenson*, 5 D. M. & G. 735).

Interest on an incumbrance for six years before writ was allowed where the action enured for benefit of all incumbrancers (*Archdall* v. *Anderson*, 25 L. R. Ir. 433; see *Greenway* v. *Bromfield*, 9 Hare, 201).

(d) On charges on land.

(*c*) Arrears of interest on legacies can only be recovered for six years, calculated from the filing of the bill (*Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 D. M. & G. 393; *Re Walker*, 7 Ch. 120; see *Thompson* v. *Eastwood*, 2 App. Cas. 215). But where the assets consisted of a reversion, and for the benefit of the estate realisation was delayed, legatees received interest from the expiration of one year from the death of testatrix, a period exceeding six years (*Blachford* v. *Worsley*, 27 Ch. D. 676). As to interest on legacies, see *Lord* v. *L.*, (2 Ch. 782); *Re Richards* (8 Eq. 119) and as to the time from which such interest runs, see *Re Waters* (42 Ch. D. 517); *Re Bignold* (45 Ch. D. 496); *Re Friend, F.* v. *Young* ([1898] W. N. 26); *Re Gardner, Long* v. *G.*, ([1892], W. N. 164); R. S. C., Ord. 55, r. 64; *Walford* v. *W.*, [1912] A. C. 658, where the legacy was demonstrative.

(e) On legacies.

(f) On charges on personal estate.

Sect. 42 does not apply to money charged on personal estate. In an action to enforce a vendor's lien on personal estate interest for more than six years was allowed (*Re Stucley; S.* v. *Kekewich*, [1906] 1 Ch. 67; see *ante*, p. 218).

(3) Express trusts.

(*d*) According to the law as it stood before 1879, it was settled that where an express trust existed, there having regard to sect. 25

3 & 4 Will. 4, c. 27, s. 42.

of R. P. Lim. Act, 1833, the claim was not barred by sect 42. So held in the case of annuities secured on realty (*Ward* v. *Arch*, 12 Sim. 472; *Mansfield* v. *Ogle*, 24 L. J. Ch. 700; *Cox* v. *Dolman*, 2 D. M. & G. 592; *Snow* v. *Booth*, 8 D. M. & G. 69; *Lewis* v. *Duncombe*, 29 Beav. 175; *Knight* v. *Bowyer*, 2 De G. & J. 421; see *Round* v. *Bell*, 30 Beav. 121; *Cunningham* v. *Foot*, 3 App. Cas. 974); in the case of a mortgage secured by a term in a trustee (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412); in the case of a simple contract debt charged by will on real estate (*Blower* v. *B.*, 7 W. R. 101); and in the case of interest on a legacy directed to be raised by a sale of realty (*Gough* v. *Bult*, 16 Sim. 323; *Kellett* v. *K.*, I. R. 5 Eq. 298; *Thompson* v. *Eastwood*, 2 App. Cas. 215). Now by R. P. Lim. Act, 1874, s. 10 (*post*, p. 241), an express trust does not prevent time running in case of arrears of rent or of interest in respect of any money or legacy charged upon or payable out of any land or rent. The section does not affect legacies not so charged or payable.

Trustee Act, 1888.

In the case of proceedings against trustees commenced after 1889, regard must now be had to the Trustee Act, 1888, ss. 1, 8, and 12, *post*, p. 283.

(*e*) See the cases as to acknowledgments, *ante*, p. 225.

Acknowledgments.

Part payment.

Sect. 42 differing from sect. 40 makes no mention of part payment. So that it would seem that part payment of an instalment of interest would not prevent the operation of the statute as to the balance (*Astbury* v. *A.*, [1898] 2 Ch. 115).

Disabilities.

The 42nd section contains no exception in favour of persons under disabilities; and if the Act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest (see *De Beauvoir* v. *Owen*, 5 Exch. 182; Sugd. V. & P., 11th ed., 638).

(4) Account of rents in equity.

A suit for the recovery of mesne rents and profits in equity, was not a suit for the recovery of arrears of rent within sect. 42 (*Hicks* v. *Salitt*, 3 D. M. & G. 816). On the question how far the account was to be carried back in such suits, the following distinctions were laid down. In cases of express trusts, it was said that the Statutes of Limitation would afford no defence, and that an account would be directed from the accruer of the plaintiff's title (*Sturgis* v. *Morse*, 3 De G. & J. 1; *Wright* v. *Chard*, 4 Drew. 673; *Mathew* v. *Brise*, 14 Beav. 341; see now R. P. Lim. Act, 1874, s. 10, *post*, p. 241). Where there is no express trust, but the person in possession has had notice of the plaintiff's title, it was formerly held, that as at law, more than six years' mesne profits could not be recovered, so in equity the account would not be carried back beyond six years from the filing of the bill (*Reade* v. *R.*, 5 Ves. 744; *Harmood* v. *Oglander*, 6 Ves. 215); and in *Hicks* v. *Sallitt* (3 D. M. & G. 782), where the defendant was a purchaser for value, with notice of the plaintiff's title, Turner, L.J., thought that the Lim. Act, 1623, might be applicable, by analogy to the action of account at law. An account for six years was granted in *Hickman* v. *Upsall* (4 Ch. D. 144); see *Burnell* v. *B.* (11 Ch. D. 213; *Forster* v. *F.*, [1918] 1 I. R. 95). But, "where there is no trust, no fraud, no infancy, no suppression, where, in short, there is a mere *bona fide* adverse possession, it is not according to the course of the Court to carry back the account of rents beyond the filing of the bill" (*Hicks* v. *Sallitt*, 3 D. M. & G. 782, where Lord Cranworth refers to the older cases; see *Thomas* v. *T.*, 2 K. & J. 79; *Penny* v. *Allen*, 7 D. M. & G. 409; *Morgan* v. *M.*, 10 Eq. 99). The principle of the rule, however, is that in order to disentitle the plaintiff to an

(a) From accruer of plaintiff's title.

(b) For six years.

(c) From filing of bill.

account of rents before the institution of the suit, there must be neglect in bringing the suit (*Hickman* v. *Upsall*, 4 Ch. D. 148).

Infancy of plaintiff.

Where the plaintiff has been under the disability of infancy during the possession of the defendant, the latter is regarded as a bailiff for the former, and an account will be directed during the period of infancy (*Blomfield* v. *Eyre*, 8 Beav. 250; *Nanney* v. *Williams*, 22 Beav. 452; *Schroder* v. *S.*, Kay. 591; *Pascoe* v. *Swan*, 27 Beav. 508; *Pelly* v. *Bascombe*, 4 Giff. 390; *Thomas* v. *T.*, 2 K. & J. 79; *Wall* v. *Stanwick*, 34 Ch. D. 763; see *Re Hobbs, H.* v. *Wade*, 36 Ch. D. 553, and the older cases discussed in *Howard* v. *Shrewsbury*, 17 Eq. 399). But so far as regards the arrears of rent, it was said that the bill must be filed within six years after the plaintiff comes of age (*Lockey* v. *L.*, 1 Eq. Ca. Abr. 304, pl. 10; see as to recovering the land, *Tinker* v. *Rodwell*, 69 L. T. 591, *ante*, p. 153). It has been laid down in Ireland, that a person entering on the estate of an infant, whether the infant has been actually in possession or not, will be fixed with a fiduciary position towards the defendant, (1) when he is the infant's natural guardian; (2) when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or at least not to prejudice, the infant's rights; (3) when he takes possession with knowledge or express notice of the infant's rights (*Quinton* v. *Frith*, I. R. 2 Eq. 396). See cases quoted *ante*, p. 152.

Laches.

Where the plaintiff has been guilty of laches an account will only be directed from the filing of the bill (*Dormer* v. *Fortescue*, 3 Atk. 130; *Pettiward* v. *Prescott*, 7 Ves. 541; *Pickett* v. *Loggan*, 14 Ves. 215; *Schroder* v. *S.*, Kay, 591). The right to an account, even in the case of mines, may be lost by laches (*Parrott* v. *Palmer*, 3 M. & K. 632). A party's right to an account may also be restricted in consequence of laches in not finding out a mistake earlier by the means which were in his power (*Denys* v. *Shuckburgh*, 4 Y. & Coll. Ex. 42).

In case of charities.

There is no fixed limit of time in directing an account against the trustee of a charity. In each case the Court is bound by the particular circumstances (*Att.-Gen.* v. *Exeter*, Jac. 448). An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the information, or to six years years before that time (*Att.-Gen.* v. *Brewers' Co.*, 1 Mer. 495; *Att.-Gen.* v. *Stafford*, 1 Russ. 547). And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount (*Att.-Gen.* v. *Exeter*, Jac. 443; 2 Russ. 362; 3 Russ. 395; *Att.-Gen.* v. *Caius College*, 2 Keen, 110; *Att.-Gen.* v. *Pretyman*, 4 Beav. 462; see now R. P. Lim. Act, 1874, s. 10, *post*, p. 241). Where, however, charitable trustees have acted honestly, though mistakenly, the Court will not make them account for rents received prior to the filing of the information (*Att.-Gen.* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 14; *Att.-Gen.* v. *Christchurch*, 2 Russ. 324). When the Court limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the statute. The Court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it (*Att.-Gen.* v. *Exeter*, 2 Russ. 367). The principles upon which the Court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *Att.-Gen.* v. *Newbury* (3 M. & K. 647); see *Att.-Gen.* v. *Davis* (18 W. R. 1132).

3 & 4 Will. 4, c. 27, s. 42.

(5) INTEREST ON DEBTS GENERALLY.

Interest on debts at common law.

At common law, independently of statute, it was the general rule that interest was not payable on any debts unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances (*Higgins* v. *Sargent*, 2 B. & C. 348; *Rhodes* v. *R.*, Johns, 653; see *L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 140). As to implication from the usage of trade. Bills and notes have always been held to carry interest (*Cameron* v. *Smith*, 2 B. & Ald. 305). This interest is now regulated by the Bills of Exchange Act, 1882, ss. 9 (3) and 57 (see *Lawrence* v. *Willcocks*, [1892] 2 Q. B. 696). Interest on bills or notes is given as damages (*ibid.*; see *Ex p. Charman* (1887), W. N. 184). As to implication from other circumstances. An agreement to pay interest was implied between banker and customer (*Calton* v. *Bragg*, 15 East, 228). Also where a tradesman delivered accounts charging interest and the customer without objection made payments on account (*Re Anglesey, Willmot* v. *Gardner*, [1901] 2 Ch. 548).

In some early cases it was said that interest might be given where a debt was wrongfully detained (*Eddowes* v. *Hopkins*, 1 Doug. 376; *Arnott* v. *Redfern*, 3 Bing. 353). But this was said to be inconvenient by Lord Tenterden, who laid down the rule that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments (*Page* v. *Newman*, 9 B. & C. 381). This rule is not now open to question (*L. C. & D. Ry.* v. *S. E. Ry.*, [1893] A. C. 441). The result of the modern English authorities seems to be that in a case which cannot be brought within the common law rule (stated above) or within the Civil Procedure Act, 1833, ss. 28 and 29 (stated below), interest on a debt cannot be claimed on the ground that the debt has been wrongfully withheld (*L. C. & D. Ry.* v. *S. E. Ry.*, [1893] A. C. 437—441; *Toronto* v. *T.*, [1906] A. C. 117, 120). A *dictum* to the contrary effect by Lord Westbury in *Caledonian Co.* v. *Carmichael* (L. R. 2 H. L. Sc. 66) has been quoted in some modern English cases (*Webster* v. *British Co.*, 15 Ch. D. 174; *Borthwick* v. *Elderslie*, [1905] 2 K. B. 520). But the *dictum* related to Scotland where the law may be different (see *L. C. & D. Ry.* v. *S. E. Ry.*, [1893] A. C. 443).

3 & 4 Will. 4, c. 42, ss. 28, 29.

The Civil Procedure Act, 1833, enacts (sect. 28) that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that the interest shall be payable in all cases in which it is now payable by law. The Act provides further (sect. 29), that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

Section 28.

Lord Tenterden was the author of the above statute, which was passed with reference to the rule laid down by him in *Page* v. *Newman*, *supra* (*L. C. & D. Ry.* v. *S. E. Ry.*, [1893] A. C. 440).

3 & 4 Will. 4, c. 27, s. 42.

Sect. 28 was declaratory of the law before the statute (*Webster* v. *British Co.*, 15 Ch. D. 173, 178). Under both sect. 28 and sect. 29, any interest given is by way of damages (*ibid.* 174, 175; see *Re Roberts, Goodchap* v. *R.*, 14 Ch. D. 49).

The Act gives the jury a discretion, "if they shall think fit" (*Attwood* v. *Taylor*, 1 M. & G. 322; *Att.-Gen.* v. *Ludlow*, 1 Hall & T. 219). And interest will not be given where there has been no default on the part of the person against whom interest is claimed (*Att.-Gen.* v. *Ludlow*, *supra; Webster* v. *British Co.*, *supra*). There must be either a written demand or a written instrument under which the sum is payable (*Harper* v. *Williams*, 4 Q. B. 219). A written application for a loan was not such a written instrument (*Taylor* v. *Colt*, 3 H. & C. 452). The instrument must ascertain the sum and the time (*L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 144). As regards the sum certain interest was allowed where the instrument gave data for ascertaining the amount, and a dispute as to such amount was settled by the Court (*McIntosh* v. *G. W. Ry. Co.*, 4 Giff. 683; see *Newton* v. *Nock*, 43 L. T. 197; *L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 143). The sum certain must be due absolutely and in all events (*L. C. & D. Ry.* v. *S. E. Ry.*, [1893] A. C. 436). As regards the time certain, six months after death is a time certain (*Re Horner, Fooks* v. *Horner*, [1896] 2 Ch. 188). Where the instrument does not mention the time certain, but contains provisions which on the happening of an event render the time certain, this is not sufficient within the statute (*Merchant Co.* v. *Armitage*, L. R. 9 Q. B. 114; *L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 120; see *contra*, *Duncombe* v. *Brighton Co.*, L. R. 10 Q. B. 371).

Written instrument.

Demand in writing.

A demand in writing may entitle the jury to give interest from date of demand, although the writing claimed interest from a prior date (*Londesborough* v. *Mowatt*, 4 El. & Bl. 1). The demand need not specify the exact amount of the debt (*Mildmay* v. *Methuen*, 3 Drew. 91, a demand for work and labour in an administration suit; *Geake* v. *Ross*, 32 L. T. 666, disapproving *Hill* v. *South Staffordshire Ry. Co.*, 18 Eq. 154; see *Ex p. Kemp*, [1894] 3 Ch. 702). A solicitor may give notice that he will claim interest on his bill of costs delivered (*Berrington* v. *Phillips*, 1 M. & W. 48; see *Ward* v. *Eyre*, 15 Ch. D. 130). And where the client is dead the notice should be given to the representative, even where an administration action is pending (*Re McMurdo*, [1896] W. N. 171). A summons in a winding-up was a sufficient demand (*Ex p. Alison*, 15 Eq. 394). But an answer in a Chancery suit was not (*Ward* v. *Eyre*, *supra*); nor a claim in a writ (*Rhymney Ry. Co.* v. *Rhymney Iron Co.*, 25 Q. B. D. 146; see *Wills* v. *Wood*, [1892] 1 Q. B. 687); nor a statement in a tradesman's bill-head that interest will be charged after a certain time (*Re Lloyd Edwards, Williams* v. *Trench*, 61 L. J. Ch. 22). Where a written notice as to interest was given under this section, and the defendants paid the principal due into Court, the Court ordered payment of subsequent interest in addition (*Hull Co.* v. *N. E. Ry. Co.*, 5 D. M. & G. 872). Interest on compensation for injury by waterworks was given from the written demand (*Fletcher* v. *Birkenhead*, [1906] 1 K. B. 605).

Section 29.

An action for damages for minerals wrongfully taken is not within sect. 29 (*Phillips* v. *Homfray*, [1892] 1 Ch. 465).

Damages and interest.

As regards damages, while interest cannot be payable on damages, it may be taken into consideration on computing damages (*G. W. Ry. Co.* v. *Fisher*, [1905] 1 Ch. 325), and was included in the damages given for breach of implied covenants for title (*ibid.*), and also in the damages given for a maritime collision (*The Kong Magnus*, [1891] P. 235).

3 & 4 Will. 4, c. 27, s. 42.

Rate.

When the rate of interest is not expressed, the rate is a question for the Court (*Gibbs* v. *Fremont*, 11 Exch. 25, where 25 per cent. was allowed). The rule was to recommend the jury to give 5 per cent. (*Re Roberts*, 14 Ch. D. 52; see *Peruvian Guano Co.* v. *Dreyfus*, [1892] A. C. 166); but the Court will follow the current rate at the time (*L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 120, 137; see *Wainwright's Case*, 62 L. T. 30, where 4 per cent. was given). The rate usually allowed on bills of exchange is 5 per cent. (*Re Commercial Bank*, 36 Ch. D. 529; see *Lawrence* v. *Willcocks*, [1892] 1 Q. B. 696). Judgment debts carry interest at 4 per cent. (Judgments Act, 1838, s. 17, *post*, where see note; and see R. S. C. Ord. 42, r. 16; Ord. 55, r. 62); and on the recovery of judgment on a covenant the covenant is merged in the judgment (*Ex p. Fewings*, 25 Ch. D. 338; *Re European* Co., 4 Ch. D. 33). But a mortgagee may on the construction of his deed be entitled to retain his security until paid interest at a rate higher than 4 per cent. (*Economic Society* v. *Usborne*, [1902] A. C. 147; see *Popple* v. *Sylvester*, 22 Ch. D. 98; *Arbuthnot* v. *Bunsilall*, 62 L. T. 234). Where judgment is signed in default of appearance on a claim for a liquidated demand, the rate of interest not being specified, the rate up to judgment is 5 per cent. (R. S. C., Ord. 13, rr. 3 and 4).

Rate of interest in equity.

4 per cent.

Courts of equity have adopted the rate of 4 per cent. in many cases. Thus the purchase-money of a reversionary interest in personalty with interest thereon for twenty-six years at 4 per cent. was held secured by the vendor's lien (*Re Stucley, S.* v. *Kekewich*, [1906] 1 Ch. 67). A purchaser of land duly rescinding may recover his deposit with interest at 4 per cent. (*Weston* v. *Savage*, 10 Ch. D. 736; *Re Marshall & Salt*, [1900] 2 Ch. 206). Where on an open contract for the purchase of land, the purchaser does not complete at the proper time, he must pay interest on the price at 4 per cent. (*Paine* v. *Meller*, 6 Ves. 352; *Fletcher* v. *Lancashire Ry Co.*, [1902] 1 Ch. 908; see *Re Richard & G. W. Ry.*, [1905] 1 K. B. 68). Executors of a surety retained out of a legacy bequeathed by him to the principal debtor the amounts paid by their testator with interest at 4 per cent. (*Re Watson, Turner* v. *W.*, [1896] 1 Ch. 937). Where advances have to be brought into hotchpot interest must be calculated at 4 per cent. (*Re Davy, Hollingsworth* v. *D.*, [1908] 1 Ch. 61; where the earlier decisions are referred to by the Court of Appeal; *Re Cooke, Randall* v. *C.*, [1916] 1 Ch. 480). *Quære*, whether the same rate applied in setting off shares in a partition action (see *Re Dracup, Field* v. *D.*, [1894] 1 Ch. 59).

3 per cent.

In questions between tenant for life and remainderman interest has been calculated at 3 per cent. in apportioning an annuity (*Re Perkins, Brown* v. *P.*, [1907] 2 Ch. 596); in applying the rule in *Re Chesterfield's Trusts* (*Re Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Cleveland, Hay* v. *Woolmer, ibid.*, 542; *Rowlls* v. *Bebb*, [1900] 2 Ch. 118; but in *Re Baker, B.* v. *Public Trustee*, [1924] 2 Ch. 271, 4 per cent); and in applying the rule in *Howe* v. *Dartmouth* (*Re Nicholson*, [1895], W. N. 106; *Re Lynch Blosse*, [1899] W. N. 27; *Re Woods, Gabellini* v. *W.*, [1904] 2 Ch. 4; *Re Chaytor, C.* v. *Home*, [1905] 1 Ch. 233). But a tenant for life was held entitled to 4 per cent. on the estimated capital value of retained unauthorised investments (*Re Owen, Slater* v. *O.*, [1912] 1 Ch. 519; *Re Beech, Saint* v. *B.*, [1920] 1 Ch. 40). As to the rate between *cestui que trust* and trustee, see below.

Interest in equity.

The earlier cases in equity as to interest are collected, C. P. Coop. 209—250, n. The Court of Chancery followed the law in dealing with legal claims (*Booth* v. *Leycester*, 3 M. & C. 459). But

it usually decreed interest in cases of purely equitable demands, *e.g.*, suits for equitable waste, or against trustees who misapplied trust moneys (*L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 142; see further *Hyde* v. *Price*, 8 Sim. 578; *Re Powell*, 10 Hare, 134; *Martyn* v. *Blake*, 3 Dru. & War. 125; *Mansfield* v. *Ogle*, 4 De G. & J. 38; *Spartali* v. *Constantinidi*, 20 W. R. 823). Interest was given as damages for non-payment of money (*Marsh* v. *Jones*, 40 Ch. D. 563). On setting aside a sale by a trustee to himself interest was not charged on rents (*Silkstone Co.* v. *Edey*, [1900] 1 Ch. 167). In ordinary cases it is against the practice of a Court of equity to allow anything in the nature of compound interest (*Re Magheramorne, Hogg* v. *H.*, [1901] W. N. 152; see the special cases below). As to the interest allowed on portions, see *Balfour* v. *Cooper*, 23 Ch. D. 472; Lewin, 12th ed., 486.

3 & 4 Will. 4, c. 27, s. 42.

As regards interest between trustee and *c. q. t.*, the true principle has been said to be, that a trustee must be charged with such interest as he either has received, or ought to have received, or which he may fairly be presumed to have received (*Att.-Gen.* v. *Alford*, 4 D. M. & G. 851). Thus a trustee who kept moneys in his hands and used them as his own has been charged with simple interest at the rate of 5 per cent. (*Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell, ibid.*, 461; *Burdick* v. *Garrick*, 5 Ch. 233; *Re Jones, J.* v. *Searle*, 49 L. T. 91; see *Vyse* v. *Foster*, 8 Ch. 329; and compare Rule 11 of the rules under the Judicial Trustee Act, 1896). In other cases 4 per cent. has been charged (*Re Emmet, E.* v. *E.*, 17 Ch. D. 142; see in Ireland *McArdle* v. *Gaughran*, [1903] 1 I. R. 106); but in England 5 per cent. is still the rule (*Re Davis, D.* v. *D.*, [1902] 2 Ch. 314). A husband who takes possession of his wife's separate money is *prima facie* a trustee. If she knows of the act, his estate will be liable to repay to her the money with interest at 4 per cent. from his death (*Wassell* v. *Leggatt*, [1896] 1 Ch. 559). If she did not know of the act, interest may run from the taking possession (see *Dixon* v. *D.*, 9 Ch. D. 593). Where promoters were compelled to make good to the company a secret profit, they were charged with interest at 3 per cent. (*Re Olympia, Lim.*, [1898] 2 Ch. 171; see, however, *Gluckstein* v. *Barnes*, [1900] A. C. 255). Where the trustee had not had the use of the money he was in some cases charged only with 3 per cent. (*Re Barclay, B.* v. *Andrew*, [1899] 1 Ch. 674; *Gilroy* v. *Stephen*, 51 L. J. Ch. 834; 46 L. T. 761; see *Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 593). Compound interest has been charged against a trustee where there was a direction to accumulate (*Re Emmet, E.* v. *E.*, 17 Ch. D. 142; *Re Barclay, supra*); where he had employed the money in trade (*Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell, ibid.*, 461; see *Burdick* v. *Garrick*, 5 Ch. 242); and where the *c. q. t.* was an infant, and the income was not required for maintenance. (*Jones* v. *Foxall, supra*; *Vyse* v. *Foster*, L. R. 7 H. L. 346; *Gilroy* v. *Stephen*, 51 L. J. Ch. 834; 46 L. T. 761). See further Lewin, 12th ed., 396 *et seq.*

Interest between trustee and *c.q.t.*

As to interest between banker and customer, see *Crosskill* v. *Bower* (32 Beav. 86); *Williamson* v. *W.* (7 Eq. 542); and between principal and agent, *Turner* v. *Burkinshaw* (2 Ch. 488); *Burdick* v. *Garrick* (5 Ch. 233); *G. W. Ry. Co.* v. *Cunliffe* (9 Ch. 525); *Baring* v. *Stanton* (3 Ch. D. 502). Where unconscionable bargains have been entered into with moneylenders, the Court will only allow the sums actually advanced to be recovered together with interest at 5 per cent. (*Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665; *Aylesford* v. *Morris*, 8 Ch. 484; see now Money Lenders Act, 1900). There is no general rule as to the interest the Court will allow on repayment of money expressed to be the consideration

Interest between banker and customer; principal and agent.

On securities.

3 & 4 Will. 4, c. 27, s. 42.

of an absolute assignment, which is treated only as a security (*Re Unsworth*, 2 Dr. & Sm. 337; where 5 per cent. was allowed). Where under a contract a fixed sum is charged on land and made payable at a fixed date, nothing being said about interest, the chargee is *prima facie* entitled to receive out of the land interest from that date (*Re Drax, Savile* v. *D.*, [1903] 1 Ch. 781). Interest at the rate of 4 per cent, was allowed on a simple contract debt secured by deposit of deeds, where there had been no stipulation as to interest (*Re Kerr*, 8 Eq. 331). As to interest on charges, see *Lippard* v. *Ricketts* (14 Eq. 291); on debenture bonds, *Price* v. *G. W. Ry.* (16 M. & W. 242); on mortgages, *Thompson* v. *Drew* (20 Beav. 49); *Ashwell* v. *Staunton* (30 Beav. 52); *Re Roberts* (14 Ch. D. 49); and on mortgagee's costs, *Eardley* v. *Knight* (41 Ch. D.

On arrears of annuity.

537). Where an annuity is in arrear "the established rule of the Court (which, however, is only general and not inflexible) is, that interest cannot be recovered on the arrears" (*Martyn* v. *Blake*, 3 Dru. & War. 125; *Mansfield* v. *Ogle*, 4 De G. & J. 41; *Blogg* v. *Johnson*, 2 Ch. 228; *Wheatley* v. *Davies*, 24 W. R. 818; *Re Hiscoe, H.* v. *Waite*, [1902] W. N. 49). As to the cases in which it has been given, see Seton, 7th ed., 1572. *Re Salvin, Worsley* v. *Marshall*, [1912] 1 Ch. 332. As to interest on arrears of

On money due under covenant.

salary, see *Rishton* v. *Grissell* (10 Eq. 393). Interest was allowed at 5 per cent. where default had been made in the performance of a covenant to pay money (*Knapp* v. *Burnaby*, 9 W. R. 765; *Re Horner, Fooks* v. *H.*, [1896] 2 Ch. 188; see *Re Roberts, Goodchap* v. *R.*, 14 Ch. D. 49; *Mellersh* v. *Brown*, 45 Ch. D. 228). Where a bond does not specify a day for payment, it is payable on the day of date, and interest runs from that day (*Farquhar* v. *Morris*, 7 T. R. 124). Where a date is specified, see as to interest after that date, *Cook* v. *Fowler* (L. R. 7 H. L. 27); *Re Dixon, Heynes* v. *D.*

Bonds.

([1900] 2 Ch. 561). It is the general rule both at law (*Brangwin* v. *Parrot*, 2 W. Bl. 1190; *White* v. *Sealey*, 1 Dougl. 49), and in equity, to consider the penalty of the bond as the limit of the debt or damages which can be recovered (see *Hatton* v. *Harris*, [1892] A. C. 547). But there are exceptions to this rule (see the earlier cases collected in C. P. Coop. 209—230; and see *Clarke* v. *Abingdon*, 17 Ves. 106; *Hughes* v. *Wynne*, 1 M. & K. 20; *Walter* v. *Meredith*, 3 Y. & Coll. 264; *Knipe* v. *Blair*, [1900] 1 Ir. R. 372; and *Mathews* v. *Keble*, 3 Ch. 691, where the interest allowed, together with the principal, exceeded the penalty).

As to deducting income tax on payments in respect of interest, see *Crane* v. *Kilpin* (6 Eq. 334). And as to calculation of interest and apportionment in questions between a tenant for life and remainderman, see *Re Grabowski* (6 Eq. 12); *Cox* v. *Cox* (8 Eq. 343); *Maclaren* v. *Stainton* (11 Eq. 382); *Re Moore* (54 L. J. Ch. 432); *Re Foster, Lloyd* v. *Carr* (45 Ch. D. 629); *Re Hubbuck, Hart* v. *Stone* ([1896] 1 Ch. 754); *Re Bird* ([1901] 1 Ch. 916); *Re Alston, A.* v. *Houston* ([1901] 2 Ch. 584). The rate allowed would probably formerly have been 3 per cent. (see *Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Cleveland, Hay* v. *Wolmer, ibid.*, 542). But see *Re Owen*, [1912] 1 Ch. 519; *Re Beech*, [1920] 1 Ch. 40; *Re Baker*, [1924] 2 Ch. 271, quoted *ante*, p. 238.

Interest in liquidation of a company.

The Civil Procedure Act, 1833, s. 28, applies to calls made in winding up a company where the notice of call states that interest will be charged (*Barrow's Case*, 3 Ch. 784). But provisions in articles as to interest on calls do not apply to calls made by liquidators (*Re Welsh Flannel, &c., Co.*, 20 Eq. 360). As regards debts due from a company where under the Act interest would be payable, it may be claimed in a winding-up (*Times Assurance Co.'s Case*, 2 H. & M. 722). The rule in the compulsory winding-up of

an insolvent company is that creditors whose debts carry interest get dividends on what was due for principal and interest at the winding-up, but no subsequent interest except there be a surplus (*Warrant Finance Co.'s Case*, 4 Ch. 643). The same rule applies in a voluntary winding-up (*Re Salt*, 98 L. T. 558). As to the application of the above rule where a creditor has security or a right of proof against another company, see *Warrant Finance Co.'s Case* (*No.* 2) (5 Ch. 86); *Quartermaine's Case*, [1892] 1 Ch. 639; and compare *Ex p. Findlay* (17 Ch. D. 334). Creditors whose debts do not carry interest are not allowed interest in a winding-up (*Re Hatfield Co.*, 11 W. R. 971). But a demand in writing for payment may be made under the Act so as to entitle the creditor to interest (*Re East of England Co.*, 4 Ch. 14; but see *Re Herefordshire Co.*, 4 Eq. 250). As to the interest now allowed in the case of a company wound up by the Court, see the Companies Winding-up Rules, 1909, rule 97. **3 & 4 Will. 4, c. 27, s. 42.**

In administration, where a debt of the deceased carries interest, interest is paid accordingly, and where it does not carry interest, interest is paid at the rate of £4 per cent. from the date of judgment out of assets remaining after satisfaction of the costs, debts, and interest in respect of debts carrying interest (R. S. C., Ord. 55, rr. 62, 63). Where the estate is insolvent, interest on a debt carrying interest is calculated up to judgment, and a dividend paid on that amount (*Re Summers, Boswell* v. *Gurney*, 13 Ch. D. 136; see *Re London, &c., Hotels Co.*, [1892] 1 Ch. 639; *Re Whitaker, W.* v. *Palmer*, [1904] 1 Ch. 299). Interest at 4 per cent. was allowed on a debt claimed against the insolvent estate of a lunatic under a contract of indemnity given by him (*Re Hunt, Harvey's Claim*, [1902] 2 Ch. 318). Computation of interest in administration actions.

As to what interest can be claimed on a writ specially indorsed under R. S. C., Ord. 3, r. 6, see *Wilks* v. *Wood*, [1892] 1 Q. B. 684; *London Bank* v. *Clancarty, ibid.*, 689; *Lawrence* v. *Willcocks, ibid.*, 696; *Gold Ores Co.* v. *Parr*, [1892] 2 Q. B. 14; *Hamilton* v. *Brogden*, 60 L. J. Ch. 88; see R. S. C., Ord. 14, r. 1 (b). Specially indorsed writ.

Where execution has been delayed by appeal, interest will be allowed (R. S. C., Ord. 58, r. 19; see Civil Proced. Act, 1833, s. 30; *Garland* v. *Carlisle*, 5 Cl. & F. 355; *Langridge* v. *Levy*, 4 M. & W. 337; *Hooper* v. *Lane*, 6 H. L. C. 443; *Tyne Commissioners* v. *General Steam Co.*, 15 W. R. 875). Where money is paid under an order which is subsequently reversed on appeal, it must be repaid with interest at £4 per cent. (*Rodgers* v. *Comptoir D'Escompte*, L. R. 3 P. C. 465; *Merchant Banking Co.* v. *Maude*, 18 Eq. 659). Interest in the case of appeals.

As to interest on costs, see note to Judgments Act, 1838, s. 17, *post*. Costs

E. *Time not enlarged by Express Trusts.*

R. P. Lim. Act, 1874, *s.* 10.

10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

37 & 38 Vict. c. 57, s. 10.

By sect. 9 of this Act (*ante*, p. 214) the provisions of R. P. Lim. Act, Act, 1833 (except the repealed sections but including the provisions substituted for such repealed sections), are to be construed together with this Act. The present section must accordingly be construed with especial reference to R. P. Lim. Act, 1874, s. 8 (substituted for R. P. Lim. Act, 1833, s. 40), and R. P. Lim. Act, 1833, s. 42.

Effect of section on cases within R. P. Lim. Act, 1833, s. 40,

Under R. P. Lim. Act, 1833, s. 40, it was held that in a number of cases (*ante*, p. 221) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference in this respect. A conveyance of a term on trust for raising money was held to be such an express trust (*Williams* v. *W.*, [1900] 1 Ch. 152). See further the cases as to express trust quoted *ante*, pp. 189, 221, 233. It has been said that simple contract debts, secured by a trust in a will to pay the same out of real estate, may be barred in twelve years (*Re Stephens, Warburton* v. *S.*, 43 Ch. D. 39; and see *Re Raggi*, [1913] 2 Ch. 206). This section prevented a trust to pay debts in a will from keeping alive a claim on a bond (*Fearnside* v. *Flint*, 22 Ch. D. 579).

Legacies not charged upon or payable out of land or rent, which were within R. P. Lim. Act, 1833, s. 40, and are within the R. P. Lim. Act, 1874, s. 8, are not within the present section. In the case of such legacies, accordingly, an express trust would seem to prevent time running (see *Playfair* v. *Cooper*, 17 Beav. 187; see further the notes *ante*, pp. 221, 233, and *post*, p. 291). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees, does not prevent time running (*Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 124; see *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491). As to arrears of interest on a legacy, see *Blachford* v. *Worsley* (27 Ch. D. 676).

or within R. P. Lim. Act, 1833, s. 42.

Again, under R. P. Lim. Act, 1833, s. 42, it was held, that in a number of cases (*ante*, p. 233), an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference as regards arrears.

Annuity charged on land.

In the case of an annuity charged on land and secured by an express trust (there being no covenant), the rule of limitation now applicable depends on whether such annuity should (1) be considered as a whole, and dealt with as one "rent" within sect. 1 of the R. P. Lim. Act, 1874, and sect. 25 of the R. P. Lim. Act, 1833 (see the note, *ante*, p. 141; *Dower* v. *D.*, 15 L. R. Ir. 273; *Re Nugent*, 19 L. R. Ir. 140; and the argument for the annuitant in *Hughes* v. *Coles*, 27 Ch. D. 234): or should (2) be considered as a series of "sums of money charged upon land" within the earlier words of the above sect. 10 (see *Hughes* v. *Coles*, 27 Ch. D. 235; *Edwards* v. *Warden*, 9 Ch. 505; *Hanly* v. *Carroll*, [1907] 1 I. R. 171, 176; but see *Re Jordison*, *infra*, as to cases where the trustee has the property in his possession). In the first view, time would not commence to run against the annuitant until the trustee alienated for value (R. P. Lim. Act, 1833, s. 25; the earlier words of the above sect. 10 not applying). In the second view, each instalment of the annuity must it seems be dealt with separately, and time runs against its recovery on its becoming payable but not before. As regards arrears they would in either view seem to be limited to six years (R. P. Lim. Act, 1833, s. 42, read in connection with the later words of the above sect. 10). In one case it was held that where apart from a trust the annuity would have been barred as a whole, no arrears were recoverable (*Hughes*

v *Coles, supra*; but see *Dower* v. *D.*, 15 L. R. Ir. 264; and *Re Jordison*, [1922] 1 Ch. 440, cited *infra*, overruling *Hughes* v. *Coles*). Where an annuity charged on land is secured by covenant, the rule applicable is stated, *ante*, p. 230. 37 & 38 Vict. c. 57, s. 10.

As regards the matters especially mentioned in it, this section appears to control Jud. Act, 1873, s. 25 (2) (unrepealed by Jud. Act, 1925), which provides generally that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be barred by any Statute of Limitations. Compare 40 & 41 Vict. c. 57, s. 28 (2); *Hanly* v. *Carroll*, [1907] 1 I. R. 172. But sect. 10 does not apply to an annuity payable under an express trust where the trustee has the property on which the annuity is charged actually in his possession. Such a case falls within sect. 25, sub-sect. 2 of Jud. Act, 1873 (*Re Jordison, Paine* v. *J.*, [1922] 1 Ch. 440). Jud. Act, 1875, s. 25.

In the case of proceedings against trustees and persons claiming through them commenced after January 1, 1890, regard must be had to the Trustee Act, 1888, *post*, p. 283. Trustee Act, 1888.

III. Of the Limitation of Actions by or against Executors in Respect of Injuries to Property.

The Administration of Estates Act, 1925.

15 Geo. 5, c. 23, s. 26.

26.—(1) For any debt (including arrears of rent) due to a deceased person, and for any injury to or right in respect of his personal estate in his lifetime, his personal representative shall have the same right of action as the deceased would have had if alive. Rights of action by and against personal representative.

(2) The personal representative of a deceased person may maintain for any injury committed to the real estate of the deceased within six months before his death any action which the deceased could have maintained, but the action must be brought within one year after his death, and any damages recovered in the action shall be part of the personal estate of the deceased.

(3) A personal representative may distrain for arrears of a rentcharge due or accruing to the deceased in his lifetime on the land affected or charged therewith, so long as the land remains in the possession of the person liable to pay the rentcharge or of the persons deriving title under him, and in like manner as the deceased might have done had he been living.

(4) A personal representative may distrain upon land for arrears of rent due or accruing to the deceased in like manner as the deceased might have done had he been living.

Such arrears may be distrained for after the termination

15 Geo. 5, c. 23, s. 26.

of the lease or tenancy as if the term or interest had not determined, if the distress is made—

(a) within six months after the termination of the lease or tenancy;

(b) during the continuance of the possession of the lessee or tenant from whom the arrears were due.

The statutory enactments relating to distress for rent apply to any distress made pursuant to this subsection.

(5) An action may be maintained against the personal representative of a deceased person for any wrong committed by the deceased within six months before his death to another person in respect of his property, real or personal, but the action shall be brought within six months after the personal representative of the deceased has taken out representation.

Any damages recovered in the proceedings shall be payable as a simple contract debt incurred by the deceased.

(6) Nothing in this section affects any right of action conferred by the Fatal Accidents Act, 1846, as amended by any subsequent enactment.

9 & 10 Vict. c. 93.

By 13 Edw. 1, st. 1, c. 23, executors were allowed a writ of account, and by 4 Edw. 3, c. 7, an action of trespass, in respect of the personal estate of their testators. By 31 Edw. 3, st. 1, c. 11, administrators had a right of action to recover debts of the deceased, and by 32 Hen. 8, c. 37, executors and administrators were enabled to sue for arrears of rent. The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), empowered (sect. 2) executors or administrators to sue in respect of injuries to the real estate of the deceased committed within six months before his death if the action were brought within one year after his death; and the section also gave a right of action against personal representatives for injuries committed by the deceased to property, real or personal, within six months of his death, if the action were brought within six months after the representatives had taken upon them the administration of his estate. By sects. 37 and 38 of the same Act, personal representatives might distrain for arrears after the determination of the term, if the distress were made within six months of the determination and during the possession of the tenant from whom the arrears became due as regards the lessor himself. The above enactments were repealed, as to deaths after 1925, by Administration of Estates Act, 1925, and replaced by this section.

It was doubted whether "real estate" in the Act of 1833 included leasehold interests (*Adam* v. *Bristol*, 2 Ad. & Ell. 389). But by sect. 55, sub-sect 1 (xix) of Administration of Estates Act, 1925, real estate includes chattels real. Under the Act of 1833 an executor was held entitled to recover damages for an obstruction to the light of a house of his testatrix. It was said that the damages would be confined to damage arising within six months before the death (*Jones* v. *Simes*, 43 Ch. D. 607). According to the rule of common law, executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered (*Kirk* v. *Todd*, 21 Ch. D. 489; see *Phillips* v. *Homfray*, 24 Ch. D. 439; *Twycross* v. *Grant*, 4 C. P. D. 45; *Re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387, and the notes to *Wheatley* v. *Lane*, 1

Wms. Saund. 239). (See also sect. 29 of the Administration of Estates Act, 1925, *post*). **15 Geo. 5, c. 23, s. 26.**

As an exception to the above rule, the Act of 1833 and this section permit executors to be sued for wrongs committed by their testator in respect of property, provided the injury has been committed not more than six months before his death (see *Kirk* v. *Todd, supra*). Trespass was maintained against an administrator for coal wrongfully taken from the plaintiff's land by the intestate within six months before his death (*Powell* v. *Rees*, 7 Ad. & Ell. 426). And sect. 2 of the Act of 1833 has been applied in the case of continuing wrongs, *e.g.*, wrongs arising from obstruction of light (*Jenks* v. *Clifden*, [1897] 1 Ch. 694, where the obstructing building was completed more than six months before the death); or from not repairing (*Woodhouse* v. *Walker*, 5 Q. B. D. 408; in which case the instrument under which possession was taken imposed an express duty to repair). But it did not apply to the remedy of a remainderman against the estate of a tenant for life for failure to repair (*Jay* v. *J.*, [1924] 1 K. B. 826).

It seems that a claim under sect. 2 might be made more than six months after the death, but within six months from probate (*Re Williames, Andrew* v. *W.*, 52 L. T. 41); see now sub-sect. 5 of the present section. Under sect. 2 an action of tort was maintained against the executors of an innkeeper within six months after his death for the property of a traveller lost in his house (*Morgan* v. *Ravey*, 30 L. J. Ex. 131). But a claim for negligence brought against the executors of a deceased landlord more than six months after the death was too late (*Erskine* v. *Adeane*, 8 Ch. 760). See as to evidence of conversion within six months, *Richmond* v. *Nicholson* (8 Scott, 134).

Law independently of the Act.

The rule *actio personalis moritur cum personâ* was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed (*Wheatley* v. *Lane*, 1 Wms. Saund. 240; *Finlay* v. *Chirney*, 20 Q. B. D. 502; *Formby* v. *Barker*, [1903] 2 Ch. 550). Thus executors were held entitled to sue for a cause of action which arose out of a statutory duty to the deceased (*Peebles* v. *Oswaldtwistle*, [1896] 2 Q. B. 159; *Darlington* v. *Roscoe*, [1907] 1 K. B. 219). As to an action for breach of promise of marriage, see *Quirk* v. *Thomas* ([1916] 1 K. B. 516). As to liability for untrue statements by a director, see *Geipel* v. *Peach* ([1917] 2 Ch. 108). In the case of non-repair, damages are, independently of the above section, recoverable from the estate of a former possessor of land, where an obligation to repair arises either from the terms of the instrument under which possession was taken (*Re Williames, Andrew* v. *W.*, 52 L. T. 41; 54 L. T. 405; *Re Bradbrook*, 56 L. T. 106; compare *Dingle* v. *Coppen*, [1899] 1 Ch. 726), or from the local law (*Batthyany* v. *Walford*, 33 Ch. D. 624; 36 Ch. D. 269), or from the custom of the manor (*Blackmore* v. *White*, [1899] 1 Q. B. 293). In the last-mentioned cases the nature of the obligation to repair was said to be contractual. In the earlier case, however, of *Woodhouse* v. *Walker* (*supra*), the neglect to repair was said to amount to a tort. The manorial custom giving rise to such an implied contract must be a special one. In ordinary cases a copyhold tenant was liable to forfeiture for non-repair amounting to waste, but was not liable to pay damages (*Galbraith* v. *Poynton*, [1905] 2 K. B. 258).

The Fatal Accidents Act, 1846, gives a right of action, for the benefit of the relatives, in respect of deaths caused by wrongful acts, neglects, or defaults, if commenced within twelve months of the death.

3 & 4 Will. 4, c. 42, s. 3.

IV.—Of the Limitation of Actions on Specialties, &c.

THE CIVIL PROCEDURE ACT, 1833.

3 & 4 Will. 4, c. 42, ss. 3—7.

§ 3. *Limitation of Actions on Specialties, and some other Debts and Penalties*...246.
§ 4. *Persons under Disability*...249.
§ 5. *Acknowledgment in Writing or by Part Payment*...250.
§ 6. *Limitation after Judgment reversed, &c.*...253.
§ 7. *Meaning of Beyond the Seas*...253.

Limitation of action of debt on specialties, &c.

3. That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. (As to Ireland, see 16 & 17 Vict. c. 113, s. 20.)

The reasons which led to this enactment are discussed by Lindley, M.R. (*Thomson* v. *Clanmorris*, [1900] 1 Ch. 725).

Covenants or bonds.

To an action of covenant six years is not a good plea of limitation (*Hartshorn* v. *Watson*, 4 Bing. N. C. 178). Where a purchaser covenanted to pay purchase-money by promissory notes of even date, an action could be brought on the covenant after six years (*Dixon* v. *Holroyd*, 7 Ell. & Bl. 703). The section applied even where the bond was executed in India, where the limitation is shorter (*Alliance Bank* v. *Carey*, 5 C. P. D. 429).

3 & 4 Will. 4, c. 42, s. 3.

As regards rent reserved, an action on a covenant may be brought to recover an instalment within twenty years from the date limited by the above section. In *Paget* v. *Foley* (2 Bing. N. C. 679), Tindal, C.J., said, "If the 42nd section of R. P. Lim. Act, 1833, is a general enactment the subsequent declaration that an action of covenant may be commenced during a longer period is virtually an exception out of the former: we are to reconcile the two enactments if it be possible, but it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception (see *Paddon* v. *Bartlett*, 3 Ad. & Ell. 895; *Wilson* v. *Jackson*, 2 Ir. L. R. 1). The R. P. Lim. Act, 1874, has made no difference in this respect (*Darley* v. *Tennant*, 53 L. T. 257; *Donegan* v. *Neill*, 16 L. R. Ir. 309).

Covenants securing rent reserved.

In the case of an annuity charged on land by deed and also secured by covenant, it was decided before 1879 that an action of covenant might be brought for an instalment within the twenty years limited by the above section (*Strachan* v. *Thomas*, 12 Ad. & Ell. 558); even where the annuity as a charge on land had become extinguished by non-payment for thirty-three years (*Manning* v. *Phillips*, 10 Exch. 59). For the present law, see *ante*, pp. 230, 231.

Annuities.

A personal covenant to pay a rent-charge cannot be enforced after twelve years of non-payment, sect. 1 of R. P. Lim. Act, 1874, having reduced the period of twenty years fixed by this section to twelve (*Shaw* v. *Crompton*, [1910] 2 K. B. 370).

Rent-charge.

As regards principal money secured by mortgage, the personal remedy of a mortgagee to obtain payment from the mortgagor, is now, by R. P. Lim. Act, 1874, s. 8, barred after twelve years, whether the action be on a collateral bond (*Fearnside* v. *Flint*, 22 Ch. D. 579), or on the mortgagor's covenant in the mortgage deed (*Sutton* v. *S.*, 22 Ch. D. 511); which section applies even where the property charged is a reversionary interest in land which has not fallen in (*Kirkland* v. *Peatfield*, [1903] 1 K. B. 756).

Mortgage debts.

Before this Act it had been held that satisfaction of money secured on bonds would be presumed after twenty years (*Humphreys* v. *H.*, 3 P. Wms. 396; 2 Atk. 144; *Morley* v. *M.*, 5 D. M. & G. 610). But such presumption might have been rebutted, as if interest were proved to have been paid (8 Mod. 278; 2 Ld. Raym. 1370; 3 Bro. P. C. 535; 2 Str. 827; 2 Cox. 118); or if the obligor had had no opportunity or means of paying (*Fladong* v. *Winter*, 19 Ves. 196); or had been abroad (*Newman* v. *N.*, 1 Stark. N. P. C. 101). See further as to the presumption of payment of bonds, *Barrington* v. *Searle* (3 Bro. P. C. 535); *Glyn* v. *Bank of England* (2 Ves. sen. 43); *Oswald* v. *Legh* (1 T. R. 271); *Colsell* v. *Budd* (1 Camp. 27); *Middleton* v. *Melton* (10 B. & C. 317); *Gleadow* v. *Atkin* (1 C. & M. 410); *Sanders* v. *Meredith* (3 M. & R. 116; 1 Phil. Ev. 7th ed. 255). No presumption of the discharge of a bond arose from the fact of its being in the obligor's possession at his death (*Re Dixon, Heynes* v. *D.*, [1900] 2 Ch. 561).

Old rule as to the presumption of payment of bonds.

In the winding up of a company established by a deed of settlement, the liability of a shareholder was a liability by way of specialty within this secton (*Re Portsmouth Banking Co.*, 2 Eq. 167). By the Companies Act, 1862, s. 75, the liability to contribute under a winding-up order created a specialty debt, even though the company was not registered under that Act (*Muggeridge* v. *Sharp*, 10 Eq. 443); and the specialty was one which bound the heirs of the contributory (*Buck* v. *Robson*, 10 Eq. 629). In the case of companies formed and registered under that Act, the liability of a member in a winding-up was a specialty (Companies Act, 1862, ss. 75, 90, 134). So also was the liability of a member under the articles (sect. 16). See now Companies Consolidation Act, 1908, ss. 14 and 125. A specialty debt was

Other specialties.

Specialty liabilities of shareholders and contributories.

3 & 4 Will. 4, c. 42, s. 3.

not created by a call made by a company established under the old Joint Stock Companies Winding-up Acts (*Robinson's Executors' Case*, 6 D. M. & G. 572), or under a colonial statute (*Weliand Ry. Co.* v. *Blake*, 30 L. J. Ex. 161).

Dividends.

Claims by shareholders for dividends were held to fall within the above section, both in the case of preference shares (*Smith* v. *Cork Ry.*, I. R. 5 Eq. 65), and ordinary shares (*Re Drogheda Co.*, [1903] 1 I. R. 512; *Re Artisans Corporation*, [1904] 1 Ch. 796); the share certificates in each case being under the seal of the Co., and referring to the articles. Compare *Re Severn Ry. Co.*, [1896] 1 Ch. 559. Time ran from the date of the declaration of the dividend. The section also applied to a shareholder's claim for money repayable on a reduction of capital; time running from the order (*Re Artisans Corporation, supra*).

Debt upon statute.

An action upon statute is an action upon a specialty (*Cork Ry. Co.* v. *Goode*, 13 C. B. 826). So the following were within the section, viz., an action by a company for calls under 8 & 9 Vict. c. 16 (*ibid.*); an action for shipping duties (*Shepperd* v. *Hills*, 11 Exch. 55); an action by solicitors for expenses (*Nichols* v. *Regent's Canal Co.*, 63 L. J. Q. B. 641); a claim under warrants for interest on debenture stock issued under the Companies Clauses Act, 1863 (*Re Cornwall Ry. Co.*, [1897] 2 Ch. 74); an action to recover the price of seed from an occupier of land in Ireland (*Magherafelt* v. *Gribben*, 24 L. R. Ir. 520). But not a claim by a borough authority against a county authority for expenses which would be payable out of a particular fund and recoverable by action on the case (*Salford* v. *Lancashire*, 25 Q. B. D. 384). See as to the recovery of paving expenses under the Metrop. Management Acts, *Hampstead* v. *Caunt*, [1903] 2 K. B. 1. The liability of a lunatic to repay to guardians the cost of his maintenance (treated as a statutory liability) was held to fall within Lim. Act, 1623, and not within this section (*Re Newbegin, Eggleton* v. *N.*, 36 Ch. D. 477; *Re Watson, Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72; *Re Taylor, Edmonton Union* v. *Deeley*, [1901] 1 Ch. 480; see *Re Clabbon*, [1904] 2 Ch. 465; *Re Murphy*, [1913] 1 I. R. 504).

Judgments.

Judgments, although specialties, are not within this section (*Jay* v. *Johnstone*, [1893] 1 Q. B. 30, 190).

Awards.

Under this section an action for debt on an award, where the submission is not by specialty, must be brought within six years, which in an action to enforce an award of compensation under the Lands Clauses Act were held to run from the date of the award (*Turner* v. *Midland Ry. Co.*, [1911] 1 K. B. 832). An action of debt on an award under seal was held not to fall within Lim. Act, 1623 (*Hodsden* v. *Harridge*, 2 Wms. Saund. 150).

Fines.

A lord's right to a fine on admittance was barred by this section, time running from the admittance (*Monckton* v. *Payne*, [1899] 2 Q. B. 603).

Penalties.

The words "actions for penalties, damages, or sums of money given to the party grieved by any statute," do not include an action for penalties by an officer of the Goldsmiths' Company, mentioned in 7 & 8 Vict. c. 22 (*Robinson* v. *Currey*, 7 Q. B. D. 465); or an action by a shareholder against directors for misrepresentation under the Directors' Liability Act, 1890 (*Thomson* v. *Clanmorris*, [1900] 1 Ch. 718). See Comp. Consol. Act, 1908, s. 84.

When time begins to run under this section.

In the case of *post obit* bonds, time does not begin to run until the death (*Tuckey* v. *Hawkins*, 4 C. B. 655; see *Barber* v. *Shore*, 1 Jebb & S. 610). On a bond conditioned to pay an annuity, the non-payment of each instalment is a distinct breach, and the statute begins to run against each as it becomes due (*Amott* v. *Holden*, 18

3 & 4 Will. 4, c. 42, s. 3.

Q. B. 593); where Lord Campbell, C.J., said (p. 603): "It is admitted that, since *Sanders* v. *Coward* (15 M. & W. 48), and *Blair* v. *Ormond* (17 Q. B. 423), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture, by reason of the non-performance of the first act in that series, yet if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that" (see *Higgs* v. *Mortimer*, 1 Exch. 711). If a bond with a penalty were given to secure a duty which is to be performed during a period of twelve years, the bond would be forfeited by a delinquency in the first year, but the obligee might elect not to act on it until the delinquency in the twelfth year (*per* Bramwell, B., 7 L. T. 792). Where the breach is a continuing breach, a fresh cause of action arises at every moment of the time during which the breach continues (*Maddock* v. *Mallet*, 12 Ir. C. L. R. 193). But the true inference from long acquiescence in breaches may be that the covenant is released (*Gibbon* v. *Payne*, 23 T. L. R. 250).

The breach of a covenant for good right to convey, occasioned by the existence of a right of way, is not a continuing breach. Time ran from the delivery of the deed (*Turner* v. *Moon*, [1901] 2 Ch. 828; *Spoor* v. *Green*, L. R. 9 Ex. 110. See, however, the judgment of Kelly, C.B., L. R. 9 Ex. 116).

In the case of a present debt and covenant to pay on demand, a demand is not a condition precedent to an action; *secus*, in the case of a covenant to pay a collateral sum on demand; and time runs accordingly (*Re Brown*, [1893] 2 Ch. 300).

A deed of settlement of a company exonerated the transferor of shares from all liabilities subsequently to transfer. In winding-up time ran from the date of the transfer (*Re Portsmouth Banking Co.*, 2 Eq. 167).

Courts of equity and the statute.

Courts of equity adopted many of the provisions of this statute (*Hyde* v. *Price*, 8 Sim. 578). In administration suits specialty debts were held barred under it (*Spickernell* v. *Hotham*, Kay, 669). But where a settlor had constituted himself a trustee of a covenant, time was no bar (*Stone* v. *Stone*, 5 Ch. 74). A covenant to pay a mortgage debt was held to remain in force for more than twenty years by reason of the pendency of a trust (*Bennett* v. *Cooper*, 9 Beav. 252). See, further, the note as to Courts of equity and the Statutes of Limitation, p. 287, *post*.

Remedy for infants, *femes coverts*, &c.

4. That if any person or persons that is, or are, or shall be entitled to any such action or suit, or to such *scire facias*, is, are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this Act, have done; and that if any person or persons against whom there shall be any such cause of action, is, or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are

Absence of defendants beyond seas provided for.

3 & 4 Will. 4, c. 42, s. 4.

before limited after the return of such person or persons from beyond the seas.

Disabilities.

This provision as to disabilities has been altered by the Merc. Law Amendt. Act, 1856, s. 10 (p. 279, *post*), which enacts that the absence beyond seas of the person entitled to the action shall be no disability. As to the meaning of "beyond seas," see sect. 7 of this statute (p. 253, *post*). See further the cases quoted under Limitation Act, 1623, s. 7 (p. 266, *post*), the law as to disabilities under both these sections being now the same. In cases within M. W. P. Act, 1882, s. 1 (2), coverture has ceased to be a disability (*Lowe* v. *Fox*, 15 Q. B. D. 676; *Weldon* v. *Neal*, 51 L. T. 289).

Proviso in case of acknowledgment in writing, or by part payment.

5. That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute (see 16 & 17 Vict. c. 113, s. 23, as to Ireland).

(1) *Acknowledgment in Writing*...250.
(2) *Acknowledgment by Payment*...251.

Since *Sutton* v. *Sutton* (22 Ch. D. 511), a mortgagee's action on covenant to recover principal money secured by a mortgage of land falls within sect. 8 of the R. P. Lim. Act, 1874. And in the note to that section (*ante*, p. 225) the decisions as to acknowledgments thereunder are collected. Before *Sutton* v. *Sutton*, such an action fell within the Civ. Proc. Act, 1833 (*Hunter* v. *Nockolds*, 1 Mac. & G. 640), and accordingly some of the decisions referred to below were in actions relating to mortgages. It has been said that for the purpose of acknowledgments there is no practical distinction between the two statutes (*Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 345).

(1) Acknowledgment in writing.

An acknowledgment may be made by writing or payment. A written acknowledgment may be sufficient, though it came into existence accidentally and without the intention of the party making it (*Read* v. *Price*, [1909] 1 K. B. 50). And if lost, parol evidence

of the contents of the writing may be admitted (S. C. [1909] 2 K. B. 724). The writing is to be signed by the party liable by virtue of such specialty. In the case of several persons who are liable under specialty jointly but not severally, a written acknowledgment may be made by such persons or any of them (*Read* v. *Price*, [1909] 1 K. B. 585). Where one of five persons jointly and severally liable on a bond died, a written acknowledgment signed by his executor was an acknowledgment of the several liability of the deceased obligor and not of the joint liability of the surviving obligors, and did not take the case out of the statute as against them (*Read* v. *Price*, [1909] 1 K. B. 577; see *Slater* v. *Lawson*, 1 B. & Ald. 396).

3 & 4 Will. 4, c. 42, s. 5.

By whom it may be made.

The written acknowledgment need not be made to the person entitled, or amount to a promise to pay (*Read* v. *Price*, [1909] 1 K. B. 588). Therefore, the admission of a bond debt, contained in an answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient (*Moodie* v. *Bannister*, 4 Drew. 433). A conveyance on trust to sell and pay off mortgages was not an acknowledgment within the section of a particular mortgage (*Howcutt* v. *Bonner*, 3 Exch. 491; see *Forsyth* v. *Bristowe*, 8 Exch. 716). As to pleading acknowledgments under the section, see *Kempe* v. *Gibbon* (9 Q. B. 609; 12 Q. B. 662).

To whom.

The case of disability at the time of the acknowledgment existing on the part of the person entitled to the action, or on the part of the person making the acknowledgment, is provided for at the end of this section. See the joint effect of this provision and the Merc. Law Amdt. Act, 1856, s. 11, explained Darb. & Bos. Stat. Lim. 161.

(2) Acknowledgment by payment.

The acknowledgment may also be made by payment; which must be made by a party interested, for the legislature could not mean to give any right against the debtors by the mere act of a stranger (*Roddam* v. *Morley*, 1 De G. & J. 18). The payment of interest to a mortgagee by the assignee of the equity of redemption was payment by the agent of the mortgagor within the section (*Forsyth* v. *Bristowe*, 8 Exch. 716; compare *Newbould* v. *Smith*, 33 Ch. D. 127); so payment by the tenant for life of an equity of redemption (*Dibb* v. *Walker*, [1893] 2 Ch. 429). Payments made by a receiver in a suit, but which were not authorised by the order appointing him, did not take the case out of this statute (*Whitley* v. *Lowe*, 25 Beav. 421; 2 De G. & J. 704; see *Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107). Where the same bond secured payment of different sums to different persons, payment of one sum was held no acknowledgment in respect of the other sum (*Ashlin* v. *Lee*, 23 W. R. 458).

Where several liable.

Where a devisee for life paid interest on a specialty of his testator's, in which the heirs were bound, this was sufficient to preserve the right of action not only against the payor, but also against all remaindermen (*Roddam* v. *Morley*, 1 De G. & J. 1). "If the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest as devisee, who is affected by the payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other persons liable on the specialty" (*per* Lord Cranworth, *ibid.*, 18).

Roddam v. *Morley*.

Roddam v. *Morley* was subsequently followed in *Pears* v. *Laing*, 12 Eq. 41; *Re Hollingshead, H.* v. *Webster*, 37 Ch. D. 651; *Dibb*

3 & 4 Will. 4, c. 42, s. 5.

v. *Walker*, [1893] 2 Ch. 429; *Leahy* v. *De Moleyns*, [1896] 1 Ir. 206; *Re Chant, Bird* v. *Godfrey*, [1905] 2 Ch. 225. In *Re Lacey, Howard* v. *Lightfoot* ([1907] 1 Ch. 339, 355), the Court of Appeal considered *Dickenson* v. *Teasdale* (1 D. J. & S. 52) and *Coope* v. *Cresswell* (2 Ch. 112); decisions apparently inconsistent with *Roddam* v. *Morley*. But in preference they adopted the latter case, the principle of which they applied to a payment treated as an acknowledgment under sect. 8 of the R. P. Lim. Act, 1874. The meaning of the section in the case where more persons than one are liable by virtue of the specialty is now settled by *Roddam* v. *Morley* (*Read* v. *Price*, [1909] 1 K. B. 585). And in such a case an acknowledgment in writing stands on the same footing as payment (S. C., [1909] 2 K. B. 735).

Where a person indebted on a specialty dies having left personal estate, and real estate devised for payment of debts, and also real estate devised beneficially, it was said by Kindersley, V.-C., "There are three parties, each of whom is liable to the claims of a specialty creditor—the executor in respect of the personalty, the trustees in respect of the real estate devised for payment of debts, and the beneficial devisee in respect of the real estate beneficially devised. . . . If any one of these parties makes the payment or gives the acknowledgment, it is a payment or acknowledgment by the party liable by virtue of the specialty" (*Coope* v. *Cresswell*, 2 Eq. 117, in which case the V.-C. held, that payment of interest on a specialty debt of a testator by his personal representatives who were also trustees of real estate devised for payment of debts, took the debt out of the statute as against a beneficial devisee). This holding was reversed by Lord Chelmsford (2 Ch. 112). But the last-mentioned decision has been disapproved in the Court of Appeal (*Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 351).

As regards acknowledgments within the present statute by payment of principal or interest, in the case of several parties being liable (whether jointly only or jointly and severally), it has now been provided by Merc. Law Amdt. Act, 1856, s. 14, that payments by one co-debtor shall not prevent time running under this statute in favour of another co-debtor (see *post*, p. 281).

What amounts to payment.

Where a settlement (under which the husband took the first life interest) comprised stock covenanted to be transferred by him, and the stock was not transferred, time ran in favour of the husband from the execution of the settlement. It could not be assumed that a person had been paying himself the interest of a non-existing fund (*Spickernell* v. *Hotham*, Kay, 669; see also *Stone* v. *Stone*, 5 Ch. 74). But where a settled fund, the income of which the settlor was entitled to receive until insolvency, was lent to him, and judgment was entered against him to secure repayment, time did not run against the judgment until the insolvency (*Re Keay*, I. R. 3 Eq. 659). And where a settlement (under which the husband took the first life interest) comprised money secured by a bond of the husband time did not run against the obligee until his death, he being the person who was both bound to pay the interest on the bond, and entitled to receive the interest under the settlement (*Mills* v. *Borthwick*, 35 L. J. Ch. 31; 13 W. R. 707). So where the wife took the first life interest, and she lived with her husband in amity (*Re Dixon, Heynes* v. *D.*, [1900] 2 Ch. 561). The principle was applied where the same person was entitled to receive the rents of mortgaged land and the interest on the mortgage (*Topham* v. *Booth*, 35 Ch. D. 607), and also where the husband was mortgagor and the wife mortgagee (*Re Hawes, Burchell* v. *H.*, 62 L. J. Ch. 463; see *Re Dixon, supra*). Where money settled to the separate use of a wife was lent to her husband, and she, with his consent,

Same hand to pay and receive.

gave formal receipts for the income, but no money passed, this was payment of interest within the section (*Amos* v. *Smith*, 1 H. & C. 238; *Re Dixon, Heynes* v. *D., supra*). See *Re England, Steward* v. *E.*, [1895] 2 Ch. 820, where the money was charged on land; and also the cases quoted *ante*, pp. 204, 225. 3 & 4 Will. 4, c. 42, s. 5.

A payment upon one of several judgments obtained upon one joint and several bond will prevent recovery upon another of such judgments from being barred (*Re Kingston*, I. R. 3 Eq. 485; see *Brew* v. *Brew*, [1899] 2 I. R. 163).

A bond conditioned for the replacing of stock in specie is not such an instrument as comes within the 5th section of Civil Proc. Act, 1833. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee, is not payment of interest, neither is any sum of money thereby acknowledged to be due (*Blair* v. *Ormond*, 17 Q. B. 436, 437).

As to the proof of payment by indorsements on a bond, see 1 Taylor, Ev. 472—476, 11th ed.

6. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after (16 & 17 Vict. c. 113, s. 21, Ireland). The limitation after judgment reversed.

See *Tynte* v. *The Queen* (7 Q. B. 216). Outlawry has been abolished in civil cases by Civil Proc. Acts Repeal Act, 1879, s. 3.

7. That no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this Act, or of the Act passed in the 21st year of the reign of King James the First, intituled "An Act for Limitation of Actions, and for avoiding of Suits in Law." No part of the United Kingdom, &c., to be deemed beyond the seas within meaning of this Act.

The Act 4 Anne, c. 16, s. 19, was omitted from this section, and the consequence was to make Ireland a place beyond the seas within the meaning of 4 Anne, c. 16, s. 19, notwithstanding the Act of Union (*Lane* v. *Bennett*, 1 M. & W. 70; *Battersby* v. *Kirk*, 2 Bing. N. C. 603). But see now the Merc. Law Amdt. Act, 1856, s. 12, *post*, p. 280.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, are to be deemed to be beyond the seas within the meaning of the Act Beyond the seas within the Irish Acts.

3 & 4 Will. 4, c. 42, s. 7.

3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, st. 2, c. 6 (3 & 4 Vict. c. 105, s. 36, which is repealed by 16 & 17 Vict. c. 113, s. 3).

V.—Of the Limitation of Actions on simple Contract Debts, &c.

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The Statute of Frauds Amendment Act, 1828, ss. 1, 3, 4 ... 267

THE LIMITATION ACT, 1623.

21 Jac. 1, c. 16, ss. 3, 4, 7.

§ 3. *Limitation of Actions on simple Contracts, and certain Personal Actions*...254.
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Limitation of certain personal actions.

3. That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than for such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after. See as to Ireland, 16 & 17 Vict. c. 113, s. 20.

(1) *Statute does not extinguish the Debt*...255.
(2) *Application of the Act*...255.
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(4) *Continuous running of Time and Actions by and against Executors*...264.

21 Jac. 1, c. 16, s. 3.

(1) Statute does not extinguish debt, but merely bars remedy.

This statute does not extinguish the debt but merely bars the remedy by action (*Smith* v. *Betty*, [1903] 2 K. B. 322; see *Courtenay* v. *Williams*, 15 L. J. Ch. 204; *Curwen* v. *Milburn*, 42 Ch. D. 434; *Re Hancock, H.* v. *Berrey*, 59 L. T. 199; *Re Hepburn*, 14 Q. B. D. 400, where it was said that for the purpose of proving in bankruptcy the remedy by action can alone be looked at). On the above principle, a creditor whose action is barred may avail himself of any other means of recovering his debt he may possess (*Re Abrahams, A.* v. *A.*, [1908] 2 Ch. 73).

An executor may out of money coming to one of the testator's debtors from the testator's estate retain a barred debt (see cases quoted *post*, p. 294). If a debtor pay money to a creditor without appropriation, the creditor may apply it in payment of a barred debt (*Mills* v. *Fowke*, 5 Bing. N. C. 455; see *Friend* v. *Young*, [1897] 2 Ch. 434). A solicitor recovered by his lien barred costs (*Higgins* v. *Scott*, 2 B. & Ad. 413; *Re Murray* (1867), W. N. 190; *Re Carter* (1885), W. N. 184; see *Re Brockman*, [1909] 2 Ch. 170; *Spears* v. *Hartley*, 3 Esp. 81). Statute-barred items were held taxable under an order directing taxation of a trustee's costs as between him and his *cestui que trust* (*Budgett* v. *B.*, [1895] 1 Ch. 202); but they are not taxable under the common order as between a client and his solicitor (*Re Brockman*, [1909] 2 Ch. 175), nor can they be recovered under the submission to pay (*ibid.*). As to a client recovering from his solicitor (under the summary jurisdiction) money the claim to which is statute-barred, see *Sittingbourne Co.* v. *Lawson* (1886), W. N. 76.

Set-off.

Set-off, however, is within sect. 3 of the Limitation Act, 1623 (Stat. Frauds Amendment Act, 1828, s. 4, *post*, p. 279); therefore, a debt barred by the statute cannot be set off (*Remington* v. *Stevens*, 2 Str. 1271; *Rawley* v. *R.*, 1 Q. B. D. 460; *Smith* v. *Betty*, [1903] 2 K. B. 323). The set-off must have been barred before the commencement of the suit in order to support a replication of the statute (*Walker* v. *Clement*, 15 Q. B. 1046; *Re Ballard, Lovell* v. *Forester* (1890), W. N. 64). A claim to retain a barred loan was disallowed as being in the nature of set-off (*Dingle* v. *Coppen*, [1899] 1 Ch. 726). As to replying the statute to part of the claim of set-off, see *Mead* v. *Bashford*, 5 Ex. 336; see also *Fairthorne* v. *Donald*, 13 M. & W. 424; and see R. S. C., Ord. XIX., r. 15.

(2) Cases within this section.

An action of debt for a penalty incurred under a bye-law, made by virtue of a royal charter under the Great Seal is an action of debt grounded upon a contract without specialty within this section (*Tobacco-pipe Makers* v. *Loder*, 16 Q. B. 765). The liability of an equitable assignee of leaseholds in respect of the covenants in the lease is that of simple contract within the statute (*Saunders* v. *Benson*, 4 Beav. 351; see *Moore* v. *Greg*, 2 Phil. 717). So an action in an English Court to recover a simple contract debt for which judgment had been recovered in a foreign Court was barred in six years (*Dupleix* v. *De Roven*, 2 Vern. 540; compare *Wilson* v. *Dunsany*, 18 Beav. 293). When by an instrument not under seal, A agrees to repay an advance and execute a mortgage, this statute would at the end of six years bar an action to recover the advance or for breach of the contract to execute the mortgage (*Firth* v. *Slingsby*, 58 L. T. 483). The section applies to the personal remedy,

21 Jac. 1, c. 16, s. 3.

even where the simple contract debt is charged on land (*Barnes* v. *Glenton*, [1899] 1 Q. B. 885). An action *in rem* in the Admiralty Court to recover damages for collision is not within this Act (*Kong Magnus*, [1891] P. 223).

Banker and customer.

Money placed with a banker to current account in the ordinary way is *money lent* to the banker with a superadded obligation that it is to be paid when called for by cheque; and if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the statute is a bar to its recovery (*Pott* v. *Clegg*, 16 M. & W. 324; distinguish money paid to a deposit account, *Re Tidd, T.* v. *Overell*, [1893] 3 Ch. 156). The relation between a banker and his customer is that of debtor and creditor, and not trustee and *cestui que trust* (*Foley* v. *Hill*, 1 Phill. 399; 2 H. L. Ca. 28; and see *Moxon* v. *Bright*, 4 Ch. 294). But, where a fund was standing to the account of two trustees, and the bankers, who had notice that it was a trust fund, transferred it to the account of the tenant for life, and thereby obtained payment of a debt due from him to them, the trustees had a right to compel the bankers to replace the fund, and the statute was inapplicable (*Bridgman* v. *Gill*, 24 Beav. 302; see *Foxton* v. *Manchester Banking Co.*, 44 L. T. 406; *Coleman* v. *Bucks Bank*, [1897] 2 Ch. 243). As to the parties to actions against bankers, and the practice of the common law Courts in allowing amendments to avoid the effect of the statute, see *Crawford* v. *Cocks* (20 L. J. Ex. 169); *Corne* v. *Malins* (*ibid.*, 434).

Solicitor and client.

The statute bars a solicitor's action for costs (*Coburn* v. *Colledge*, [1897] 1 Q. B. 702). As to the effect of a solicitor's lien, see cases quoted *supra*, p. 255; and as to the running of time in the case of actions for costs, see p. 263, *post*. In the absence of fraud, the statute bars a client's action to recover money received by a solicitor as his client's agent (*Re Hindmarsh*, 1 Dr. & Sm. 129; *Crawford* v. *Crawford*, 16 W. R. 411; *Watson* v. *Woodman*, 20 Eq. 721). But where a solicitor was dealing for his own benefit with his client, the client was entitled to open accounts settled more than six years before action (*Cheese* v. *Keen*, [1908] 1 Ch. 245), and the statute did not apply where a solicitor received money of which he knew his client was an express trustee (*Re Bell, Lake* v. *B.*, 34 Ch. D. 462; see *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390); nor where a solicitor received his client's money under a special power of attorney, which was held to create a trust (*Burdick* v. *Garrick*, 5 Ch. 233; *Gray* v. *Bateman*, 21 W. R. 137). See now Trustee Act, 1888, s. 8, *post*. No trust, however, is created where a solicitor is employed to invest in a particular mortgage, or to find securities to be approved by the client and then invest, and the client does approve the security; in such a case the statute will bar an action for negligence (*Dooby* v. *Watson*, 39 Ch. D. 178; see *Hughes* v. *Twisden*, 54 L. T. 570; *Mara* v. *Browne*, [1896] 1 Ch. 199). See also *Smith* v. *Pococke*, 2 Drew. 197.

Master and steward.

Where during his life a master had permitted his steward to retain his salary out of moneys in his hands, the steward, in accounting after the master's death, was allowed his salary for twenty years, the statute not applying (*Hawkins* v. *H.*, 28 W. R. 240).

Principal and agent.

An action by a principal for an account against his agent is, generally speaking, within the statute, time not commencing to run until the agency is terminated (*Re Sharpe, Masonic Co.* v. *Sharpe*, [1892] 1 Ch. 166; see *Burdick* v. *Garrick*, 5 Ch. 233; *Friend* v. *Young*, [1897] 2 Ch. 421).

Account.

Before the Stat. Frauds Amendment Act, 1828, it was held, that in the case of open accounts between persons other than merchants, the statute did not begin to run so long as the account was continued

(see *Foster* v. *Hodgson*, 19 Ves. 185). The effect, however, of that Act in the case of actions of debt or assumpsit was, that although there might be a mutual open running account, the existence of items not barred was not sufficient to take items which were barred out of the statute (*Williams* v. *Griffiths*, 2 C. M. & R. 45; *Cottam* v. *Partridge*, 4 M. & G. 271; see *Jackson* v. *Ogg*, Johns., 397). Merchants' accounts were excepted from the Lim. Act, 1623 (see as to the exception, *Robinson* v. *Alexander*, 2 Cl. & Fin. 717); but this exception has been repealed by the M. L. A. Act, 1856, s. 9 (*post*, p. 279), and merchants' accounts now stand upon the same footing as other accounts. The statute bars an action by a merchant against his factor (*Friend* v. *Young*, [1897] 2 Ch. 431); and an action to recover the balance of the proceeds of sale of the cargo of a wrecked vessel sold by an agent of the insurers (*Henry* v. *Hammond*, [1913] 2 K. B. 515).

21 Jac. 1, c. 16, s. 3.

Merchants' accounts.

In the case of partnership accounts it is settled that, after a partnership has ceased, any claim on simple contract by one partner against the others in respect thereof is *prima facie* subject to be barred after six years. (*Knox* v. *Gye*, L. R. 5 H. L. 656; in which case a suit for an account by the executors of a deceased partner instituted against the surviving partner more than six years from the death, was barred, although the business had been carried on and assets got in by the defendant during the six years; see also *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257, where time ran against the estate of the deceased partner from the grant of administration). In another case an action for an account brought more than six years after a dissolution was barred (*Noyes* v. *Crawley*, 10 Ch. D. 31, where *Miller* v. *M.*, 8 Eq. 499, was treated as overruled). On the other hand, "while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of Lindley, L.J. (Partnership, 7th ed. 553), is to the contrary" (*Barton* v. *N. Stafford. Co.*, 38 Ch. D. 463; see *The Pongola*, 73 L. T. 512). The statute was no bar where the accounts of an old partnership had been carried on into a new partnership without interruption or settlement (*Betjemann* v. *B.*, [1895] 2 Ch. 474). A partner is entitled to rely on the good faith of his co-partner, and concealed fraud (even where due caution would have discovered it) will prevent the statute applying (*ibid.*).

Partnership accounts.

An action by a shareholder against a company for unpaid dividends appears to be within the section (*Re Severn Ry. Co.*, [1896] 1 Ch. 559; see cases quoted, *ante*, p. 248). Where an action was brought to compel a company to replace stock transferred on a forgery, time ran from the refusal of the company after notice of the forgery to treat the plaintiff as owner (*Barton* v. *N. Stafford Co.*, 38 Ch. D. 458).

Companies.

A shareholder's action against directors under sect. 3 of the Directors' Liability Act, 1890 (see Comp. Consol. Act, 1908, s. 84) is within the section (*Thomson* v. *Clanmorris*, [1900] 1 Ch. 718); so an action based on concealed fraud (e.g., to recover a bribe secretly received by a director) is within the section, time running from the discovery of the fraud (*Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; *Re Fitzroy Bessemer Co.*, 50 L. T. 144; see *Re Cape Breton Co.*, 29 Ch. D. 810). Compare the case of a claim against directors for improperly paying dividends, which was a claim for a breach of trust, and was not then capable of being barred, *Flitcroft's Case* (21 Ch. D. 519); and see the principle stated by Cotton, L.J. (5 Ex. D. 325). Where an auditor was guilty of a breach of duty to the company, the plea of the statute was admitted without argument (*Leeds Co.* v. *Shepherd*, 36 Ch. D. 809). In an action for damages

Fraud, breach of duty.

21 Jac. 1, c. 16, s. 3.

arising from fraudulent misrepresentation, time ran from the discovery of the fraud (*Gibbs* v. *Guild*, 9 Q. B. D. 59; compare *Moore* v. *Knight*, [1891] 1 Ch. 547; *Rawlins* v. *Wickham*, 3 D. G. & J. 304, and the other cases cited *post*, p. 289). As to an action to rescind a contract on the ground of fraud, see *Redgrave* v. *Hurd*, 20 Ch. D. 13; *Molloy* v. *Mutual Reserve Co.*, 22 T. L. R. 525; *Oelkers* v. *Ellis*, [1914] 2 K. B. 139. And as to an injunction in aid of an action of deceit, see *Fullwood* v. *F.* (9 Ch. D. 176).

Fraudulent trespass.

The statute applies to Chancery proceedings in respect of trespass unless some equitable grounds repel it (*Trotter* v. *Maclean*, 13 Ch. D. 584). Where for years coal was furtively taken from a mine by a wilful and secret underground trespass, the statute did not apply (*Bulli Co.* v. *Osborne*, [1899] A. C. 351). To avoid the defence of the statute in such a case it is not necessary to show active concealment (*ibid.*). But breaking bounds into a neighbouring colliery is not *per se* fraudulent (*Bulli Co.* v. *Osborne*, *supra*; disapproving *Ecc. Commrs.* v. *N. E. Ry.*, 4 Ch. D. 845); and the fact that the defendants kept a map, in which they omitted to mark their workings into the plaintiff's mine, was not sufficient to establish fraud (*Daws* v. *Bagnall*, 23 W. R. 690). Where the wrongful working of the defendant was with the knowledge of the plaintiff, it was treated as inadvertent, and an account was only directed for six years (*Trotter* v. *Maclean*, 13 Ch. D. 574; see the cases classified, *ibid.* 586; and see *Dean* v. *Thwaite*, 21 Beav. 61).

As to waste, see *post*, p. 290.

Devastavit.

A person injured by a devastavit is but a simple contract creditor of the executor (*Charlton* v. *Low*, 3 P. W. 331). And in general his claim is barred by this statute when six years have elapsed from the act constituting the devastavit (*Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale, Blake* v. *G.*, 22 Ch. D. 820; *Re Hyatt, Bowles* v. *H.*, 38 Ch. D. 618). The rule was applied where the devastavit consisted of parting with assets without providing for a contingent claim, and the action was brought within six years after the contingency had ripened into a certain claim (*Lacons* v. *Warmoll*, [1907] 2 K. B. 350; see *Re Croydon, Hincks* v. *Roberts*, 55 Sol. J. 632). But a claim by originating summons by a residuary legatee against an executor for administration is an action to recover a legacy within sect. 8 of the R. P. Lim. Act, 1874 (*Re Richardson, Pole* v. *Pattenden*, [1920] 1 Ch. 423, where *Re Croydon* was disapproved in C. A.).

Arrears of pauper lunatic's maintenance.

Where a pauper lunatic becomes entitled to property, the guardians can only recover six years' arrears in respect of his maintenance either from himself (*Re Newbegin, Eggleton* v. *N.*, 36 Ch. D. 477; see *Re Weaver*, 21 Ch. D. 615) or from his representatives (*Re Watson, Stamford* v. *Bartlett*, [1899] 1 Ch. 72; *Re Taylor, Edmonton* v. *Deeley*, [1901] 1 Ch. 480; *Re Murphy*, [1913] 1 I. R. 504). *Secus* where payments on account had been made by a receiver appointed in the lunacy (*Wandsworth* v. *Worthington*, [1906] 1 K. B. 420) or where the claim was by the Crown for the maintenance of a criminal lunatic (*Re J.*, [1909] 1 Ch. 574).

India.

Foreign contracts.

Prior to 1859 this statute extended to India (*Buckmaboye* v. *Mottichund*, 8 Moore, P. C. 4; but see now *Re Peat*, 7 Eq. 302). In the construction of a contract, the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law where the contract is sought to be enforced (*Ex p. Melbourne*, 6 Ch. 69). Therefore a debt contracted abroad can only be enforced in England within the time limited by the English statutes. (*Huber* v. *Steiner*, 2 Bing. N. C. 202; see *Harris* v. *Quine*, L. R. 4 Q. B. 653; *Pardo* v. *Bingham*, 4 Ch. 738; *Finch* v. *F.*, 35 L. T. 235;

Alliance Bank v. *Carey*, 5 C. P. D. 429). But where a debt was disallowed as barred in an English administration action, and the creditor afterwards obtained in Scotland a judgment which he registered in England under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), he was restrained from enforcing his judgment only on the terms of being admitted to prove (*Re Low, Bland* v. *L.*, [1894] 1 Ch. 147). See as to the Irish Free State *Wakely* v. *Triumph Cycle Co.* [1924] 1 K. B. 214, where it was held that that Act has ceased to apply to that State, and that a plaintiff resident in it without assets in England is in the position of a foreigner. 21 Jac. 1, c. 16, s. 3.

(3) When time begins to run.

There cannot be a cause of action within the meaning of the statute from which time will run unless there be not only a person in existence capable of suing (*Murray* v. *East India Co.*, 5 B. & Ald. 214; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257), but also a person who can be sued (*Douglas* v. *Forrest*, 4 Bing. 704; see *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 358). An ambassador cannot be sued either while he is accredited, or during such reasonable period afterwards as he requires for preparing to return home; and time does not run against his creditors until the expiration of such period (*Musurus Bey* v. *Gadban*, *supra*), and see the cases as to executors and administrators, *post*, p. 265. Cause of action from which time runs.

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(b) *Actions* ex Contractu...260.
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(d) *Costs*...263.

(a) Running of time in actions *ex delicto*.

In an action on the case for negligence (*e.g.*, against a solicitor), where the plaintiff alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the negligence was discovered, or when the consequential damage accrued (*Howell* v. *Young*, 5 B. & C. 259; *Smith* v. *Fox*, 6 Hare, 386; *Hughes* v. *Twisden*, 54 L. T. 570. Compare the rule in assumpsit, *Short* v. *M'Carthy*, 3 B. & Ald. 626, *post*, p. 261). Concealment of the negligence without fraud would make no difference (*Armstrong* v. *Milburn*, 54 L. T. 247, 723; and see *Osgood* v. *Sunderland*, 111 L. T. 529). There is no duty on the part of the solicitor to disclose his negligence (*Wood* v. *Jones*, 61 L. T. 551). Time runs against a shareholder's right to sue directors for compensation under sect. 3 of the Directors' Liability Act, 1890 (see Comp. Consol. Act. 1908, s. 84), from the subscription for the shares (*Thomson* v. *Clanmorris*, [1900] 1 Ch. 718). In actions on the case for injury to real property, where the ground of the action is the consequential damage, time runs from the actual damage, and not from the wrongful act (*Bonomi* v. *Backhouse*, 9 H. L. C. 503; an action for negligently working mines, where the working which caused the thrust was more than six years before action brought, but the actual damage did not commence till within six years). In the case of a further subsidence, time commences to run from such subsidence (*Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127, overruling *Lamb* v. *Walker*, 3 Q. B. D. 389; see *Crumbie* v. *Wallsend Board*, [1891] 1 Q. B. 503; and *West Leigh Co.* v. *Tannicliffe*, [1908] A. C. 27). Case.

In trover, time runs from the conversion (*Denys* v. *Shuckburgh*, 4 Y. & C. 42). A's furniture having been seized under an execution, and then purchased by his friends, was left in A's possession for more than six years. After A's death the furniture was Trover. Detinue.

21 Jac. 1, c. 16, s. 3.

claimed by his friends, and adversely by his administratrix: it was held that the rights of the former were not barred by the statute, which could only apply from six years from a conversion (*Edwards* v. *Clay*, 28 Beav. 145). Where once there has been a complete cause of action arising out of contract or tort, the statute begins to run, and subsequent circumstances, which would but for the prior wrongful act or default have constituted a cause of action, are disregarded (*Wilkinson* v. *Verity*, L. R. 6 C. P. 209). In the case of tort this principle only applies where the defendant is the sole wrongdoer (*Miller* v. *Dell*, [1891] 1 Q. B. 470). Where an action of detinue is founded upon a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue, either for the wrong or for the breach of the original terms of deposit, time will run from the period at which the property was first wrongfully dealt with (*Wilkinson* v. *Verity*, L. R. 6 C. P. 206; see *Hinchcliffe* v. *Sharpe*, 77 L. T. 714). Where A's lease was deposited fraudulently with B to secure a loan, and the mortgage debt and lease were afterwards transferred to C, both B and C being ignorant of the fraud, and C having refused to return the lease, A brought detinue against him, the statute ran from the time when A first had a complete cause of action against C by reason of his refusal, irrespective of the existence of any previous cause of action against B (*Miller* v. *Dell*, [1891] 1 Q. B. 468; *Spackman* v. *Foster*, 11 Q. B. D. 99). It was doubted whether the statute would prevent a person rightfully in possession of land from recovering title deeds more than six years after their conversion ([1891] 1 Q. B. 472). In an action for detention of title deeds, time does not begin to run so long as the deeds are in the possession of the person enjoying the land, although such enjoyment be wrongful (*Plant* v. *Cotterell*, 5 H. & N. 430).

Fraud.

As to the running of time in the cases of concealed fraud, see the cases on p. 289.

False imprisonment.

As to when time runs in the case of an action for false imprisonment, see *Violett* v. *Simpson* (8 El. & Bl. 344; 6 W. R. 12).

(b)

In actions *ex contractu* time only runs from complete cause of action,

The time limited by the statute does not begin to run until there be a full and complete cause of action (see *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 358). Where the cause of action does not arise until after request made, the statute will only run from the time of such request (*Gould* v. *Johnson*, 2 Salk. 422; 2 Saund. 63 b, n.). If the contract be to pay money at a future period, or upon the happening of a certain event, the statute does not begin to run until that specified period or that event (*Fenton* v. *Imbers*, 1 W. Bl. 354; 3 Burr. 1278). If goods be consigned to a factor for sale, an action does not lie against him for not accounting for them, until after a demand made of an account; and the statute, therefore, in such case runs only from the time of such demand (*Topham* v. *Braddick*, 1 Taunt. 572). On a sale of goods on credit, the statute begins to run from the time when credit has expired (*Helps* v. *Winterbottom*, 2 B. & Ad. 431). In general, the day on which the cause of action accrued is to be included (Hob. 109; 4 Moore, 465).

but runs from earliest time.

The statute runs from the earliest time at which an action can be brought (*Reeves* v. *Butcher*, [1891] 2 Q. B. 511; see *Barker's Claim*, [1894] 3 Ch. 290). In assumpsit the statute begins to run from the breach of the promise, and not from the consequential damage. In an action against an attorney for an omission to make a search, which took place upwards of six years before, the statute was a bar, though the omission was not discovered till within the

six years (*Short* v. *M'Carthy*, 3 B. & Ald. 626; *Brown* v. *Howard*, 2 Brod. & B. 73; *Battley* v. *Faulkner*, 3 B. & Ald. 288). Compare the rule in an action on the case (*Howell* v. *Young*, 5 B. & C. 259, *ante*, p. 259). As regards the liability of a husband for his wife's ante-nuptial debts under sects. 14, 15 of M. W. P. Act, 1882, time runs in favour of the husband from the date of the cause of action against the wife, not from marriage (*Beck* v. *Pierce*, 23 Q. B. D. 323). The defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of default, to have judgment for the whole. The fact that the first default was made more than six years before action was a defence, not only as to instalments due more than six years ago, but also as to those due within that period (*Hemp* v. *Garland*, 4 Q. B. 519). If any one of the securities for an annuity are set aside, the grantee may recover back the purchase-money on the ground of failure of consideration, and the statute runs from the time when the security is set aside (*Huggins* v. *Coutes*, 5 Q. B. 432; *Cowper* v. *Godmond*, 9 Bing. 748; see *Churchill* v. *Bertrand*, 3 Q. B. 568). 21 Jac. 1, c. 16, s. 3.

Guarantees.

On the construction of a guarantee for a current account given to a bank, time ran against the bank's right to sue on the guarantee as regards each item of the account as it became due. The bank, however, recovered interest which had accrued within six years, although the principal was barred (*Parr's Bank* v. *Yates*, [1898] 2 Q. B. 460). An action on a guarantee was held barred (*Henton* v. *Paddison*, 68 L. T. 405). The points from which time runs in an action on a warranty and in an action on a contract of indemnity are different. And the difference may be material in considering which should be implied (*Sheffield* v. *Barclay*, [1903] 2 K. B. 596; [1905] A. C. 404).

Debt payable on demand.

In the case of a present debt and promise to pay on demand, the demand is not a condition precedent to an action: *secus*, in the case of a promise to pay on demand a collateral sum—*e.g.*, by a surety (*Re Brown*, [1893] 2 Ch. 300; see *Birks* v. *Trippet*, 1 Wms. Saund. 38). Where money was advanced to a firm to be repaid on demand, with compound interest: the statute ran from the date of the advance (*Jackson* v. *Ogg*, Johns. 397); in which case it was also held that entries in the books of the firm, crediting the lender with interest, did not affect the operation of the statute. Compare the cases as to a mortgagee's accounts, *ante*, p. 201. Where the plaintiff advanced £5,000 to assist an undertaking, and the defendant was not to be personally liable, but the plaintiff was to be paid out of the profits, the statute did not run until after the plaintiff's first demand. A distinction was drawn between debts payable on demand, and debts recoverable on demand (*Knox* v. *Gye*, 15 W. R. 628). In an action to recover paving expenses under the Metrop. Man. Acts, time did not run against the vestry until demand (*Hampstead* v. *Caunt*, [1903] 2 K. B. 5). The defendant, drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise to pay the bills, "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." The statute ran from the time of the defendant becoming able to pay, though the plaintiff had made no demand, and had no knowledge of such ability (*Waters* v. *Thanet*, 2 Q. B. 757; see *Hammond* v. *Smith*, 33 Beav. 452; *Bethell* v. *Bethell*, 34 Ch. D. 561). A promissory note being given to a banker by A and a surety, and a contemporaneous agreement being executed showing the note to be given as a security for A's banking account, the statute did not run from the time when A became indebted to the bank, but from the time when the balance was struck (*Hartland* v. *Jukes*, 32 L. J. Exch. 162). Time runs without demand in the case of money

21 Jac. 1, c. 16, s. 3.

paid into a bank on current account (*Pott* v. *Clegg*, 16 M. & W. 32, see *ante*, p. 256); but a demand is necessary in the case of an ordinary deposit account (*Re Tidd; Tidd* v. *Overell*, [1893] 3 Ch. 154); also in the case of money entrusted to another for safe custody (*ibid.*); also in the case of a loan to a building society on the terms that the same should be repayable on notice (*Atkinson* v. *Bradford Society*, 25 Q. B. D. 377). But time ran from the date of an advance, notwithstanding that the lender was authorised to sell bonds deposited as security, and the borrower undertook to pay the difference (*Re McHenry, McDermott* v. *Boyd*, [1894] 3 Ch. 290).

Bills and notes.

In the case of a note, payable on demand, the statute runs from the date of the note (*Christie* v. *Fonsick*, 1 Selw. N. P. 301, 13th ed.; *Re George; Francis* v. *Bruce*, 44 Ch. D. 627). So in the case of a cheque given for a pre-existing debt (*Bethell* v. *Bethell*, 34 Ch. D. 566). It makes no difference that the note is payable with interest (*Norton* v. *Ellam*, 2 M. & W. 461). Where, upon a loan, the borrower, before the advance was made, gave to the lender a promissory note payable on demand, it was said that time ran from the giving of the note, not from the date of the advance (*Buccleuch* v. *Eden*, 61 L. T. 360). Where in form a note is payable twenty-four months after demand, the cause of action on the note does not accrue, and the statute does not begin to run until twenty-four months after demand made (*Thorpe* v. *Boothe*, 1 Ry. & Moo. 388). Payment of interest upon a promissory note payable on demand, although there be no independent evidence that any demand of payment of the note has been made, is of itself evidence of a demand (*Bamfield* v. *Tupper*, 7 Exch. 27; *Re Rutherford; Brown* v. *Rutherford*, 14 Ch. D. 687). Where a note is payable after sight, the statute runs only from the time of presentment (*Holmes* v. *Kerrison*, 2 Taunt. 323; and see *Savage* v. *Aldred*, 2 Stark. 232). As to when bills and notes are to be deemed payable on demand, see Bills of Exchange Act, 1882, ss. 10, 11, 88.

Where the statutory period for suing on a note expired on a Sunday, and a writ was issued on Monday, the action was held barred, R. S. C. Ord. 64, r. 3, not applying (*Morris* v. *Richards*, 45 L. T. 210; *Gelmini* v. *Moriggia*, [1913] 2 K. B. 549). Where a debtor draws a bill to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment to defeat the statute only from the time of the delivery of the bill by the debtor, not from the time of its payment (*Irving* v. *Veitch*, 3 M. & W. 90). The defendant gave his acceptance in blank on a bill to S., who filled up the same long afterwards. The defendant being sued on the bill, and having pleaded the statute, the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank (*Montague* v. *Perkins*, 22 L. J. C. P. 187). In the case of a bill of exchange drawn on a bank, time did not commence to run against the holder's right to sue the drawer until presentation to the bank for payment (*Re Boyse; Crofton* v. *Crofton*, 33 Ch. D. 612). In the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment (*Wilkinson* v. *Verity*, L. R. 6 C. P. 209; see *Whitehead* v. *Walker*, 9 M. & W. 506). K. being indebted to the plaintiffs and to the defendant, and also to a banking company, it was agreed between all the parties that to secure K.'s debt to the company the defendant should draw upon K. three bills of exchange, payable to the plaintiffs, and that the plaintiffs should indorse them to the company. The bills became due in 1843, and

were dishonoured. In 1847 the company sued the plaintiffs on the bills, and the plaintiffs, in 1851, paid the amount: it was held, in 1852, that the plaintiffs were barred by the statute from suing the defendant as drawer of the bills (*Webster* v. *Kirk*, 17 Q. B. 944). 21 Jac. 1, c. 16, s. 3.

Where a bill is drawn payable at a future period for a sum lent by payee to drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the bill became due (*Wintersheim* v. *Carlisle*, 1 H. Bl. 631). Where an advance was made by the lender giving to the borrower a cheque which was subsequently paid, time ran against the lender, in an action for money lent, from the payment, not the giving of the cheque (*Garden* v. *Bruce*, L. R. 3 C. P. 300).

As to actions for contribution, see *post*, p. 291. Contribution.

(c) Effect of fraud.

Before the Jud. Acts it was held that it was no answer at law to a plea of the statute that the plaintiff was prevented by the defendant's fraud from knowing of the cause of action until after the time of limitation had expired (*Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39; *Hunter* v. *Gibbons*, 1 H. & N. 459). The rule was different in equity where time ran from the discovery of the fraud (*Blair* v. *Bromley*, 2 Phil. 354). The rule in equity now prevails at least in cases where before the Jud. Acts there was a concurrent remedy both in law and equity (*Gibbs* v. *Guild*, 9 Q. B. D. 59; *Re Crosley, Munns* v. *Burn*, 35 Ch. D. 266). As to purely common law actions, where there was no such concurrent remedy, see *Armstrong* v. *Milburn*, 54 L. T. 247, 723; *Barber* v. *Houston*, 18 L. R. Ir. 475; *Osgood* v. *Sunderland*, 111 L. T. 529. In cases falling within the Trustee Act, 1888, s. 8, the rule in *Blair* v. *Bromley* is not affected by that section (*Moore* v. *Knight*, [1891] 1 Ch. 547). Concealment of a cause of action without fraud makes no difference (*Armstrong* v. *Milburn*, 54 L. T. 723). Where fraud or non-discovery of fraud is relied on as taking a case out of the statute, it must be the fraud of the person who invokes the statute (*Thorn* v. *Heard*, [1895] A. C. 495).

(d) Actions for costs.

The cause of action in respect of a solicitor's costs arises when the work is completed, from which time the statute runs, and not from a month after delivery of bill (*Coburn* v. *Colledge*, [1897] 1 Q. B. 702). In the case of bills of costs items dated more than six years before action will be barred, where the work was miscellaneous (*Beck* v. *Pierce*, 23 Q. B. D. 323), or the employment not continuous (*Phillips* v. *Broadley*, 9 Q. B. 744). Where, however, the employment was continuous and lasted till within the six years, such items will not be barred (*Harris* v. *Quine*, L. R. 4 Q. B. 653). As where a solicitor is retained to conduct an action; in which case he cannot, as a rule, sue for his costs until the termination of the action or of his retainer (*Harris* v. *Osbourn*, 2 C. & M. 629; *Nicholls* v. *Wilson*, 11 M. & W. 106; see *Underwood* v. *Lewis*, [1894], 2 Q. B. 306; *Court* v. *Berlin*, [1897] 2 Q. B. 396). So costs incurred in conducting a suit in which no final decree had been made were held not to be barred, though no steps had been taken in the suit for ten years prior to action brought (*Whitehead* v. *Lord*, 7 Exch. 691; see *Stokes* v. *Trumper*, 2 K. & J. 232; *Baile* v. *B.*, 13 Eq. 497). The statute will, as a rule, run from the date of the judgment in the action for which the retainer was given (*Rothery* v. *Munnings*, 1 B. & Ad. 15); but when an appeal is brought, the employment will be considered continuous as from the commencement of the action (*Harris* v. *Quine*, L. R. 4 Q. B. 657). During the course of the action the solicitor may give reasonable notice to the client to supply him with funds, and on refusal sue for costs. The retainer will

21 Jac. 1, c. 16, s. 3.

also be determined by the death of the client (*Whitehead* v. *Lord*, 7 Exch. 691). As to part payment in the case of bills of costs, see *Morley* v. *Finney* (1870, W. N. 82). And as to taxation where some of the items of a bill are barred, see *Curwen* v. *Milburn* (42 Ch. D. 424); *Budgett* v. *B.*, ([1895] 1 Ch. 202); *Re Brockman* ([1909] 2 Ch. 170).

Costs in lunacy.

Costs incurred by solicitors in prosecuting a commission in lunacy, and subsequently acting on behalf of the committee, were held (at the lunatic's death) not barred by the lapse of six years during his life; for any action for the recovery of the claim would have been restrained (*Stedman* v. *Hart*, Kay, 607). See the cases as to a lunatic's maintenance, *post*, p. 299.

Where costs were incurred in obtaining an Act for a railway, subsequently abandoned, time did not commence to run until the company had assets (*Re Kensington Station*, 20 Eq. 197).

Costs incurred by a company which is afterwards wound up.

Where solicitors delivered to a liquidator papers, on which they had a lien upon his undertaking in writing to pay out of the first funds available, the statute had no application (*Re Gloucester Ry. Co.*, 2 Giff. 47). A solicitor's right to have a call made for his payment may be lost by laches (*Ex p. A'Beckett*, 2 Jur. (N.S.) 684; see *Re Gloucester Ry. Co.*, *supra*).

(4) Continuous running of time.

Under the Winding-up Acts of 1848-49, an order to wind up a company did not stop time from running against a right of action accrued previously to the order (*Ex p. Forest*, 2 Giff. 42). But the carrying in a claim under the winding-up did so (*Wryghte's Case*, 5 De G. & Sm. 244). Under the Companies Consol. Act, 1908, a winding-up order stops the running of time (*Re General Rolling Stock Co.*, 7 Ch. 646). Compare the similar effect of judgment in an administration action, *post*, p. 296.

Effect of winding-up order.

Inability to sue, &c.

It was formerly laid down that when once time had begun to run, no subsequent disability or inability to sue would stop it (*Rhodes* v. *Smethurst*, 4 M. & W. 42). But it has since been held, that where a debtor takes out administration to his creditor, the running of time will be suspended during the administration (*Seagram* v. *Knight*, 2 Ch. 628).

Where a testator appointed as executors several persons of whom one was indebted to him, and the others proved at once but the debtor did not prove for more than six years, he could not then set up the statute, the act of proving having relation to the testator's death (*Ingle* v. *Richards*, 28 Beav. 366). See as to a creditor appointing his debtor to be his executor, *Re Bourne*, *Davey* v. *B.*, [1906] 1 Ch. 708; Wms. Exors., 11th ed. 1053.

The rule as to the continuous running of time in the case of claims to land is stated *ante*, p. 160.

A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute (*Fuller* v. *Redman*, 26 Beav. 614). But a covenant not to sue for a certain period will prevent time running until the expiration of that period (*Iron* v. *Elwes*, 3 Drew. 25; see *O'Brien* v. *Osborne*, 10 Hare, 92). Where under a composition deed a debtor makes default in payment of a composition, a fresh promise to pay the original debt at that time is implied, and time begins to run accordingly (*Irving* v. *Veitch*, 3 M. & W. 107; *Re Stock*, 66 L. J. Q. B. 146; *Macdonnell* v. *Broderick*, [1896] 2 I. R. 136).

Bankruptcy or death of creditor.

Where the creditor becomes bankrupt, time runs against the bankruptcy trustee as against the bankrupt (*Ex p. Norton*, [1892] W. N. 32). Where the creditor dies, the cause of action having accrued to him in his lifetime, his executor cannot sue after the time limited by the statute has expired (*Penny* v. *Brice*, 18

C. B. (N.S.) 393; 13 W. R. 342). But if time has not begun to run during the lifetime of an intestate, it does not run against the administrator until administration has been taken out (*Burdick* v. *Garrick*, 5 Ch. 241; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257). Where there is no evidence to show whether the intestate died before or after the cause of action accrued, time does not run against the administrator until administration is taken out (*Atkinson* v. *Bradford Society*, 25 Q. B. D. 377). In an action by an administrator against the acceptor of a bill payable to the testator, *but accepted* after his death, time ran from the grant of administration, there being no cause of action until there was a party capable of suing (*Murray* v. *East India Co.*, 5 B. & Ald. 204; and see *Pratt* v. *Swaine*, 8 B. & C. 285; *Perry* v. *Jenkins*, 1 M. & C. 118; *Hyde* v. *Price*, 1 C. P. Coop. 196; *Freake* v. *Cranefeldt*, 3 M. & C. 499; *Howlitt* v. *Lambert*, 1 Ir. Eq. R. 263; *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 358). 21 Jac. 1, c. 16, s. 3.

When the debtor becomes bankrupt before the right of action is complete, it would seem that time does not commence to run until the close of the bankruptcy (see *Re Crossley; Munns* v. *Burn*, 35 Ch. D. 266; but where the right has arisen and the statute has begun to run, the debtor's subsequent bankruptcy does not prevent it from continuing to run (*Re Benzon; Bower* v. *Chetwynd*, [1914] 2 Ch. 68). Bankruptcy of debtor.

Where the debtor dies, and time has once begun to run against the debt in the debtor's life, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted (*Freake* v. *Cranefeldt*, 3 M. & C. 499; *Boatwright* v. *B.*, 17 Eq. 71; see *Martin* v. *Beauchamp* (1888), W. N. 247). But where an action was brought in time and the defendant died, the plaintiff had a right to bring a new action against the executor or administrator within a reasonable time (*Sturgis* v. *Darell*, 6 H. & N. 120; see sect. 4, *post*). This rule was applied where the second action was commenced within a year from the proof of the will by the executor (*Swindell* v. *Bulkeley*, 18 Q. B. D. 250). Death of debtor.

Where time had not commenced to run against a debt during the debtor's life, the statute was not a good plea where an executor had not proved, because no laches could be imputed to a plaintiff for not suing whilst there was no executor against whom he could bring his action (*Jolliffe* v. *Pitt*, 2 Vern. 694; Coop. Eq. Pl. 233; 1 Eq. Cas. Abr. 305; see *Douglas* v. *Forrest*, 4 Bing. 686; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 532). But where the defendant acts, and might be sued, as executor *de son tort*, time runs from his so acting, and not from probate (*Flood* v. *Patterson*, 29 Beav. 299; *Webster* v. *Webster*, 10 Ves. 93).

As to actions by or against executors for injuries to property, see *ante*, p. 243.

By sect. 4, if judgment is given for the plaintiff and reversed by error or arrested, or if the defendant is outlawed and the outlawry reversed, a new action may from time to time be commenced within a year afterwards by the plaintiff, his heirs, executors or administrators. Limitation after judgment or outlawry reversed.

Within the equity of this section the Courts permitted an executor, within a year, or within a reasonable time after the death of the testator, to renew a suit commenced by the testator, and *vice versâ* (*Curlewis* v. *Mornington*, 7 E. & B. 283; see 15 & 16 Vict. c. 76, ss. 135 *et seq.*; *Swindell* v. *Bulkeley*, 18 Q. B. D. 250).

21 Jac. 1, c. 16, s. 7.

Infants, femes coverts, &c., excepted.

7. Provided nevertheless, and be it further enacted, that if any person or persons that is, or shall be, entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

Infancy.

A case of infancy occurred in *Dashwood* v. *Magniac*, [1891] 3 Ch. 387.

Coverture.

From the time when the M. W. P. Act, 1882, enabled a married woman to sue, she became discovert within the above section; so held in the case of an action for slander (*Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828), and for assault (*Lowe* v. *Fox*, 15 Q. B. D. 676). Neither the imprisonment of the plaintiff nor his absence beyond the seas now constitute a disability (Merc. Law. Amdt. Act, 1856, s. 10, *post*).

Imprisonment and beyond the seas.

During the absence of a defendant beyond the seas the running of time is suspended by 4 Anne, c. 16, s. 19 (see *Forbes* v. *Smith*, 11 Ex. 161); and the right of the plaintiff to sue after the defendant's return is not affected by R. S. C. Ord. 11, giving leave to serve out of the jurisdiction (*Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352). As to the meaning of "beyond seas" in these Acts, see Civil Proc. Act, 1833, s. 7 (p. 253, *ante*); and Merc. Law Amdt. Act, 1856, s. 12 (*post*, p. 280); and see, as to the effect of the proviso relating to plaintiffs beyond the seas, *Perry* v. *Jackson* (4 T. R. 516); *Lafond* v. *Ruddock* (13 C. B. 813; 2 Atk. 610—614); *Strithorst* v. *Græme* (3 Wils. 145); *Le Veux* v. *Berkeley* (5 Q. B. 836); *Townsend* v. *Deacon* (3 Exch. R. 706); *Smith* v. *Hill* (1 Wils. 134; 4 T. R. 311); *Denys* v. *Shuckburgh* (4 Y. & Coll. 47).

One of several under disability.

Under 4 Anne, c. 16, s. 19, if a right of action had accrued against several persons, one of whom was beyond seas, the statute did not run until his return, though the others had never been absent from the kingdom (*Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123; see M. L. A. Act, 1856, ss. 10, 11, *post*, p. 280).

Representatives of persons dying under disability.

Where a person died abroad, to whom a right of action had accrued during his residence there, and he never returned to this country, his executors could sue for it, although more than six years had elapsed since it accrued. It was unnecessary to consider the question whether the executor could maintain the action after the expiration of six years from the death; Parke, B., inclining to the opinion that the executor was under no restraint; but Rolfe, B., thinking it would be more reasonable to consider the right of action as accruing to the executor at the death of the testator, and to limit the right of action accordingly (*Townsend* v. *Deacon*, 3 Exch. 706). A person gave his creditor a bill, and, before the bill arrived at maturity, went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved in England. A creditor's bill filed within six years after his death was held not barred (*Story* v. *Fry*, 1 Y. & Coll. C. C. 603; see *Williams* v. *Jones*, 13 East, 439; and *Flood* v. *Patterson*, 29 Beav. 295).

9 Geo. 4, c. 14, s. 1.

Express Acknowledgments.

THE STATUTE OF FRAUDS AMENDMENT ACT, 1828, ss. 1, 3, 4.

9 Geo 4, c. 14.

An Act for rendering a Written Memorandum necessary to the Validity of certain Promises and Engagements.
[19th May, 1828.]

§ 1. *No Acknowledgment sufficient unless in Writing or by Payment*...267.
§ 3. *Indorsements by Payee not sufficient*...278.
§ 4. *Limitation Act*, 1623, *applied to Set-off*...279.

The stat. 9 Geo. 4, c. 14, recites the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; and enacts (sect. 1).

In actions of debt or upon the case no acknowledgment shall be deemed sufficient, unless it be in writing or by part payment.

In actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or

Proviso for case of joint contractors.

9 Geo. 4, c. 14, s. 1.

promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff. See as to Ireland, 16 & 17 Vict. c. 113, ss. 24, 25, and 26.

Old law.

Before the above Act the plaintiff was permitted, although the time limited by the Lim. Act, 1623, had elapsed, to prove an acknowledgment, or promise to pay, within six years, which was sufficient to entitle him to recover (*Willis* v. *Newham*, 3 Y. & Jerv. 522). To provide a remedy against vague verbal promises, this Act was passed (*Towler* v. *Chatterton*, 6 Bing. 264).

(1) *Acknowledgments in Writing*...268.
(2) *Acknowledgments by Payment*...274.

(1) Acknowledgments in writing.

The intention of the Act was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but to require a different mode of proof; substituting the certain evidence of writing signed by the party chargeable, for the insecure testimony derived from the memory of witnesses (*Haydon* v. *Williams*, 7 Bing. 163; see *Courtenay* v. *Williams*, 3 Ha. 549; *Moodie* v. *Bannister*, 4 Drew. 440; *Emery* v. *Day*, 1 C. M. & R. 245).

Parol evidence.

Where a written promise to pay a debt barred by the statute has been lost, parol evidence is admissible of the contents of the writing (*Haydon* v. *Williams*, 7 Bing. 163; see *Read* v. *Price*, [1909] 2 K. B. 724). It is also admissible to connect two letters relied on as an acknowledgment (*M'Guffie* v. *Burleigh*, 78 L. T. 264). But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence (*Edmunds* v. *Downes*, 2 C. & M. 459). It is not necessary that the writing should specify the debt or the matter out of which it arose (*Whitcombe* v. *Steere*, 19 Times L. R. 697. See *Spickernell* v. *Hotham*, Kay, 699; *Kennett* v. *Milbank*, 8 Bing. 38).

When acknowledgment must be made.

An acknowledgment made within six years before action brought is sufficient, although it be made more than six years after the original cause of action (*Spickernell* v. *Hotham*, Kay, 669; see *Re Lane*, 23 Q. B. D. 74). Compare the rule on this point as to land, *ante*, p. 210, and as to money charged on land, *ante*, p. 226. An acknowledgment made after action brought cannot be used to take a case out of the statute (*Bateman* v. *Pinder*, 3 Q. B. 574).

Acknowledgments by agent.

Previously to the M. L. A. Act, 1856, it was held, under 9 Geo. 4, c. 14, that an acknowledgment signed by an agent of the debtor would not revive a debt barred by the Lim. Act, 1623, but that it must have been signed by the debtor himself (*Hyde* v. *Johnson*, 2 Bing. N. C. 776; *Clark* v. *Alexander*, 8 Scott, N. R. 165; see *Swift* v. *Winterbotham*, L. R. 8 Q. B. 249; and *Williams* v. *Mason*, 21 W. R. 386). An acknowledgment signed by an agent is now sufficient (see M. L. A. Act, 1856, s. 13, *post*, p. 281). Thus an acknowledgment by a solicitor bound his client (*Curwen* v. *Milburn*, 42 Ch. D. 432). And an acknowledgment by one partner would probably be regarded as an acknowledgment by the firm (Lindley, Partnership, 7th ed. 295). Compare the case of payments by one partner (*Watson* v. *Woodman*, 20 Eq. 730; *Re Tucker*, *T.* v. *T.*, [1894] 3 Ch. 429). Where a debt due from a company to L was barred, and the board of directors, of whom L was one, passed a resolution in reference to the debt, it was said, that even if the resolution had been a suffi-

cient acknowledgment, it would not have bound the company (*Lowndes* v. *Garnett*, 33 L. J. Ch. 418). As to acknowledgments given by a client to his solicitor in respect of costs owing, see *Lloyd* v. *Coote & Ball*, [1915] 1 K. B. 242. 9 Geo. 4, c. 14, s. 1.

Since 9 Geo. 4, c. 14, one of several executors can bind the estate by an acknowledgment or promise (*Re Macdonald, Dick* v. *Fraser*, [1897] 2 Ch. 187), and after the death of the promisor payment of the debt may be ordered out of assets in hands of the surviving executors (*ibid.*). See before 9 Geo. 4, c. 14, *Tulloch* v. *Dunn*, 1 Ry. & M. 416; *Scholey* v. *Walton*, 12 M. & W. 514. By one of several executors.

A written acknowledgment of a debt by an infant is sufficient if the debt was for necessaries (*Willins* v. *Smith*, 4 Ell. & Bl. 180). Note, however, that it is provided by Infants' Relief Act, 1874, s. 2, that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. By infants.

An acknowledgment made to a third party will not take the case out of the statute (*Moodie* v. *Bannister*, 4 Drew. 439; *Fuller* v. *Redman*, 26 Beav. 619; *Grenfell* v. *Girdlestone*, 2 Y. & Coll. Exch. 676; *Tanner* v. *Smart*, 6 B. & C. 603; *Stamford Banking Co.* v. *Smith*, [1892] 1 Q. B. 765; *Rogers* v. *Quin*, 26 L. R. Ir. 136. But an acknowledgment to the agent of the creditor will be sufficient (*Edmonds* v. *Goater*, 15 Beav. 415). Acknowledgment to a third party: to an agent.

An admission by a bankrupt in his balance-sheet will not, as between the creditor and the bankrupt's assignees, take a debt out of the statute (*Pott* v. *Clegg*, 16 M. & W. 321); where it was also held that an admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, would not take a debt of the bankrupt out of the statute (see *Everett* v. *Robertson*, 1 Ell. & Ell. 16, and *Ex p. Topping*, 34 L. J. Bk. 44). Bankrupt's balance sheet.

An advertisement under the Law of Property Amendment Act, 1859, s. 29, to creditors to bring in their claims did not take a debt out of the statute (*Re Stephens, Warburton* v. *Stephens*, 43 Ch. D. 43). So in the case of advertisements before that Act (*Scott* v. *Jones*, 4 Cl. & Fin. 382). Advertisement.

But an admission in cross-examination, and appearing in a signed deposition, may amount to an acknowledgment (*Re Beynon* (1873), W. N. 186). Deposition.

So also a statement by the debtor in an affidavit for probate (*Re Emmett, Jenkins* v. *Emmett*, [1906] W. N. 201; see *Smith* v. *Poole*, 12 Sim. 17; *Maniram* v. *Seth*, 22 T. L. R. 619; but see *contra*, *Re Beavan, Davies* v. *B.*, [1912] 1 Ch. 196; *Lloyd* v. *Coote & Ball*, [1915] 1 K. B. 242). Affidavit.

To prevent the right to have an account from being barred by the statute, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party (*Prance* v. *Sympson*, Kay, 678; see *Langrish* v. *Watts*, [1903] 1 K. B. 636; *Maniram* v. *Seth*, 22 T. L. R. 619). Acknowledgment of pending account.

If, since the stat. 9 Geo. 4, c. 14, a defendant, by letter, admits a *balance to be due*, without stating the amount, this will take the case out of the statute, but the damages will be nominal unless the amount be proved at the trial (*Dickenson* v. *Hatfield*, 5 C. & P. 46; *Bird* v. *Gammon*, 3 Bing. N. C. 833; *Archer* v. *Leonard*, 15 Ir. Ch. Rep. 67, a promise to pay a solicitor an amount to be ascertained by taxation; *Cheslyn* v. *Dalby*, 4 Y. & C. 238, where the recitals of a deed amounted to a promise to pay an amount to be ascertained Amount need not be stated.

9 Geo. 4, c. 14, s. 1.

as mentioned in the deed; *Dodson* v. *Mackey*, 8 Ad. & El. 225, n.; *Dabbs* v. *Humphries*, 10 Bing. 446; *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Waller* v. *Lacey*, 1 Scott, N. R. 186).

Effect of an acknowledgment.

The legal effect of an acknowledgment of a debt, barred by the Statute of Limitations, is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the whole debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him (*Philips* v. *Philips*, 3 Hare, 299; since adopted, *Buckmaster* v. *Russell*, 10 C. B. (N.S.) 749; *Chasemore* v. *Turner*, L. R. 10 Q. B. 505; *Lusher* v. *Hassard*, 20 T. L. R. 563; compare *Re Wheeler*, *Hankinson* v. *Hayter*, [1904] 2 Ch. 70). On this principle a mere acknowledgment of a debt, accompanied with a proposal to pay part, which has not been acceded to, is not sufficient to take the case out of this statute (*Francis* v. *Hawkesley*, 1 Ell. & Ell. 1052).

Construction of an acknowledgment.

The construction of an acknowledgment is a question for the Court, not the jury, except where the document is connected with other evidence affecting the construction (*Morrell* v. *Frith*, 3 M. & W. 402; *Bird* v. *Gammon*, 3 Bing. N. C. 883; *Power* v. *Barham*, 4 Ad. & Ell. 473; *Smith* v. *Thorne*, 18 Q. B. 140).

What a sufficient acknowledgment.

There must be —(a) acknowledgment, or (b) unconditional promise, or (c) conditional promise and evidence of condition performed.

On the construction of acknowledgments the following principles have been laid down. A mere acknowledgment is not sufficient to take a case out of the statute, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, an implication will not arise (*Tanner* v. *Smart*, 6 B. & C. 602; but see *Brown* v. *Mackenzie*, [1913] W. N. 75; 29 Times L. R. 310). A statement of inability to pay does not *per se* exclude the implication of a promise (*Firth* v. *Slingsby*, 58 L. T. 485; *Parson* v. *Nesbitt*, 85 L. J. K. B. 654), nor the expression of a hope to pay (*Whitcombe* v. *Steere*, 19 Times L. R. 697; *Cooper* v. *Kendall*, [1909] 1 K. B. 405). In *Smith* v. *Thorne* (18 Q. B. 134, 139), Parke, B., said, "the acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled" (see *Everett* v. *Robertson*, 1 Ell. and Ell. 20). "There must be, in order to take the case out of the statute, one of the three following things: either there must be an acknowledgment of the debt from which a promise to pay it must be implied: or secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt in writing, and evidence that that condition has been performed" (*Mitchell's Claim*, 6 Ch. 828; see also *Fettes* v. *Robertson*, 37 Times L. R. 80). The authorities were reviewed, *Cooper* v. *Kendall* (*supra*) approved, and *Fettes* v. *Robertson* (*supra*) considered in *Spencer* v. *Hemmerde*, [1922] A. C. 507, where the House of Lords held to be a sufficient acknowledgment to take the case out of the statute a letter stating "It is not that I won't pay you but that I can't do so. . . . What I wrote" [in a previous letter] "was not that I saw no prospect at present of being able to repay the capital but that I saw no prospect of being able to repay the capital at present."

Instances of sufficient

The following letters by debtors have also been held sufficient acknowledgments from which a promise to pay must be implied:—

9 Geo. 4, c. 14, s. 1.

acknowledgments.

"In regard to your statement of account received, I am ashamed the account has stood so long, and I must beg to trespass on your kindness a short time longer" (*Cornforth* v. *Smithard*, 1 H. & N. 13). "It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked Mrs. H. (defendant's agent) to mark the agreements, and send them to me, and I will return them by first post, with instructions to pay, if correct" (*Sidwell* v. *Mason*, 2 H. & N. 306; see *Whitcombe* v. *Steere*, 19 T. L. R. 697). "When the policy is paid on the 29th October, I hope that you will have the whole of your account ready for me as I hope to be with you on that day": followed by a second letter, "Oct. 25, Mr. V., when here on Saturday, stated that the amount due against me was about £280; of course this includes the £100 and interest that I had some years since, and the £40 promissory note that I jointly signed with the late Mr. B." (*Godwin* v. *Culley*, 4 H. & N. 373). "I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week" (*Lee* v. *Wilmot*, L. R. 1 Ex. 364). "I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done": followed by another letter, "I again beg of you to send in your account" (*Quincey* v. *Sharpe*, 1 Ex. D. 72). A request for the delivery of "any unsettled bill" (*Curwen* v. *Milburn*, 42 Ch. D. 424). The submission, formerly inserted in a petition for taxation, to pay what shall be found due (*Re Margetts*, [1896] 2 Ch. 263; see now *Re Brockman*, [1909] 2 Ch. 170). An indorsement by the maker of a promissory note, with his name, together with the date, upon the note (*Bourdin* v. *Greenwood*, 13 Eq. 281). So where a first mortgagee who had sold the property, wrote to the second mortgagee enclosing account showing balance after payment of first mortgage, and offered explanation (*Banner* v. *Berridge*, 18 Ch. D. 254, see 274). S. borrowed of J. £200 upon promissory notes, and a year afterwards remitted to J. £10 on account of the interest due, and sent him a bill of £17 for goods. J. wrote, acknowledging the £10 and bill and stated that he placed both sums to the credit of S., and requested S. to receipt the bill and return. In an action for the £17, it was held, that the above letter took the case out of the statute (*Evans* v. *Simon*, 9 Exch. 282).

Unconditional promises.

The following were held to be unconditional promises to pay:— "I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes" (*Edmonds* v. *Goater*, 15 Beav. 415; see *Fuller* v. *Redman*, 26 Beav. 620). "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time and all will be right" (*Collis* v. *Stack*, 1 H. & N. 605, in which case it was said that the question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made). "I shall be taking some money next month and will then try to settle with you" (*Pryke* v. *Hill*, 79 L. T. 738). "Show this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity" (*Wilby* v. *Elgee*, L. R. 10 C. P. 497).

Conditional promises.

Where a debtor says he does not owe the amount claimed, but that if vouchers are furnished he will pay what is due, there is a conditional promise (*Langrish* v. *Watts*, [1903] 1 K. B. 641; see *Skeet* v. *Lindsay*, 2 Ex. D. 314). So where the debtor wrote, "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid" (*Chasemore* v. *Turner*, L. R. 10 Q. B. 500).

Condition performed.

The following is an instance of a conditional promise to pay, the

9 Geo. 4, c. 14, s. 1.

condition having been performed. A debtor wrote to his creditor, "I will pay you as soon as I get it in my power: before I cannot." Held, that time commenced to run when the debtor became of ability to pay, and not before (*Hammond* v. *Smith*, 33 Beav. 452; see *Waters* v. *Thanet*, 2 Q. B. 757; *Buccleugh* v. *Eden*, 61 L. T. 360).

See also *Archer* v. *Leonard* (15 Ir. Ch. R. 267); *Leland* v. *Murphy* (16 Ir. Ch. R. 500); *Burrows* v. *Baker* (I. R. 3 Eq. 596); *Fiske* v. *Mitchell* (19 W. R. 798).

Instances of insufficient acknowledgments.

An acknowledgment, accompanied with what is a contradiction of any promise to pay, is not sufficient (*Linsell* v. *Bonsor*, 2 Bing. N. C. 241). If the acknowledgment does not amount to a new promise, it is not sufficient (*Fearn* v. *Lewis*, 6 Bing. 349; *Scales* v. *Jacob*, 3 Bing. 638; *Ayton* v. *Bolt*, 4 Bing. 105). Therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability, was insufficient (*Brigstock* v. *Smith*, 1 C. & M. 483). So where the debtor expressed a hope that the creditor would name some figure less than the principal and interest (*Mowbray* v. *Appleby*, 80 L. T. 805). The following letters written by debtors have been held not to be sufficient:—"I am happy to say that by that time both the principal and interest will have been paid in full" (*Green* v. *Humphreys*, 26 Ch. D. 474). "A paper has been received purporting to be a memorandum of account between you and this company, which is altogether incorrect, omitting all deductions and credits, which would leave a balance considerably in their favour. The company are still willing to have all accounts decided by arbitration" (*Mitchell's Claim*, 6 Ch. 822). "I am in hopes that I shall be able to transfer the mortgage to enable me to clear off the whole that may be standing against me" (*Smith* v. *Thorne*, 18 Q. B. 134). "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear" (*Routledge* v. *Ramsey*, 8 Ad. & Ell. 221). "I have been in almost daily expectation of being enabled to give a satisfactory reply to your application. I will call upon you (the plaintiff's solicitor) to-morrow on the matter" (*Morrell* v. *Frith*, 8 C. & P. 246). "I am not conscious of ever having had this bill put before me till now, nor did I know it was owing. I am much annoyed that it should have been so long unsettled" (*Collinson* v. *Margetson*, 27 L. J. Ex. 305). "I never shall be able to pay you in cash, but you may have any of the goods we have at the pantechnicon by paying the expenses incurred thereon, as before agreed" (*Cawley* v. *Furnell*, 12 C. B. 291). "I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. In time an augmentation of salary may enable me to propose some satisfactory arrangement" (*Rackham* v. *Marriott*, 2 H. & N. 196). "It is agreed that Mr. H. in his general account shall give credit to Dr. H. for £174, being for bricks delivered to the trustees of Y. P. chapel in 1834" (*Hughes* v. *Paramore*, 7 D. M. & G. 229). "I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated" (*Buckmaster* v. *Russell*, 10 C. B. (N.S.) 745). "I will not fail to meet the plaintiff on fair terms, and have now a hope, before perhaps a week from this date, I shall have it in my power to pay him at all events a portion of the debts, when we shall settle about the liquidation of the balance" (*Hart* v. *Prendergast*, 14 M. & W. 745; see *Gardner* v. *M'Mahon*, 3 Q. B. 561; *Fuller* v. *Redman*, 26 Beav. 620). A letter in which the defendant stated "that family

arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A is trustee; and that the defendant has handed the plaintiff's account to A; and that some time must elapse before payment, but that the defendant is authorized by A to refer the plaintiff to him for any further information" (*Whippy* v. *Hillary*, 3 B. & Ad. 399).

9 Geo. 4, c. 14, s. 1.

Instances of insufficient acknowledgments.

The renewal of former promissory notes by a debtor cannot be considered as a promise rendering a party liable to pay original debts, but only that the party intended to give a fresh security limited to the new notes (*Foster* v. *Dawber*, 6 Exch. 839). A deed of composition was not evidence of a promise nor an acknowledgment, for the debt acknowledged remained to be made out by parol evidence (*Kennett* v. *Millbank*, 8 Bing. 38). P., indebted to the executors of C. in £1,100 to which A. was beneficially entitled, wrote to A.:—"I have sent you a note for the money due to you, which your mother left for you." Inclosed was a promissory note insufficiently stamped. The letter was not a sufficient acknowledgment, it being impossible to refer to the note (*Parmiter* v. *Parmiter*, 3 D. F. & J. 461). See the cases as to parol evidence above.

Improvement commissioners appointed a committee, who made a report with schedule of liabilities, including arrears of salary due to a clerk. The commissioners' entry in their minute book accepted the report. Held, no sufficient acknowledgment of the debt (*Bush* v. *Martin*, 2 H. & C. 311; 11 W. R. 1078; see *Re Severn Ry. Co.*, [1896] 1 Ch. 559; see also *Emery* v. *Day*, 1 C. M. & R. 245; *Lowndes* v. *Garnett*, 33 L. J. Ch. 418; 12 W. R. 573). In *Williams* v. *Griffith* (3 Exch. 335), letters were not sufficient to take the plaintiff's claim, nor an account and affidavit sufficient to take the defendant's set-off, out of the statute. An admission of a debt made to a person, who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe (*Goate* v. *G.*, 1 H. & N. 29). A debtor with a view to an arrangement inserted the debt in the account of his debts, and his proposal was, that "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate, &c.: held, not a sufficient acknowledgment (*Everett* v. *Robertson*, 1 Ell. & Ell. 16). An account stated between the defendant, a part owner and ship's husband, and his co-owners, in which the items of the plaintiff's account for work done and money advanced are included, is not a sufficient acknowledgment (*Nash* v. *Hill*, 1 F. & F. 198). Where the defendant and H gave to the plaintiff a joint and several promissory note, and after time had run the defendant wrote to the plaintiff, "I hereby consent to your receiving the dividend under H's assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." Held not a sufficient acknowledgment (*Cockrill* v. *Sparke*, 1 H. & C. 699). In *Cassidy* v. *Firman* (I. R. 1 C. L. 8), and *Crawford* v. *C.* (I. R. 2 Eq. 166) acknowledgments were held to be insufficient. See further Darb. & Bos. Stat. Lim. 2nd ed. 81—91.

Conditional promises.

Condition not performed.

The following have been held to be conditional promises, the conditions of which were not shown to have been performed:—"I will send it as soon as possible, send your account next week" (*Bethell* v. *B.*, 34 Ch. D. 561); "I shall be glad as soon as my position becomes somewhat better to begin again my instalments" (*Meyerhoff* v. *Froehlich*, 4 C. P. D. 63); "I cannot pay the debt at present, but I will pay it as soon as I can" (*Tanner* v. *Smart*, 6 B. & C. 602); "If in funds I would immediately pay the money and take the bill out of your hands" (*Richardson* v. *Barry*, 29 Beav. 22);

9 Geo. 4, c. 14, s. 1.

"I shall be happy to pay you both principal and interest as soon as convenient, I shall pay no more interest till we have a fair settling" (*Edmunds* v. *Downes*, 2 C. & M. 459). An agreement to pay the amount found due by arbitration, where the arbitration proved ineffective (*Fenner* v. *Lord*, 14 Times L. R. 450). "I cannot pay off anything of my account at present. As soon as I have the money, I shall forward you a cheque" (*Lusher* v. *Hassard*, 20 Times L. R. 563). "In the event of my selling my shares in the A. Co. I will pay the calls on such shares and the balance in settlement of my account" (*Barrett* v. *Davies*, 91 L. T. 736).

Acknowledgment exempted from stamp duty.

9 Geo. 4, c. 14, s. 8.

No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps (9 Geo. 4, c. 14, s. 8; 16 & 17 Vict. c. 113, s. 27, Ir.). Under this section the following memorandum:—"I acknowledge to owe to M. £36, which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute, the debt itself being proved by other evidence (*Morris* v. *Dixon*, 4 Ad. & Ell. 845). When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the statute under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp (*Jones* v. *Ryder*, 4 M. & W. 32; see also *Parmiter* v. *Parmiter*, 3 D. F. & J. 461).

(2) Acknowledgment by payment.

In addition to written acknowledgments, a creditor may, for the purpose of taking a case out of the statute, rely on the act of part payment (*Emery* v. *Day*, 1 C. M. & R. 249). This is the result not of the statute, but of judicial decision grafted on the statute (*Re Hollingshead, H.* v. *Webster*, 37 Ch. D. 657). The payment is sufficient even though at the time the debt is barred (*Re Lane*, 23 Q. B. D. 74); and even if the payment could be recovered back as *pro tanto* a fraudulent preference (*ibid.*).

Part payment of principal.

In order to take a case out of the statute by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and thirdly, that the payment was made as part of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the payment (*Tippets* v. *Heane*, 1 C. M. & R. 252; see *Wainman* v. *Kynman*, 1 Exch. R. 118; *Waugh* v. *Cope*, 6 M. & W. 829). Part payment to come within the statute must be a payment from which a promise may be inferred to pay the remainder (*Stamford Banking Co.* v. *Smith*, [1892] 1 Q. B. 769; *Foster* v. *Dawber*, 6 Exch. 839; *Marrecco* v. *Richardson*, [1908] 2 K. B. 588. See *Sims* v. *Brutton*, 5 Exch. 802; *Re Somerset, S.* v. *Poulett*, [1894] 1 Ch. 268; *Friend* v. *Young*, [1897] 2 Ch. 421). The reason why the effect of such a payment is not lessened by the Act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact (*Waters* v. *Tompkins*, 2 C. M. & R. 726; see *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493).

Payment of interest.

Payment of interest upon a promissory note payable on demand will take the principal sum secured by the note out of the statute, although there be no independent evidence of any demand having been made (*Bamfield* v. *Tupper*, 7 Exch. 27; *Beally* v. *Greenslade*, 2 C. & J. 61; *Wyatt* v. *Hodson*, 8 Bing. 309). But the payment of

9 Geo. 4, c. 14, s. 1.

interest must be such that a promise to pay the principal can be inferred (*Morgan* v. *Rowlands*, L. R. 7 Q. B. 498). Accordingly, payment under compulsion of law is not enough (*ibid.*). And payment by trustees to a tenant for life of interest on a mortgage debt was not an acknowledgment of their liability to pay the principal in the investing of which a breach of trust had been committed (*Re Somerset, S.* v. *Poulett*, [1894] 1 Ch. 231; *Re Fountaine, F.* v. *Amherst*, [1909] 2 Ch. 382). As to whether a part payment of principal will take a claim for interest out of the statute, see *Collyer* v. *Willcock*, 4 Bing. 313; Darb. & Bos. Stat. Lim. 108.

Insufficient payments.

A debt will not be kept alive by payment into Court (*Long* v. *Greville*, 3 B. & C. 10; distinguish *Re Dennis*, [1895] 2 Q. B. 630); nor by the payment of a dividend under an insolvency (*Davies* v. *Edwards*, 7 Exch. 22; *Taylor* v. *Hollard*, [1902] 1 K. B. 676), or under an inspectorship deed (*Ex p. Topping*, 34 L. J. Bank. 44), or under an arrangement with creditors (*Re Lee, ex p. Grunwaldt*, [1920] 2 K. B. 200). The effect of a payment may be qualified by words used at the time, but the jury must judge the truth of statements accompanying the admission of a previous payment (*Baildon* v. *Walton*, 1 Exch. 617; see *Trentham* v. *Deverill*, 3 Bing. N. C. 397). Where payment was relied upon as taking a debt out of the statute, it was for the jury to judge whether such payments were made in respect of interest or in respect of an annuity (*Baildon* v. *Walton, supra*). As to the effect of payments by guardians of one union to those of another, see *Wycombe Union* v. *Eton Union* (1 H. & N. 687).

Appropriation.

Where, several debts being due of which some are barred and some not barred, the debtor pays a sum without appropriating it to any debt, such payment will not, in the absence of evidence, be appropriated so as to revive the debts barred (*Mills* v. *Fowkes*, 5 Bing. N. C. 455). *Semble*, the creditor cannot, without the consent of the debtor, appropriate the payment, so as to entitle himself to sue for the balance of a barred debt (*Nash* v. *Hodgson*, 6 D. M. & G. 490; see, however, the judgment of Knight-Bruce, L.J., *S. C.*). And such consent will not be inferred from the debtor omitting to question an account sent to him which shows the appropriation (*Re McHenry, McDermott* v. *Boyd*, 71 L. T. 146). The creditor, however, may appropriate the payment towards satisfaction of such debt (*Mills* v. *Fowkes, supra*; distinguish *Friend* v. *Young*, [1897] 2 Ch. 421). The creditor may appropriate up to the very last moment (*The Mecca*, [1897] A. C. 294; *Seymour* v. *Pickett*, [1905] 1 K. B. 715). But his right of appropriation was held to have ceased (*Smith* v. *Betty*, [1903] 2 K. B. 317). It may, of course, be shown that the debtor has himself appropriated the payment to any particular debt (*Gwynn* v. *G.*, 41 L. T. 610). Where neither party has made any appropriation, the appropriation which the law will make as between items barred and not barred is discussed *Re Boswell, Merritt* v. *B.*, [1906] 2 Ch. 366.

Payment "on account."

Payment by an agent to a principal of £300 "on account" was an acknowledgment that there was an account between them on which more than £300 would be payable, from which a promise to pay that balance must be inferred (*Friend* v. *Young*, [1897] 2 Ch. 436; see *Walker* v. *Butler*, 6 E. & B. 506).

Proof of payment —by parol evidence;

Part payment of principal or payment of interest on account of a debt is not affected by the 9 Geo. 4, c. 14, and therefore a *parol acknowledgment* of payment within six years before the action brought will take the case out of the statute (*Cleave* v. *Jones*, 6 Exch. 573; 20 L. J. Exch. 238; *Edwards* v. *Janes*, 1 K. & J. 534; *Bevan* v. *Gething*, 3 Q. B. 740). A witness, who said he settled all kinds of accounts for the defendant, admitted that an account

9 Geo. 4, c. 14, s. 1.

containing a memorandum of a payment was in his own handwriting, but could not recollect the fact of payment: held, sufficient evidence to go to the jury, as to the fact of payment (*Trentham* v. *Deverill*, 3 Bing. N. C. 397; see further, as to parol evidence of part payment, *Morley* v. *Finney* (1870), W. N. 82). A letter not in itself sufficient as a written acknowledgment may form part of the evidence for deciding the question whether there has been a payment (*Collinson* v. *Margesson*, 27 L. J. Ex. 305).

—by indorsements on bills and notes.

Indorsements on bills and notes treated as evidence of payment are dealt with by sect. 3, *post*.

Entries in debtor's books.

See as to admitting in evidence entries in a deceased's books, on the ground that they were against interest, *Taylor* v. *Witham* (3 Ch. D. 605); *Newbould* v. *Smith* (29 Ch. D. 882).

Modes in which payment can be made.

To constitute a payment sufficient to take a debt out of the statute it is not essential that money should pass between the parties. Thus there was a sufficient payment where the creditor gave a receipt (*Maber* v. *Maber*, L. R. 2 Ex. 153); and where a debtor supported a creditor's child (*Bodger* v. *Arch*, 10 Exch. 333). Anything received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the statute (*Hooper* v. *Stephens*, 4 Ad. & Ell. 71). If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is a sufficient part payment (*Hart* v. *Nash*, 2 C. M. & R. 337); but in order to make a delivery of goods operative, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment (*Cottam* v. *Partridge*, 4 Scott, N. R. 819).

Payment —by delivery of goods;

—by settlement of accounts.

The stat. 9 Geo. 4, c. 14, does not apply to the fact of an account stated, where there are items on both sides; but the going through an account with items on both sides and striking a balance converts the *set-off* into *payments* (*Ashby* v. *James*, 11 M. & W. 342; *Worthington* v. *Grimsditch*, 7 Q. B. 484; *Clark* v. *Alexander*, 8 Scott, N. R. 165; *Amos* v. *Smith*, 1 H. & Colt. 238). See *Williams* v. *Griffiths* (2 C. M. & R. 45); *Hughes* v. *Paramore* (7 D. M. & G. 229). In *Scholey* v. *Walton* (12 M. & W. 510), the setting-off a sum of money in an account stated and settled was held to be a payment within the statute (see *Stewart* v. *Connick*, I. R. 5 C. L. 562). In another case a transaction in the nature of set-off was not a payment (*Re Boswell, Merritt* v. *Boswell*, [1906] 2 Ch. 368).

Set-off.

The going through an account where there are items on one side only does not alter the situation of the parties at all (*Smith* v. *Forty*, 4 C. & P. 126; *Jones* v. *Ryder*, 4 M. & W. 32; *Mills* v. *Fowkes*, 5 Bing. N. C. 455).

Payment —by giving note or bill.

Where a bill is given in payment on account of a debt in such a manner as to raise an implication of a promise to pay the balance, this is sufficient part payment (*Turney* v. *Dodwell*, 3 Ell. & Bl. 136; *Irving* v. *Veitch*, 3 M. & W. 90). The promise is to be implied at the time when the bill is given (*Gowan* v. *Foster*, 3 B. & Ad. 513), and where a cheque was given in part payment, it being at the time verbally agreed that the cheque should not be presented until a later date, the only date at which the promise could be implied was the giving of the cheque, and time ran accordingly (*Marrecco* v. *Richardson*, [1908] 2 K. B. 584. See *Sparkes* v. *Restall*, 22 Beav. 587, where a second note was given as a new security).

Payment to an agent;

Payment may be made to an agent of the creditor (*Evans* v. *Davies*, 4 Ad. & El. 840). The payment of interest to a *cestui que trust* was held to keep alive the right of the trustee to maintain an action on a promissory note (*Megginon* v. *Harper*, 2 C. & M. 322). Payment to a husband of interest on a promissory note given to his

wife before marriage, was held sufficient payment (*Hart* v. *Stephens*, 6 Q. B. 937). **9 Geo. 4, c. 14, s. 1.**

Payment to a stranger is not sufficient (*Stamford Banking Co.* v. *Smith*, [1892] 1 Q. B. 765). Unless possibly where the payment is made to a person filling a representative capacity, or who was believed to fill that capacity, when the payment might enure for the benefit of the persons for whom it was believed to be made (*ibid.*, 769; *Clark* v. *Hooper*, 10 Bing. 480). —to a stranger.

Before M. W. P. Act, 1882, an acknowledgment or part payment by a woman before marriage kept her debt alive, both as against herself and her after-taken husband. But similar acts by her after marriage were of no avail either against herself or as against her husband (*Pittam* v. *Foster*, 1 B. & C. 248; *Neve* v. *Hollands*, 18 Q. B. 262). The M. W. P. Act, 1882, enables a wife to keep alive her liabilities in respect of her separate estate by an acknowledgment or part payment, or by suffering judgment to be obtained against her. But such acts do not affect her husband (*Beck* v. *Pierce*, 23 Q. B. D. 322). Payment by a wife;

The words of the Act, that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," can never mean a payment made by a stranger, and without authority, but payment made by the principal debtor or someone acting by his authority (*Linsell* v. *Bonsor*, 2 Bing. N. C. 245; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106). In *Jones* v. *Hughes* (5 Exch. 104), where money was advanced on a promissory note signed by the defendant thus: "I. H., churchwarden, J. E., overseer, or *others for the time being*," it was a question for the jury, whether the defendant had not constituted the parish officers for the time being his agents for payment of interest (see *Rew* v. *Pettet*, 1 Ad. & E. 196). As to whether payments by a company affect a director who has guaranteed the company's debt, see *Re Wolmershausen* (62 L. T. 541). In paying interest on a second mortgage a solicitor was held not to be the agent of the first mortgagee for whom he had previously acted on a sale (*Thorne* v. *Heard*, [1893] 3 Ch. 530). —by an agent;

Payment of part of a debt by a receiver of a business (appointed under a power in a mortgage) kept alive the debt against the estate of the owner of the business (*Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107; compare *Whitley* v. *Lowe*, 2 De G. & J. 704). So payments by a receiver in lunacy towards the support of a lunatic maintained by poor law guardians (*Wandsworth* v. *Worthington*, [1906] 1 K. B. 420). —by receiver;

As to payments by one of a number of joint contractors, executors, or partners, see Merc. Law Amdt. Act, 1856, s. 14, *post*, p. 281. These case of payments by one of a number of persons bound by several promises is dealt with in *Re Wolmershausen* (62 L. T. 541). —by one of a number of joint contractors, &c.

Payments having been made to residuary legatees by the executors, it was held that such payments whilst the debts of the testator remained unpaid were a breach of trust, and that the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor as against the residuary legatees to the extent of their interest in the residue, and they must therefore refund the moneys they had received on account of the estate (*Fordham* v. *Wallis*, 10 Hare, 226; see *Re Brogden, Billing* v. *B.*, 38 Ch. D. 546). A claim by a creditor to make legatees refund was held barred by lapse of time and acquiescence (*Blake* v. *Gale*, 32 Ch. D. 571). Payment by executors; effect in keeping alive right to make legatees refund;

It was held under 47 Geo. 3, c. 74, that a payment by the executrix of a trader would not take a debt out of the statute, so as to enable the creditor to claim payment out of the real

9 Geo. 4, c. 14, s. 1.

effect against beneficial devisee.

estate in the hands of a devisee (*Putnam* v. *Bates*, 3 Russ. 188: conf. *Wilson* v. *Leonard*, 3 Beav. 373, where a devisee was held not bound by the amount of a claim substantiated against the executor in an action at law to which he was not a party). And it has since been held under the Administration of Estates Act, 1833 (see notes to sect. 32 of the Administration of Estates Act, 1925, *post*), that the payment of interest on a debt of the testator by the executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for although the executors and trustees were the same persons they filled different characters, and where the payments were made by them in the character of executors only, the real estate was not affected by it (*Fordham* v. *Wallis*, 10 Hare, 230; compare *Astbury* v. *A.*, [1898] 2 Ch. 119, where Stirling J., held that an acknowledgment which might have bound personal estate did not bind real estate; and see *Re England*, *Steward* v. *E.*, [1895] 2 Ch. 109).

Where executor is beneficial devisee.

Where executor is trustee.

Payment of interest on a testator's simple contract debt made by a party filling the two characters of beneficial devisee and executor, was attributed to both characters, and not to one only, for the moral obligation did not attach more to one character than to the other. But it was otherwise where the characters held by the party were entirely distinct, as where he was personally liable as debtor, and was answerable also in the character of trustee of another; for he then represented two persons, and the question in such a case is by whom the promise is made and not what is its extent or effect (*Fordham* v. *Wallis*, 10 Hare, 225; compare *Brown* v. *Gordon*, 16 Beav. 302).

Consider now in connection with the last two paragraphs the effect of L. T. Act, 1897, s. 1, and the Administration of Estates Act, 1925, *post*.

Right to marshall.

The demand of a simple contract creditor as against the real estate of the testator, which would otherwise be barred by the statute, is not kept alive by the effect of any right to have the assets marshalled (*Fordham* v. *Wallis*, *supra*; see, however, Darb. & Bos. Stat. Lim., 2nd ed., 130).

Payments by devisees.

Having regard to the Debts Recovery Act, 1830 (see note to sect. 32 of the Administration of Estates Act, 1925, *post*), several devisees of distinct estates were jointly liable to a specialty creditor of their testator, and were "co-debtors" within sect. 14 of the M. L. A. Act, 1856 (*Re Lacey*, *Howard* v. *Lightfoot*, [1907] 1 Ch. 349). Their liability in respect of his simple contract debts appears to have been similar. If so, payment by one such devisee would not affect another. It has been held, however, that payment of interest on a simple contract debt by a devisee for life of the debtor's real estate kept the creditor's right of action alive against all parties interested in such real estate in remainder (*Re Hollingshead*, *H.* v. *Webster*, 37 Ch. D. 651). It was said in one case that such a payment would operate to prevent time running as regards the testator's real estate only (*Boatwright* v. *B.*, 17 Eq. 74).

See further as to the acknowledgment of a simple contract debt by payment, *Whitcomb* v. *Whiting* (1 Smith, L. C.); and see the cases quoted under R. P. Lim. Act, 1874, s. 8 (*ante*, p. 224), and Civil Proc. Act, 1833, s. 5 (*ante*, p. 251).

Indorsements of payments.

3. That no indorsement or memorandum of any payment, written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange,

or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes. 9 Geo. 4, c. 14, s. 3.

As to this section, see *Bradley* v. *James*, 13 C. B. 822; *Briggs* v. *Wilson*, 5 D. M. G. 12.

4. That the said recited Acts and this Act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise. Simple contract debts alleged by way of set-off.

See *ante*, p. 255.

VI.—The Mercantile Law Amendment Act, 1856.

19 & 20 Vict. c. 97, ss. 9—14.

An Act to amend the Laws of England and Ireland affecting Commerce. [29th July, 1856.]

§ 9. *Actions on Merchants' Accounts to be commenced within six years*...279.
§ 10. *Absence beyond seas and imprisonment of creditor not to be disability*...279.
§ 11. *Joint Debtors beyond seas*...280.
§ 12. *Definition of "beyond seas"*...280.
§ 13. *Acknowledgments by agents*...281.
§ 14. *Part payment by one co-contractor*...281.

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant (*a*), their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit. 19 & 20 Vict. c. 97, s. 9. Limitation of actions for "merchants' accounts."

(*a*) *Ante*, p. 257.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the Act of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*b*), or by the Act Absence beyond seas or imprisonment of a creditor not to be a disability.

19 & 20 Vict. c. 97, s. 10.

of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the Act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five (*c*), or by the Acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two (*d*), and chapter forty-two, section three (*e*), or by the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*f*), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

(*b*) *Ante*, p. 254.
(*c*) *Ante*, p. 229.
(*d*) *Ante*, pp. 216, 228.
(*e*) *Ante*, p. 246.
(*f*) *Ante*, p. 246.

This section was retrospective, and included causes of action accrued before the statute was passed (*Pardo* v. *Bingham*, 4 Ch. 755; see *Cornill* v. *Hudson*, 8 El. & El. 429).

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

See *ante*, p. 266.

Definition of "beyond

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey,

Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this Act.

19 & 20 Vict. c. 97, s. 12.

"seas," within 4 & 5 Anne, c. 16, and this Act.

See R. P. Lim. Act, 1833, s. 19, *ante*, p. 184; Civil Proc. Act, 1833, s. 7, *ante*, p. 253. This section of the Act is not retrospective (*Flood* v. *Patterson*, 29 Beav. 295). A testator in Jersey appointed his Jersey wife executrix. She proved in Jersey, but not in England; and, though she had been three weeks in England after the death, she did not act there as executrix: held, that she could not be sued in England, and therefore that time did not run in favour of her testator's estate (*ibid.*).

13. In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight (*i*), and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven (*k*), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

(*i*) *Ante*, p. 267. (*k*) *Ante*, pp. 267, 268.

14. In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*l*), and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three (*m*), and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*n*), when there shall be two or more co-contractors, or co-debtors, whether bound or liable jointly only or jointly and severally, or executors, or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

Part payment by one contractor, &c., not to prevent bar by certain Statutes of Limitations in favour of another contractor, &c.

(*l*) *Ante*, p. 254. (m) *Ante*, p. 246. (*n*) *Ante*, p. 246.

Before this Act payment of interest by one of the makers of a joint or joint and several promissory note took the case out of the statute as against the other maker (*Whitcomb* v. *Whiting*, 2 Doug. 652), although such payment was made after the statute had run (*Channell* v. *Ditchburn*, 5 M. & W. 494; *Goddard* v. *Ingram*, 3 Q. B. 839; see *Atkins* v. *Tredgold*, 2 B. & C, 23; *Slater* v. *Lawson*,

Old law as to payments by one of several joint contractors.

19 & 20 Vict. c. 97, s. 14.

1 B. & Ad. 396; *Burleigh* v. *Stott*, 8 B. & C. 36; *Munderston* v. *Robertson*, 4 M. & R. 140). The doctrine of *Whitcomb* v. *Whiting* was applied to the case of one of the co-contractors jointly liable being a principal and the other a surety (*Perham* v. *Raynall*, 2 Bing. 306; *Wyatt* v. *Hodson*, 8 Bing. 309).

But the doctrine was limited to cases where a joint liability existed, and was never applied where the liability arose from promises which were several only (*Re Wolmershausen*, 62 L. T. 544); even where one of the promisors was a principal mortgaging real estate and another a surety for him (*ibid.*). So where a joint contract was severed by the death of one of the contractors, nothing could be done by his personal representatives to take the debt out of the statute as against the survivor (*Slater* v. *Lawson*, 1 B. & Ad. 396; see *Read* v. *Price*, [1909] 1 K. B. 577), nor by the survivor so as to affect the deceased (*Atkins* v. *Tredgold*, 2 B. & C. 23).

Payments after death of one of several joint contractors.

Partners: payments after death of one of several;

So also payments of interest on a partnership debt by surviving partners have not the effect of taking the debt out of the statute as against the real or personal estate of a deceased partner (*Way* v. *Bassett*, 5 Hare, 55). See the doubts previously expressed as to this, *Winter* v. *Innes* (4 M. & Cr. 111); *Braithwaite* v. *Britain* (1 Keen, 221). Even where payments are made by a surviving partner, who is also executor of the deceased partner, the presumption seems to be that the payments are made in the character of surviving partner, and not as executor (*Thompson* v. *Waithman*, 3 Drew, 628; *Brown* v. *Gordon*, 16 Beav. 302).

Where a partnership continues, and all the partners are living, it has been decided, since the present Act, that the above section does not apply to a payment made by one partner on account of a debt due by the firm, such a payment being considered as a payment of the firm itself (*Goodwin* v. *Parton*, 42 L. T. 91; see *Watson* v. *Woodman*, 20 Eq. 730). But where a partner retires, and the retirement is publicly announced, part payment by a continuing partner cannot be set up against the retiring partner as an answer to the statute (*Watson* v. *Woodman*, 20 Eq. 721; *Bristow* v. *Miller*, 11 Ir. L. R. 461). *Secus* where the retirement is secret (*Re Tucker*, [1894] 3 Ch. 429).

payments after dissolution.

Executors.

For the effect before the present Act, of a payment by one of several executors as regards his co-executors, see *Atkins* v. *Tredgold* (2 B. & C. 23); *Scholey* v. *Walton*, 12 M. & W. 512). The effect since the Act of one of several executors paying interest on a simple contract debt of his testator is discussed, *Re Hollingshead*, *H.* v. *Webster* (37 Ch. D. 658). See *Re Macdonald*, *Dick* v. *Fraser*, [1897] 2 Ch. 181.

Devisees.

Where a specialty debtor died having devised distinct estates to several persons, the devisees were "co-debtors" (within this section) in respect of their testator's specialties (*Re Lacey*, *Howard* v. *Lightfoot*, [1907] 1 Ch. 349). It seems that the tenant for life and remainderman of a single estate would not be co-debtors (*ibid.*; *Re Hollingshead*, *H.* v. *Webster*, 37 Ch. D. 657).

Other cases on the section.

Under the above section (which was held not retrospective as regards the date of the payment, *Jackson* v. *Woolley*, 8 E. & B. 784), part payment by one of two makers of a joint and several promissory note did not take the case out of the statute as against the other (*Cockerill* v. *Sparkes*, 1 H. & C. 699).

The section does not apply in the case of payments under R. P. Lim. Act, 1874, s. 8, *ante*, p. 224 (*Re Frisby*, *Allison* v. *F.*, 43 Ch. D. 106). As to the effect of a mortgagor's payment of interest where by a separate instrument a surety had guaranteed the mortgage debt, see *Re Powers*, *Lindsell* v. *Phillips*, (30 Ch. D. 291, a separate bond); *Re Wolmershausen* (62 L. T. 541,

a separate promissory note). And as to the effect of the section on the right of contribution between co-debtors, see *Gardner* v. *Brooke*, [1897] 2 I. R. 6. 19 & 20 Vict. c. 97, s. 16.

16. In citing this Act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856." Short title.

17. Nothing in this Act shall extend to Scotland. Extent of Act.

VII.—The Trustee Act, 1888.

51 & 52 Vict. c. 59, ss. 1, 8, 12.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees. [24th December, 1888.]

1.—(1) This Act may be cited as the Trustee Act, 1888. Short title, extent, and definition.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act, the expression "trustee" shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

It was doubtful whether an executor, merely as such, came within the above definition (*Lacons* v. *Warmoll*, [1907] 2 K. B. 362, 364; but see now *Re Blow, St. Bartholomew's Hospital* v. *Cambden*, [1914] 1 Ch. 233, cited in note to clause (b) of section 8, *post*). As regards moneys of a company under their control, directors are trustees within this section (*Re Lands Allotment Co.*, [1894] 1 Ch. 616; *National Bank of Wales*, [1899] 2 Ch. 629, 663; see *Re Kingston Cotton Co.*, [1896] 1 Ch. 347; *Whitwam* v. *Watkin*, 78 L. T. 188); but not a trustee in bankruptcy (*Re Cornish*, [1896] 1 Q. B. 99; see *Re Gallard*, [1897] 2 Q. B. 8). The word "trustee" included a husband who had seized his wife's separate estate (*Wassell* v. *Leggatt*, [1896] 1 Ch. 554); or property in which she had a separate life interest (*McArdle* v. *Gaughran*, [1903] 1 I. R. 106).

As to the cases of constructive trust in which independently of this Act lapse of time would be a defence, see the note, *post*, p. 292.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply— Statute of Limitations may be pleaded by trustees.

(a.) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the

51 & 52 Vict. c. 59, s. 8.

trustee or person claiming through him had not been a trustee or person claiming through him:

(b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right of defence to which he is entitled under any existing statute of limitations.

As to the application (independently of the present Act) of the Statutes of Limitation to proceedings against trustees, see in the case of land sect. 25 of the R. P. Lim. Act, 1833, *ante*, p. 189, in the case of money, whether charged or not charged on land, the note to sect. 10 of the R. P. Lim. Act, 1874, *ante*, p. 242, and the references there given.

(1) *Effect of the Section*...284.
(2) *Point from which Time Runs*...285.
(3) *Exceptions from the Section*...286.
(4) *Proceedings and Persons within the Section*...287.

(1) Effect of section.

The short effect of sect. 8 is that, except in three specific cases—viz., fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use—a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them (*How* v. *Winterton*, [1896] 2 Ch. 640). In cases where it applies the section appears to control sect. 25, sub-sect. 2 of the Jud. Act, 1873.

Clause (a).

As to clause (a) of sub-sect. 1, Fry, L.J., pointed out that there was no right or privilege conferred by any Statute of Limitations in respect of a breach of trust (*Re Bowden*, 45 Ch. D. 450). But

this seems to deprive clause (a) of meaning (*How* v. *Winterton*, [1896] 2 Ch. 639). Rigby, L.J., said that the clause dealt with remedies, not with causes of action. The clause supposed the trustee to be guilty of a breach of duty, and provided that he was to be treated as though the breach of trust were nothing more or less than a breach of duty by reason of some act or omission (*ibid.*, 642). Where, accordingly, an annuitant sued a trustee of a will for breaches of trust consisting of omission to accumulate, clause (a) protected the defendant from demands more than six years before writ (*How* v. *Winterton*, *supra*). The same clause barred a second mortgagee's action for an account against a first mortgagee who had sold and received the proceeds (*Thorne* v. *Heard*, [1894] 1 Ch. 603; [1895] A. C. 495). 51 & 52 Vict. c. 59, s. 8.

In discussing the period prescribed by clause (a) Rigby, L.J., said that a duty might be thrown on a trustee by virtue of his simple contract to undertake the trust, or by reason of a covenant to undertake it, and that you must look to the appropriate Statutes of Limitation under which the periods might be different (*How* v. *Winterton*, [1896] 2 Ch. 642; see as to this the cases quoted under sect. 32 of the Administration of Estates Act, 1925 (*post*)). Lindley, L.J., said that if clause (a) applies to the trustee's accounts at all, it puts them on the same footing as other accounts; as to which (see *ante*, p. 257) the period is six years ([1896] 2 Ch. 639). The form of an order for account by trustees protected by the section is given, *Re Davies, Ellis* v. *Roberts*, [1898] 2 Ch. 142.

Clause (b).

As to clause (b). The period prescribed in the case of an action of debt for money had and received is the six years mentioned in the Lim. Act, 1623 (*ante*, p. 254; see *Re Somerset, S.* v. *Poulett*, [1894] 1 Ch. 255; *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 184). Clause (b) has been held to bar an action to compel a trustee to make good loss from improper investment (*Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 444; *Re Gurney, Mason* v. *Mercer*, [1893] 1 Ch. 590; *Re Somerset*, *supra*), or to make good to the estate income tax overpaid to annuitants (*Re Sharp, Rickett* v. *R.*, [1906] 1 Ch. 793). Also an action by a residuary legatee to recover from a trustee loss from non-realisation of residue (*Re Swain, S.* v. *Bringemann*, [1891] 3 Ch. 233). The words of the clause are satisfied if the action be one to make the trustee pay money which does not belong to the plaintiff, but is payable into a fund as against which the plaintiff has a claim (see *How* v. *Winterton*, [1896] 2 Ch. 642). The clause protected an executor in an action for an account brought by a creditor, and the executor was allowed sums honestly paid to beneficiaries more than six years before action brought (*Re Blow*, [1914] 1 Ch. 233). But a claim for administration made by a residuary legatee was held to be an action to recover a legacy barred only after twelve years by sect. 8 of R. P. Lim. Act, 1874, *ante* (*Re Richardson, Pole* v. *Pattenden*, [1920] 1 Ch. 423). On the concluding part of the clause see *Re Allsop, Whittaker* v. *Bamford*, [1914] 1 Ch. 1. As to pleading the statute, see *Re Williams, Jones* v. *W.*, [1916] 2 Ch. 38.

Where a will appointed the same persons executors and trustees, and the executors completed the administration and became trustees of a fund settled by the will, an action to make them liable for improperly paying over the fund was barred by clause (b) as being an action to which no existing Statute of Limitations applied (*Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 174).

(2) Point from which time runs.

The section has not altered the principles determining the time when a cause of action accrues (*Thorne* v. *Heard*, [1894] 1 Ch. 605). In the case of a breach of trust time runs from the date of

51 & 52 Vict. c. 59, s. 8.

the breach (*ibid.*; see *Re Somerset, S.* v. *Poulett*, [1894] 1 Ch. 231; *Re Bowden*, 45 Ch. D. 450; *Smith* v. *Fox*, 6 Hare, 386). Under the concluding words, however, of clause (b), time does not run against a beneficiary until his interest is in possession. Accordingly in an action brought more than six years after a breach of trust infant remaindermen were not barred, although the tenant for life was (*Re Somerset, supra; Re Fountaine, F.* v. *Amherst*, [1909] 2 Ch. 382; *Re Dive, D.* v. *Roebuck*, [1909] 1 Ch. 336; see *Collings* v. *Wade*, [1896] 1 I. R. 340). So where under a settlement of personal estate a wife took (expressly) an estate during the joint lives of herself and her husband, and (by way of resulting trust) a further estate for life after her husband's death, an action to enforce a breach of trust brought by her within six years after her husband's death was not barred (*Mara* v. *Browne*, [1895] 2 Ch. 69). In the case of an owner of a deferred annuity suing for previous breaches of trust, time ran against the annuitant from the commencement of her annuity (*How* v. *Winterton*, [1896] 2 Ch. 637). Inasmuch, however, as during a life tenancy a remainderman can sue to have trust funds properly secured, his action for a breach of trust may, even where not barred under this statute, be barred by laches (*Re Taylor, Atkinson* v. *Lord*, 81 L. T. 812).

Where fraud as regards a client's money was committed by solicitors in partnership, and was concealed by misrepresentation, time did not run against the client until the discovery of the fraud; an innocent partner being deprived of the benefit of the statute by representations which bound him as a partner (*Blair* v. *Bromley*, 2 Ph. 354). This decision rests on the law relating to representation and partnership, and not the law relating to trusts; and remains unaffected by the above section (*Moore* v. *Knight*, [1891] 1 Ch. 555). In the last-mentioned case Stirling, J., said that as against a trustee relying on clause (b), the *cestui que trusts* could claim the benefit of *Blair* v. *Bromley* (*ibid.*, 556; see *Whitwam* v. *Watkin*, 78 L. T. 190).

(3) Exceptions from the section.

Sect. 8 starts by mentioning three exceptions. The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest. It was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have (*Re Timmis; Nixon* v. *Smith*, [1902] 1 Ch. 186).

Fraud.

The first exception relates to fraud to which the trustee was party or privy. This means fraud in which the trustee has personally participated. It does not include fraud committed by an agent in his own interest, of which the trustee was ignorant, from which he did not benefit, and which he did not ratify (*Thorne* v. *Heard*, [1894] 1 Ch. 606, 615; [1895] A. C. 503. Conf. *Ruben* v. *Great Fingall*, [1906] A. C. 439). The receipt by a promoter of a secret profit may be "fraudulent" (*Re Sale Hotel Co.* (1897), W. N. 174; 46 W. R. 617; compare *Collings* v. *Wade*, [1896] 1 I. R. 340; *Omnium Electric Palaces* v. *Baines*, [1914] 1 Ch. 332).

Trust property still retained.

The second exception relates to trust property still retained by the trustee. This is confined to cases in which, at the date of the writ, the trustee has in his hands, or under his control, the property sought to be recovered. It refers to cases where the trustee, or any agent for him, has the property so that he can get it; but not cases where the property has been lost, whether by the trustee's negligence or otherwise (*Thorne* v. *Heard*, [1894] 1 Ch. 606). The property must be in some sense in his pocket (*Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 185). Accordingly a trustee cannot be treated as having trust moneys still in his hands until he can account for

their proper application (*How* v. *Winterton*, [1896] 2 Ch. 634, 638; *Re Tufnell*, 18 T. L. R. 705). Where an executor expended the residue in maintaining the infant residuary legatee, but rendered no account, the legatee's action for account brought more than six years after his majority was barred, the exceptions not applying (*Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 301). But the second exception applied in the case of a husband who had seized his wife's separate estate (*Wassell* v. *Leggatt*, [1896] 1 Ch. 554), or property in which she had a separate life interest (*McArdle* v. *Gaughran*, [1903] 1 I. R. 106). 51 & 52 Vict. c. 59, s. 8.

The third exception relates to trust property received by the trustee and converted to his use. The exception did not include the case of trust funds advanced on mortgage, and, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a bank in which the trustee was partner (*Re Gurney, Mason* v. *Mercer*, [1893] 1 Ch. 590); but was thought to include the case of money deposited with solicitors for investment, and embezzled by a clerk of the firm (*Moore* v. *Knight*, [1891] 1 Ch. 553). Trust property converted.

The section only applies to "proceedings against a trustee," &c. Accordingly where the executors of a deceased trustee took out a summons to ascertain the liability, if any, of the trustees for retaining mortgages, the defence of the section was said not to be available (*Re Chapman, Cocks* v. *Chapman*, [1896] 1 Ch. 326). The words "any person claiming through" a trustee refer not to *cestui que trusts*, but to such persons as the executors, administrators, and assigns of the trustee (*Leahy* v. *De Moleyns*, [1896] 1 I. R. 206). (4) Proceedings and persons within the section.

In connection with sub-sect. 2 compare the case of creditors claiming in administration actions, *post*, p. 295; and see *Williams* v. *W.*, [1900] 1 Ch. 152. As to sub-sect. 3, see *Re Harrison; Allen* v. *Cort* (1892), W. N. 148. Sub-sect. (2). (3).

12.—(1) This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act. Application of Act.

(2.) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

VIII.—Courts of Equity and the Statutes of Limitation.

(1) *The Effect of Lapse of Time in Equity generally*...287.
(2) *The Effect of Trusts*...291.
(3) *The Statute in the Administration of Estates*...294.
(4) *Pendency of Proceedings*...296.
(5) *Funds in Court*...297.
(6) *Lunacy*...298.

(1) Lapse of time in equity generally.

In the case of suits in courts of equity (before the Judicature Acts) relating to land, rent-charges, church property, advowsons, money charged on land or rent-charges, legacies, and the estates of

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intestates, provisions in terms affecting such suits occurred in R. P. Lim. Act, 1833 (sects. 24—34, 40—43); R. P. Lim. Act, 1837; Law of Prop. Amendment Act, 1860 (s. 13). See these sections, *ante*. Sects. 2—5, 7—9, 14—22 of R. P. Lim. Act, 1833, applied in terms only to actions at law, although in substance these limitations by virtue of sect. 24, governed suits in equity. All the provisions, however, of R. P. Lim. Act, 1874 (*ante*, p. 214), were so framed as to apply in terms to courts of equity as well as courts of law. In the case of trusts, proceedings in all courts are also affected by Jud. Act, 1873, sect. 25 (2); Trustee Act, 1888, s. 8.

Land, money charged on land, &c.

Legal demands.

In the case of specialty and simple contract debts the statutes which prescribed the periods of limitation for the recovery of such debts did not apply in terms to Courts of equity. But it was said before the Judicature Acts that in the case of legal demands those courts acted in obedience to the statutes (*Foley* v. *Hill*, 1 Ph. 399). Since the Judicature Acts, it has been said that Lim. Act, 1623, s. 3, is binding upon the High Court, and applies to every action properly described by it (*Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 554; see *Gibbs* v. *Guild*, 9 Q. B. D. 67; *Re Sharpe, Masonic Co.* v. *S.*, [1892] 1 Ch. 154). Again, it has been laid down that in the case of a legal right a Court of equity will not refuse relief on the ground of delay unless sufficient to create a statutory bar (*Re Maddever, Three Towns' Co.* v. *M.*, 27 Ch. D. 532; *Moore* v. *Marriott*, 7 Ch. D. 546). Thus a less delay did not deprive a plaintiff of his right to an injunction in aid of an action of deceit (*Fullwood* v. *F.*, 9 Ch. D. 176). So also a deed was set aside under 13 Eliz. c. 5, ten years after the death of the grantor (*Three Towns' Co.* v. *Maddever, supra*). And a specialty creditor recovered his debt more than eighteen years after the debtor's death (*Re Baker, Collins* v. *Rhodes*, 20 Ch. D. 230). Mere laches does not deprive the creditor of his right to sue an executor for devastavit (*Re Birch, Roe* v. *B.*, 27 Ch. D. 622).

Equitable demands.

Acting by analogy.

Where a remedy in equity corresponds to a remedy at law which is within the statute, the Court of equity acts by analogy to the statute (*Knox* v. *Gye*, L. R. 5 H. L. 674; see *Bulli Co.* v. *Osborne*, [1899] A. C. 351; *Oelkers* v. *Ellis*, [1914] 2 K. B. 139). Thus an action against directors for misrepresentation in a prospectus was treated as analogous to an action for deceit, and it was said that no delay short of the statutory period would be a bar (*Peek* v. *Gurney*, L. R. 6 H. L. 377). So an action to set aside a gift on the ground of undue influence (*Allcard* v. *Skinner*, 36 Ch. D. 186). The analogy of the Lim. Act, 1623, was held applicable to an action to recover a debt out of a married woman's separate estate (*Re Hastings, Hallett* v. *Hastings*, 35 Ch. D. 105; *Beck* v. *Pierce*, 23 Q. B. D. 322), and to an action to set aside a forfeiture of shares (*Rule* v. *Jewell*, 18 Ch. D. 667). Lapse of time barred the claim of the liquidator to place a name on the list of contributories, the case being specific performance of an agreement to take shares (*Mackenzie's Case, Europ. Assur. Arbitration Cases*, 141). Where an action for damages for breach of a contract to execute a mortgage would have been barred by Lim. Act, 1623, it was said that specific performance would not be decreed (*Firth* v. *Slingsby*, 58 L. T. 483). But Courts of equity have refused by analogy to apply to personal estate a statute dealing only with real estate (*Mellersh* v. *Brown*, 45 Ch. D. 229; *Charter* v. *Watson*, [1899] 1 Ch. 175; *Re Stucley, S.* v. *Kekewich*, [1905] 1 Ch. 72). And the Court of Admiralty refused to apply the analogy of the statute in dealing with arrears of interest in an action *in rem* (*The Kong Magnus*, [1891] P. 223). As to acting by analogy see further the earlier cases quoted under sect. 24 of the R. P. Lim. Act, 1833, *ante*, p. 188.

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Laches and acquiescence.

Independently of the statute claims may be barred on the ground of laches; *e.g.* where a dowress neglects for more than twelve years to claim any of her rights (*Williams* v. *Thomas*, [1909] 1 Ch. 722). Or where the mortgagee of an advowson neglected for forty-eight years to require any payment (*Brooks* v. *Muckleston*, [1909] 2 Ch. 519). So equitable demands may be barred by laches (*Harcourt* v. *White*, 28 Beav. 303; *Nutt* v. *Easton*, [1900] 1 Ch. 29; *Levy* v. *Stogdon*, [1899] 1 Ch. 5; see *Re Sharpe, Masonic Co.* v. *S.*, [1892] 1 Ch. 154; and cases quoted *ibid.* p. 168; *Watt* v. *Assets Co.*, [1905] A. C. 329, 333). In the case of legal demands, relief will not be refused on the ground of delay unless sufficient to create a statutory bar (see above). Acquiescence will also, independently of the statute, prevent the enforcement of demands in equity (*Blake* v. *Gale*, 32 Ch. D. 571; *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; *Allcard* v. *Skinner*, 36 Ch. D. 163; see *Archbold* v. *Scully*, 9 H. L. C. 383, where laches and acquiescence are distinguished; and see the cases quoted under R. P. Lim. Act, 1833, s. 27, *ante*, p. 195. Laches and acquiescence will prevent the enforcement of a claim, even in the case of an express trust (*Re Cross, Harston* v. *Tenison*, 20 Ch. D. 121; *Bright* v. *Legerton*, 2 D. F. & J. 606; *M'Donnell* v. *White*, 11 H. L. C. 570).

Fraud.

In actions based on concealed fraud, time in Courts of equity always ran from the discovery of the fraud (*Booth* v. *Warrington*, 4 Bro. P. C. 163; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607; *Rolfe* v. *Gregory*, 4 D. J. & S. 579; see *Gibbs* v. *Guild*, 9 Q. B. D. 70; *Re Crossley, Munns* v. *Burn*, 35 Ch. D. 266). For the operation of the rule as between partners in regard to partnership accounts, see *Betjemann* v. *B.*, [1895] 2 Ch. 474. The rule was applied where fraud, as regards a client's money, was committed by solicitors in partnership and concealed by misrepresentation (*Blair* v. *Bromley*, 2 Phil. 354; *Moare* v. *Knight*, [1891] 1 Ch. 547). In *Blair* v. *Bromley* (*supra*), the defendant was not personally concerned in the fraud, and had ceased to be a partner for six years before action, but was held liable for the fraud of his co-partner, committed in the ordinary course of the partnership business. The defendants were not liable where the fraud was not in such ordinary course (*Hughes* v. *Twisden*, 54 L. T. 570; compare *Mara* v. *Browne*, [1896] 1 Ch. 199), nor where fraud was committed not by themselves, but by an agent acting in his own interest (*Thorne* v. *Heard*, [1894] 1 Ch. 599; [1895] A. C. 495; see *British Co.* v. *Charnwood Co.*, 18 Q. B. D. 714). In actions to open accounts, where an item complained of is fraudulent, the accounts will be opened altogether; but where the item is not fraudulent, and the accounts are of some years' standing, the plaintiff will only have liberty to surcharge and falsify (*Gething* v. *Keighley*, 9 Ch. D. 550; see *Allfrey* v. *A.*, 1 Mac. & G. 87; *Williamson* v. *Barbour*, 9 Ch. D. 529). Delay deprives a man of his right to rescind a contract on the ground of fraud or misrepresentation, and the delay counts from the time when by due diligence the fraud or misrepresentation might have been discovered (*Redgrave* v. *Hurd*, 20 Ch. D. 13; *Molloy* v. *Mutual Reserve Co.*, 22 T. L. R. 525; see *Oelkers* v. *Ellis*, [1914] 2 K. B. 139).

Mistake.

In the case of mistake, where equitable relief was claimed, time ran from the moment when the plaintiff discovered the mistake, or had reasonable means of discovery (*Baker* v. *Courage*, [1910] 1 K. B. 63). Thus, where trustees paid over trust money on a mistake of fact, and within six years from its discovery commenced a suit to compel refunding, they recovered (*Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58; see *Durrant* v. *Ecclesiastical Commrs.*, 6 Q. B. D. 234). Where A and B being tenants in common of rents, A under a mutual mistake of fact received more than his share, and B sued

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for an account. Held that as B had the means of discovering the mistake earlier, he was entitled to an account for six years only before bill (*Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42). In a common law action to recover money paid under a mistake of fact time ran from payment (*Baker* v. *Courage*, [1910] 1 K. B. 56). It is not necessary to the cause of action in such a case that the payor should give the payee notice of his mistake and demand the money (*ibid.*; see *Freeman* v. *Jeffries*, L. R. 4 Ex. 200; *Cowper* v. *Godmond*, 9 Bing. 148; *Leather, &c. Bank* v. *Merchants' Bank*, 128 U. S. 26; *Bree* v. *Holbech*, 2 Doug. 654). As between A and B, *cestui que trusts*, where trustees by mistake overpaid A, the statute was no defence to a suit by B brought more than six years after the payment to make A refund (*Harris* v. *H.*, 29 Beav. 110, where it does not appear when the mistake was discovered; see *Prowse* v. *Spurgin*, 5 Eq. 99; *Re Horne, Wilson* v. *Cox Sinclair*, [1905] 1 Ch. 76). *Secus* where the claim is in the nature of a claim for money and not for a specific trust fund (*Re Robinson, McLaren* v. *Public Trustee*, [1911] 1 Ch. 502). As between a trustee and a *cestui que trust* who by the trustee's mistake of law has been underpaid, the effect of time is dealt with, *Newton* v. *Ayscough*, 19 Ves. 534. And see *Hilliard* v. *Fulford*, 4 Ch. D. 389.

A release to trustees has been set aside after the lapse of more than twenty years, it having been executed under a mistake (*Re Garnett, Gaudy* v. *Macaulay*, 31 Ch. D. 1). Where property has been long enjoyed by a family in certain shares under a mistake, the Court will presume a family arrangement (*Re Peat*, 7 Eq. 302).

Mortgagee of interests in personalty.

A mortgagee of an equitable reversionary interest in personal estate can, on the interest falling into possession, recover the fund from the trustee and pay himself in full, although the debt, to secure which the mortgage was made, is barred (*Re Hancock, H.* v. *Berrey*, 59 L. T. 197; *Re Lake*, 63 L. T. 416; see *Re Stucley, S.*, v. *Kekewich*, [1906] 1 Ch. 67; *Jordan* v. *Young* (1878), W. N. 229). And inasmuch as sects. 40 and 42 of R. P. Lim. Act, 1833, do not affect mortgages of personal estate (*London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; *Re Stucley, S.* v. *Kekewich*, [1906] 1 Ch. 67), a mortgagee of personal estate in possession may foreclose after the personal remedy to recover the debt is barred (*London and Midland Bank* v. *Mitchell*, *supra*), and a mortgagee can in an action to foreclose personal estate recover interest for more than six years (*Mellersh* v. *Brown*, 45 Ch. D. 225; see *Smith* v. *Hill*, 9 Ch. D. 143). So in an action to enforce a vendor's lien on personal estate, the plaintiff recovered interest for twenty-six years (*Re Stucley, S.* v. *Kekewich*, *supra*). As to the right of the trustees of a fund, who have notice of other claims, to refuse to pay over the whole fund to a mortgagee, see *Re Bell, Jeffery* v. *Sayles*, [1896] 1 Ch. 1; *Hockey* v. *Western*, [1898] 1 Ch. 350.

Where real and personal estate were comprised in one mortgage, and the right to redeem the land was barred, redemption of the personalty was refused (*Charter* v. *Watson*, [1899] 1 Ch. 175).

Waste.

In the case of legal waste by a tenant for life, the period of limitation is six years (*Birch Wolfe* v. *B.*, 9 Eq. 692), which period may be extended by infancy (*Dashwood* v. *Magniac*, [1891] 3 Ch. 386). Time runs against the remainderman from the cutting of the timber (*Seagram* v. *Knight*, 2 Ch. 628; *Higginbottom* v. *Hawkins*, 7 Ch. 676; see *Simpson* v. *S.*, 3 L. R. Ir. 314). In the case of equitable waste time runs against the remainderman from the date when his title accrues in possession (*Leeds* v. *Amherst*, 2 Phil. 117; *Morris* v. *M.*, 6 W. R. 427; *Dashwood* v. *Magniac*, [1891] 3 Ch. 386); and the period of limitation is now twelve years

(R. P. Lim. Act, 1833, ss. 2, 3, 24; R. P. Lim. Act, 1874, s. 2; *Leeds* v. *Amherst*, *supra*).

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In the case of exclusion of a partner, time runs from the act of exclusion (*Barton* v. *N. Stafford Co.*, 38 Ch. D. 463).

Partners.

The statute does not being to run against a surety's right to sue a co-surety for contribution until the time at which the claim of the principal creditor is established against the surety. And during the statutory period computed from that time the surety can sue, although at the time of suing the statute may have run as between the principal creditor and the co-surety (*Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; see *Gardner* v. *Brooke*, [1897] 2 I. R. 6). The same principle applies to the case of a trustee claiming contribution from his co-trustee (*Robinson* v. *Harkin*, [1896] 2 Ch. 415).

Contribution.

(2) Trusts.

In the case of proceedings against trustees commenced after January 1, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*ante*, p. 283).

Trustee Act, 1888, s. 8.

The following note as to how far the existence of a trust may prevent any Statute of Limitation being set up relates to the law apart from the last-mentioned Act.

Express trusts affecting land or rent were dealt with by R. P. Lim. Act, 1833, s. 25 (*ante*, p. 189), and express trusts affecting money charged upon land by R. P. Lim. Act, 1874, s. 10 (*ante*, p. 241). As to express trusts in the case of legacies payable out of personalty, see *ante*, p. 221).

Express trusts.

As regards real and personal property generally, it was enacted by the Jud. Act, 1873, s. 25 (2), that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust, should be barred by any Statute of Limitations; "a statutory declaration of a law which has always been recognised and administered in Courts of equity" (*Re Cross, Harston* v. *Tenison*, 20 Ch. D. 121). See, as to this law, *Beckford* v. *Wade* (17 Ves. 97); *Townshend* v. *T.* (1 Bro. C. C. 550); *Wedderburn* v. *W.* (4 M. & C. 41); *Stone* v. *Stone* (5 Ch. 74). So far as regards money charged on land, the last section appears to be subject to 37 & 38 Vict. c. 57, s. 10 (*ante*, p. 241). Compare the Irish Act, 40 & 41 Vict. c. 57, s. 28 (2).

Jud. Act, 1873, s. 25, sub-s. 2.

In a case affecting personal estate decided since the Jud. Act, 1873, it was said there might be an express trust without any actual expression in words (*Banner* v. *Berridge*, 18 Ch. D. 265; but see *Sands* to *Thompson*, 22 Ch. D. 617). The first mortgagee of a ship having sold, it was held that there was no express trust of the proceeds; that in the case of an ascertained surplus, the first mortgagee might be constructively trustee of the surplus; but that after six years, evidence could not be adduced to prove a surplus (*Banner* v. *Berridge*, *supra*). Where a stranger had assumed to act as a trustee, and had received trust money under a breach in which he concurred, he was treated as if he were an express trustee (*Soar* v. *Ashwell*, [1893] 2 Q. B. 390; see *Re Dixon, Heynes* v. *D.*, [1900] 2 Ch. 561; *Re Eyre-Williams*, [1923] 2 Ch. 533). Compare the cases as to express trust within R. P. Lim. Act, 1833, s. 25 (*ante*, p. 189).

Where an express trust for the payment of a debt was for the benefit of the debtor only, it did not prevent time running against the creditor (*Henriques* v. *Bensusan*, 20 W. R. 350).

Where a breach of an express trust relating to personal estate had been committed, it was said that a *cestui que trust* might by his conduct raise a presumption of abandonment of his right of action which would bar subsequent proceedings (*Re Cross, Harston* v. *Tenison*, 20 Ch. D. 122). So if there had been a direct and

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independent dealing between the trustee and *cestui que trust* after the relation had terminated (*Wedderburn* v. *W.*, 2 Keen, 749).

As regards constructive trusts, strictly so called, in some cases the statute would be a defence (*Beckford* v. *Wade*, 17 Ves. 87; *Bonney* v. *Ridyard*, 17 Ves. 97; see *Soar* v. *Ashwell*, [1893] 2 Q. B. 395, 400; and compare *Re Davis*, [1891] 3 Ch. 124). In other cases it would not (*Soar* v. *Ashwell*, [1893] 2 Q. B. 405; *Re Eyre-Williams*, [1923] 2 Ch. 533).

Constructive trusts :

statute no defence;

Thus, solicitors receiving money were held to be trustees who could not set up the statute (*Re Bell, Lake* v. *Bell*, 34 Ch. D. 462; *Lee* v. *Sankey*, 15 Eq. 204; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390). Distinguish the case of solicitors held not to be trustees (*Dooby* v. *Watson*, 39 Ch. D. 178; *Mara* v. *Browne*, [1896] 1 Ch. 199; and compare *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Hughes* v. *Twisden*, 54 L. T. 570). A person purchasing land on behalf of another was held a trustee of the land unable to set up the statute (*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; see *Duffy* v. *D.*, [1906] 1 I. R. 205); and an agent receiving money to purchase land was a trustee of the money (*North American Land* v. *Watkins*, [1904] 1 Ch. 242). So a husband seizing his wife's separate estate (*Wassell* v. *Leggatt*, [1896] 1 Ch. 554; see *McArdle* v. *Gaughran*, [1903] 1 I. R. 106); an agent receiving rents and stating the receipt to be on behalf of another (*Lyell* v. *Kennedy*, 14 App. Cas. 457). It has been held generally that no lapse of time will bar the right to an account of moneys received by a person standing in a fiduciary position (*Teed* v. *Beere*, 7 W. R. 394; *James* v. *Holmes*, 10 W. R. 634; *Burdick* v. *Garrick*, 5 Ch. 233; *Re Tidd, T.* v. *Overell*, [1893] 3 Ch. 154; *Cheese* v. *Keen*, [1908] 1 Ch. 245. Managers of an annuity fund were held trustees for the members so as to prevent time running (*Edwards* v. *Warden*, 1 App. Cas. 281). And before the Trustee Act, 1888, the defence of the statute was unsuccessfully raised by the following persons who were held to be trustees: a receiver appointed by the Court (*Seagram* v. *Tuck*, 18 Ch. D. 296; see *Re Gent, Gent-Davis* v. *Harris*, 40 Ch. D. 190; and compare the decisions since the Trustee Act, 1888, as to a trustee in bankruptcy, (*Re Cornish*, [1896] 1 Q. B. 99; *Re Gallard*, [1897] 2 Q. B. 8); a director who had paid dividends out of capital (*Flitcroft's Case*, 21 Ch. D. 519; *Re Oxford Society*, 35 Ch. D. 509; *Re Sharpe, Masonic Co.* v. *S.*, [1892] 1 Ch. 154; see *Re Lands Allotment Co.*, [1894] 1 Ch. 616; and compare the case of an action to recover a bribe received by a director, *Metrop. Bank* v. *Heiron*, 5 Ex. D. 319); a person who borrowed trust money with notice of the trust (*Ernest* v. *Croysdill*, 2 D. F. & J. 198; see *Butler* v. *Carter*, 5 Eq. 276; *Coxwell* v. *Franklinski*, 12 W. R. 1072; *Re Dixon, Heynes* v. *D.*, [1900] 2 Ch. 561; *Re Eyre-Williams*, [1923] 2 Ch. 533).

statute a defence.

In other cases, however, accounting parties were held not to be trustees of money received by them (*Phillips* v. *Homfray*, 44 Ch. D. 694; see *Lister* v. *Stubbs*, 45 Ch. D. 1). So the fiduciary relation between principal and agent did not prevent the statute from barring an action for balance of account (*Friend* v. *Young*, [1897] 2 Ch. 432). A company was not made a trustee of a dividend for a shareholder by declarations of the dividend, or by entry thereof in its books, no notice of the entry being given and no assets set aside (*Re Severn Ry. Co.*, [1896] 1 Ch. 559). A secretary of a company can raise the defence of the statute to a charge of misfeasance (*Municipal Co.* v. *Pollington*, 63 L. T. 238); and an auditor (*Leeds Co.* v. *Shepherd*, 36 Ch. D. 787).

Where there was no trust, except such as was created by the decree of the Court on setting aside the transaction, time ran from the discovery of circumstances which constituted the right to relief

(*Clanricarde* v. *Henning*, 30 Beav. 175, a purchase by a solicitor from his client; the rules of equity as to such a purchase, and the operation of lapse of time upon the right to relief in such a case, were considered in *Gresley* v. *Mousley*, 4 De G. & J. 78). In one case the purchase of trust property by trustees for their own benefit was set aside, after a considerable lapse of time and several assignments (*Att.-Gen.* v. *Dudley*, Coop. C. C. 146; see *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196). But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years (*Gregory* v. *Gregory*, Coop. C. C. 201; see *Champion* v. *Rigby*, 1 R. & M. 539; *Postlethwaite* v. *Rickman*, 60 L. T. 514). Damages in respect of a sale at an undervalue were given against a bankruptcy trustee after long delay (*Re Gallard*, [1897] 2 Q. B. 8; compare *Re Cornish*, [1896] 1 Q. B. 99).

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Compare with the above the decisions as to the effect of lapse of time in the case of constructive trusts of land, *ante*, p. 190. Constructive trusts are within the Trustee Act, 1888, s. 8 (see sect. 1 of that Act).

Enforcing breach of trust against estate of deceased trustee.

A claim arising from a breach of trust is, generally speaking, considered as a simple contract debt (*Holland* v. *H.*, 4 Ch. 449). But it was held that the analogy of the Lim. Act, 1623, could not, in answer to a claim founded on a breach of trust, be set up, either by the executor of the trustee (*Brittlebank* v. *Goodwin*, 5 Eq. 545; *Creswell* v. *Dewell*, 4 Giff. 460; *Woodhouse* v. *W.*, 8 Eq. 514; *Smith* v. *Cork, &c. Ry. Co.*, I. R. 5 Eq. 65; *Carroll* v. *Hargrave*, *ibid.* 548), or by his heir (*Re Burge*, *Gillard* v. *Lawrenson*, 57 L. T. 364). See now Trustee Act, 1888, s. 8, *ante*, p. 283.

Testamentary provisions for payments debts.

A devise of real estate in trust for the payment of debts generally has been held not to operate for the benefit of a creditor whose debt is barred at the time of the testator's death (*Burke* v. *Jones*, 2 V. & B. 275). When a man makes a provision for his debts, he makes a provision for those which are not barred, that is to say, for those which in law are deemed debts (*O'Connor* v. *Haslam*, 5 H. L. C. 181). A direction, however, to pay specific debts may operate for the benefit of a creditor whose debt is barred at the testator's death (*Williamson* v. *Naylor*, 3 Y. & C. Ex. 308; *Philips* v. *Philips*, 3 Hare, 281; *Turner* v. *Martin*, 7 D. M. & G. 429; *Clinton* v. *Brophy*, 10 Ir. Eq. 139). And a debtor's will has been held to amount to a sufficient acknowledgment within R. P. Lim. Act, 1833, s. 40 (*Millington* v. *Thompson*, 3 Ir. Ch. Rep. 236; see *Re Hoyle*, *H.* v. *H.*, [1893] 1 Ch. 92; *Scott* v. *Synge*, 27 L. R. Ir. 560).

Effect as regards debts barred at the death.

Effect as regards debts not barred at the death.

As regards debts not barred at the testator's death, it has been held that a trust for payment of debts generally out of a testator's personal estate does not stop the running of time (*Scott* v. *Jones*, 4 Cl. & F. 382; *Evans* v. *Tweedy*, 1 Beav. 55; *Freake* v. *Cranefeldt*, 3 My. & Cr. 499). For if a testator merely imposes upon his executors that which it is their regular duty to do, he does not create a trust (*Cadbury* v. *Smith*, 9 Eq. 42). So where a testator devised real estate on trust for payment of his debts and had in fact no real estate at his death, the devise had no effect on the running of time (*Ex p. Hepburn*, 14 Q. B. D. 394). And the case was the same where debts were charged on property which was described in the will as real estate but was in fact personalty (*Scott* v. *Jones*, *supra*). For the case where real and personal estate are blended in one gift to executors, see *Re Stephens*, *Warburton* v. *S.*, 43 Ch. D. 46.

On the other hand a provision for payment of debts generally

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out of real estate (whether in the form of a trust, or a charge) is available for twelve years (*Re Stephens, Warburton* v. *S.*, 43 Ch. D. 46; see *Re Raggi, Brass* v. *Young*, [1913] 2 Ch. 206), but no longer (*Fearnside* v. *Flint*, 22 Ch. D. 582; *Piggott* v. *Jefferson*, 12 Sim. 26). See the earlier cases decided before the R. P. Lim. Act, 1874, *Moore* v. *Petchell*, 22 Beav. 172; *Hughes* v. *Wynne*, T. & R. 307; *Hargreaves* v. *Mitchell*, 6 Madd. 326; *Fergus* v. *Gore*, 1 Sch. & Lef. 107. Notwithstanding the L. T. Act, 1897, s. 2 (and see now Administration of Estates Act, 1925, s. 2, *post*), the above rule applies in the case of a testator who has died since 1897 (*Re Bails, Treeby* v. *B.*, [1909] 1 Ch. 791); see Williams' Executors, 11th ed. 1638.

A direction in the will of a testator to pay the debts of another person operated for the benefit of those creditors of that other person whose debts were not barred at his death (*O'Connor* v. *Hasham*, 5 H. L. C. 170).

(3) The statute in the administration of estates.

Debts due from the testator which are barred.

An executor may pay debts due from the testator to a stranger, although barred in testator's lifetime (*Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 415; *Hunter* v. *Baxter*, 3 Giff. 214); but not after the defence of the statute has been decided in favour of the estate (*Midgley* v. *M.*, [1893] 3 Ch. 282). An executor may also retain a debt due from testator to himself, although barred (*Hill* v. *Walker*, 4 K. & J. 166; *Beswick* v. *Orpen*, 16 Ch. D. 207; see *Coombs* v. *Coombs*, L. R. 1 P. & M. 288; *Morley* v. *Saunders*, 8 Eq. 599); but the court will not pay out a fund to an executor, so that he may exercise such right of retainer (*Trevor* v. *Hutchins*, [1896] 1 Ch. 844). An executor, however, cannot either pay or retain a debt unenforceable by reason of the Statute of Frauds (*Re Rownson, Field* v. *White*, 29 Ch. D. 358).

Debts due to the testator which are barred.

To satisfy a debt due from a legatee to testator, but statute barred at his death, an executor may retain a pecuniary legacy (*Courtenay* v. *Williams*, 3 Hare. 539; *Coates* v. *C.*, 33 Beav. 249. Compare *Re Abrahams, A.* v. *A.*, [1908] 2 Ch. 69). But there must be a debt for which, apart from the Stat. Lim., the legatee could have been sued (*Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66), or a liability (*Re Jewell's Settlement, Watts* v. *Pub. Trustee*, [1919] 2 Ch. 161). And a legatee could not be compelled to bring into account a debt due to the testator from a stranger under whose will the legatee was executor and residuary legatee (*Re Bruce, Lawford* v. *B.*, [1908] 2 Ch. 682). An administrator could retain the share of a next of kin (*Re Cordwell, White* v. *C.*, 20 Eq. 644). But there was no such right of retainer as against the heir out of moneys representing undisposed-of real estate (*Re Milnes, M.* v. *Sherwin*, 53 L. T. 554), nor is there as against a specific devisee of freeholds (*Re Taylor, T.* v. *Wade*, [1894] 1 Ch. 674; *Re Akerman*, [1891] 3 Ch. 212), or a specific legatee of leaseholds or of chattels (*ibid.*), or of stocks (*Re Savage, Cull* v. *Howard*, [1918] 2 Ch. 146). But retainer was allowed against a specific legatee of the profits of a business (*Re Taylor, T.* v. *Wade, supra*). Trustees can require a barred debt to be brought into account in the division of the proceeds of sale of real and personal residue (*Re Akerman*, [1891] 3 Ch. 212; see *Re Watson, Turner* v. *W.*, [1896] 1 Ch. 925). Executors of a tenant for life against whom the remainderman recovered damages for waste could not retain the damages to answer a statute-barred debt (*Dingle* v. *Coppen*, [1899] 1 Ch. 726). After appropriating assets to meet a legacy, executors cannot retain or impound such assets to meet a debt due from the legatee (*Ballard* v. *Marsden*, 14 Ch. D. 374). Directions in wills that debts due from beneficiaries are to be deducted from shares bequeathed to them, have been held

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to include barred debts (*Rose* v. *Gould*, 15 Beav. 189; *Poole* v. *P.*, 7 Ch. 17; see *Mathews* v. *Keble*, 3 Ch. 691), but not moneys claimed as rent for land to which as against the beneficiary the testator's title was barred (*Re Jolly, Gathercole* v. *Norfolk*, [1900], 2 Ch. 616).

Lapse of time will not of itself bar an executor of an executor of his right to have an account of the original testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party (*Smith* v. *O'Grady*, L. R. 3 P. C. 311).

Executor's liability as regards devastavit.

According to decisions before the Trustee Act, 1888, it was settled that in an action on a devastavit, the claim as between the creditor and the executor personally was barred in six years (*Thorne* v. *Kerr*, 2 K. & J. 54); the executor being at liberty to set up the statute (*Re Hyatt; Bowles* v. *H.*, 38 Ch. D. 616). But in a creditor's administration action an executor might, in respect of a debt not barred between the creditor and the estate, be made personally liable to the extent of personal assets which the executor had lost or parted with, even though he did so more than six years before action brought (*Re Baker, Collins* v. *Rhodes*, 20 Ch. D. 230; *Re Marsden, Bowden* v. *Layland*, 26 Ch. D. 783); the executor not being at liberty to set up the statute (*Re Hyatt, Bowles* v. *H.*, *supra*; which case see as regards assets claimed from a devisee). Where the executor had parted with assets to a legatee, the legatee might be made to refund (*Fordham* v. *Wallis*, 10 Hare, 217). But the conduct of the creditor might bar his right against the legatee (*Blake* v. *Gale*, 32 Ch. D. 571; *Harrison* v. *Kirk*, [1904] A. C. 8); and it would seem also against the executor (*Re Birch, Roe* v. *B.*, 27 Ch. D. 627; *Re Marsden, supra*). The above liability of the executor was sometimes placed on the ground of trust (*Re Marsden*, 26 Ch. D. 789; *Fordham* v. *Wallis*, 10 Hare, 226; see, however, *Re Hyatt*, 38 Ch. D. 619; *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 124).

Since the above cases the Trustee Act, 1888, has been passed, which contains provisions protecting a trustee (sect. 8, *ante*, p. 283), and also provides (sect. 1, sub-s. 3) that for the purposes of that Act the expression "trustee" shall include an executor or administrator; and the statute affords a defence to an executor in a creditor's administration action (*Re Blow, St. Bartholomew's Hospital* v. *Cambden*, [1914] 1 Ch. 233), as well as in an action of devastavit (*Lacons* v. *Wormoll*, [1907] 2 K. B. 364).

Administration actions.

Who may set up statute.

In administration actions legal demands are decided by Courts of equity entirely on legal grounds (*Fuller* v. *Redman*, 26 Beav. 619). An acknowledgment by an executor after an administration decree will not revive a debt already barred (*Phillips* v. *Beale*, 32 Beav. 26). Executors in administration actions are not bound to plead the statute (*Ex p. Dewdney*, 15 Ves. 498; *Norton* v. *Frecker*, 1 Atk. 526; *Castleton* v. *Fanshaw*, Prec. Ch. 100; *Re Baker, Nicolls* v. *B.*, 44 Ch. D. 270; see *Re Wenham, Hunt.* v. *W.*, [1892] 3 Ch. 59). Nor is the Court bound to set up the statute on behalf of absent parties (*Alston* v. *Trollope*, 2 Eq. 205). Where one executor who was also residuary legatee set up the statute, while the other executor desired to pay, the debt was held barred (*Midgley* v. *M.*, [1893] 3 Ch. 282). A residuary legatee was entitled to insist on the statute being set up where there was no administration judgment, but the executors had issued a summons to determine whether a defendant was a creditor of the estate (*Re Wenham, Hunt* v. *W.*, [1892] 3 Ch. 59). The statute may, where a decree has been obtained, be set up in the proceedings under the decree, by one creditor against another (*Fuller* v. *Redman*, 26 Beav. 614), and by a residuary legatee or other party interested in the estate against a creditor (*Moodie* v. *Bannister*, 4 Drew. 432; *Shewen*

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v. *Vanderhorst*, 1 Russ. & M. 347; *Beeching* v. *Morphew*, 8 Hare, 129). The statute cannot be set up against the plaintiff whose debt is the foundation of the decree (*Adams* v. *Waller*, 14 W. R. 789; *Fuller* v. *Redman*, *supra*; see *Re Baker*, *Nicholls* v. *B.*, 44 Ch. D. 262). But as to this there is, in the administration of real estate, an exception in favour of *c. q. t's* of specifically devised land (*Briggs* v. *Wilson*, 5 D. M. G. 21; *Re Lacy*, *Howard* v. *Lightfoot*, [1907] 1 Ch. 331). A residuary legatee has been held to be precluded by his own acts from setting up the statute as against a pecuniary legatee (*Prowse* v. *Spurgin*, 5 Eq. 99). As to proof in an English action by a creditor who had attached French assets as security for two debts, one of which was barred in England but not in France, see *Re Bowes*, *Strathmore* v. *Vane* ((1889) W. N. 53); and by a creditor who had recovered judgment in Scotland for a debt barred in England, see *Re Low*, *Bland* v. *L.*, ([1894] 1 Ch. 147).

Judgment in administration action.

The sending in a claim in answer to an executor's advertisement is not such a proceeding as will prevent time running against a debt (*Re Stephens*, *Warburton* v. *S.*, 43 Ch. D. 43). But judgment in a legatee's administration action, containing a direction for payment of debts, prevents time running against creditors having then valid claims (*Finch* v. *F.*, 35 L. T. 235, where the judgment was within the statutory period from the incurring of the debt; *Re Crossley*, *Munns* v. *Burn*, 35 Ch. D. 266; see *Harrison* v. *Kirk*, [1904] A. C. 5). Compare the effect of a winding-up order (*Re General Rolling Stock Co.*, 7 Ch. 646). An administration judgment also operates in favour of the estate in regard to a set-off against a creditor's demand (*Re Ballard*, *Lovell* v. *Forester* (1890), W. N. 64).

(4) Pendency of administration action.

A decree in a creditor's administration suit did not prevent the barring of a debt in respect of which no claim was made under the decree (*Tatam* v. *Williams*, 3 Hare, 347). On the other hand, claims in actions which enured for the benefit of incumbrancers operated so as to increase the interest allowed (*Archdall* v. *Anderson*, 25 L. R. Ir. 433; *Greenway* v. *Bloomfield*, 9 Hare, 201). As to proving in an administration action after a lapse of time where there is a fund in Court, see *Harrison* v. *Kirk*, [1904] A. C. 1.

Berrington v. *Evans.*

Where a judgment creditor had allowed twenty years to elapse without enforcing his debt, he was not allowed to prove in a suit instituted within the twenty years for the benefit of the specialty creditors of his debtor (*Berrington* v. *Evans*, 1 Y. & Coll. 434; see also *O'Kelly* v. *Bodkin*, 3 Ir. Eq. R. 390; *Hutchins* v. *O'Sullivan*, 11 Ir. Eq. R. 443).

Sterndale v. *Hankinson.*

Before R. P. Lim. Act, 1833, it was held that although a creditor was in strictness barred by the rule of equity, yet that rule would not be applied against him if he had delayed, relying on the prosecution of an existing suit by another creditor on behalf of himself and other creditors (*Sterndale* v. *Hankinson*, 1 Sim. 393; *Brown* v. *Lynch*, 4 Ir. Eq. R. 316; *Carroll* v. *Darcy*, 10 Ir. Eq. R. 321; *Bermingham* v. *Burke*, 2 J. & Lat. 714; see *Foster* v. *Mackenzie*, 17 Beav. 414; *Finch* v. *F.*, 35 L. T. 235; see *Harpur* v. *Buchanan*, [1919] 1 I. R. 1). Since the Judicature Acts the reasons on which *Sterndale* v. *Hankinson* was founded no longer apply (*Re Greaves*, *Bray* v. *Tofield*, 18 Ch. D. 551; where the action was commenced within the statutory period from the incurring of the debt, but the judgment was made after the expiration of that period). Compare *Thompson* v. *Hurley*, [1905] 1 I. R. 588; *Williams* v. *W.*, [1900] 1 Ch. 152. And in actions against trustees or executors, see the language of the Trustee Act, 1888, s. 8, sub-s. 2.

Courts of Equity and the Statutes of Limitation.

Pendency of proceedings.

The institution of a suit to execute the trusts of a will did not preserve the rights of the heir who claimed adversely to the will (*Simmons* v. *Rudall*, 1 Sim. (N.S.) 115). The right of a vendor to enforce his lien was not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, to administer his estate; nor by suits by the residuary devisees and legatees of the purchaser, for the administration of his estate (*Toft* v. *Stephenson*, 7 Hare, 1). A mortgagee's suit for foreclosure and sale instituted during the debtor's life, did not prevent time running against a judgment creditor of that debtor (*Bennett* v. *Bernard*, 12 Ir. Eq. R. 229; but see *Harpur* v. *Buchanan*, [1919] 1 I. R. 1). For the case where a creditor or incumbrancer is made a defendant to the suit, see *Watson* v. *Birch* (15 Sim. 523), and *Humble* v. *H.* (24 Beav. 535). As to relief where time has run pending improper litigation, see *Pultney* v. *Warren* (6 Ves. 73); *East India Co.* v. *Campion* (11 Bligh, 158, 186, 187); *Furnival* v. *Boyle* (4 Russ. 142); *Sirdefield* v. *Price* (2 Y. & C. 73).

Orders to carry on proceedings.

As to the application of the Statutes of Limitation to an order to carry on proceedings made before judgment, see *Perry* v. *Jenkins* (1 M. & Cr. 118, 121); *Bland* v. *Davison* (21 Beav. 312); and after judgment, see *Alsop* v. *Bell* (24 Beav. 451); *Parkinson* v. *Lucas* (28 Beav. 627, 630); see also *Bampton* v. *Birchall* (11 Beav. 38; 1 Phil. 568; 5 Beav. 67). Where a defendant was out of the jurisdiction and a bill prayed process against him when he should come within it, the operation of the statute was suspended though he had neither been served nor appeared (*Hele* v. *Bexley*, 20 Beav. 127).

Effect of appointment of a receiver.

Although the appointment of a receiver by the Court does not prevent the bar under the statute *against* a stranger, yet it will prevent time running in *favour* of a stranger to the suit (*Wrixon* v. *Vize*, 3 Dr. & War. 104, see p. 123; *Parkinson* v. *Lucas*, 28 Beav. 627). But under special circumstances the possession of a receiver prevented time running against a stranger to the action (*Penney* v. *Todd*, 26 W. R. 502). The possession of the receiver in a cause in which a trustee of the legal estate is made a party as such, may fairly be treated as the possession of the trustee. For many purposes the possession of the receiver is the possession of the party entitled to the lands, and time will not run against a person in possession (*Gresley* v. *Adderley*, 1 Swans. 579; *Boehm* v. *Wood*, T. & R. 345; *Wrixon* v. *Vize*, 3 Dr. & War. 104; see *Groome* v. *Blake*, 8 Ir. C. L. R. 428; *Re Butler*, 13 Ir. Ch. R. 453; *Dixon* v. *Gayfere*, 17 Beav. 421). The appointment of a receiver in the matter of an infant will not prevent the operation of the statute on a claim affecting the minor's estate, notwithstanding the fact that the master, in a report ascertaining the nature of the minor's property, has expressly found that the minor's estate was subject to that incumbrance (*Harrison* v. *Duignan*, 2 Dr. & War. 295; see *Greenway* v. *Bromfield*, 9 Hare, 203).

Injunction.

See as to the relief granted by Courts of equity where time had ran pending an injunction, *Brown* v. *Newall* (2 M. & Cr. 572); *Anon.* (2 Cas. Ch. 217); *Fyson* v. *Pole* (3 Y. & C. 273); *Morgan* v. *M.* (2 Dick. 643); *Grant* v. *G.* (3 Sim. 364; 3 Russ. 607); *Duval* v. *Terry* (Show, P. C. 15); *O'Donel* v. *Browne* (1 Ball & B. 262).

Petition for sale in Irish Land Court.

As to the effect of a petition for sale in the Irish Land Court, see *Re Swanton* (1898), 1 I. R. 157; Darb. & Bos. 571; Lightwood, Time Limit, 317.

(5) Funds in Court;

The claim of an equitable incumbrancer was kept alive by the existence of a fund in Court the rights in which had not been ascertained (*Lancaster* v. *Evans*, 10 Beav. 154). As to proving in

Courts of Equity and the Statutes of Limitation.

an administration action after a lapse of time, where there is a fund in Court, see *Harrison* v. *Kirk*, [1904] A. C. 1. Where in an incumbrancer's suit against a tenant for life rents belonging to the defendant were paid into Court by a receiver and so remained 1815—1870, the claim of the remainderman to be recouped out of such rents payments which had subsequently fallen upon him was not barred (*Howlin* v. *Sheppard*, 6 Ir. Eq. Rep. 38; see *Kirwan* v. *Kennedy*, 3 I. R. Eq. 472; *Re Slacke*, [1896] 1 I. R. 199). And where lands on which an annuity was charged were sold by the Court, the claim of the annuitant to resort for arrears to the corpus of the proceeds which were in Court was not barred (*Re Belton*, [1894] 1 I. R. 537). So where to annul a bankruptcy money is paid into Court to provide for undisputed debts, time does not run against the creditors (*Re Dennis*, [1895] 2 Q. B. 630). Compare the case of money provided under a scheme to satisfy unascertained bondholders (*Collingham* v. *Sloper*, [1901] 1 Ch. 779; [1904] A. C. 159). But payment into Court under the Trustee Relief Act of a fund on which an annuity was charged did not make the Court a trustee or prevent a bar (*Re Nugent*, 19 L. R. Ir. 140; where, however, the annuity was also charged on real estate the remedy against which was held barred).

funds paid into court under the L. C. C. Act.

Where land in the occupation of a trespasser was compulsorily taken under the Lands Clauses Act and the purchase-money paid into Court, the trespasser was, after the expiration of the full statutory period (the true owner not claiming), held entitled to the money, although at the date of the purchase his adverse possession had only lasted eighteen years (*Re Evans*, 42 L. J. Ch. 357), or nineteen years and a half (*Ex p. Winder*, 6 Ch. D. 696; see *Ex p. Chamberlain*, 14 Ch. D. 323). It seems that a less period of adverse possession would be sufficient (*Gedye* v. *Commrs. of Works*, [1891] 2 Ch. 636). And where, at the purchase, land was in occupation of A who originally entered in respect of a long term, but had continued in occupation after the expiration of the term, the fund was invested and the dividends ordered to be paid to A until the lapse of twelve years from the end of the term (*Re Harris*, [1901] 1 Ch. 931; see *Ex p. Chamberlain*, 14 Ch. D. 323; *Ex p. Forde*, [1894] 1 I. R. 156). The fund was paid out after possession for fourteen years from the end of the term (*Re Harris*, (1909), W. N. 181). But where at the date of the purchase the land was in the possession of a person claiming in respect of a term which subsequently expired, and twelve years after the expiration of the term the termor claimed payment of a fund which had been paid into Court as representing the reversion the claim was dismissed (*Gedye* v. *Commrs. of Works*, [1891] 2 Ch. 636). Where the land taken was in mortgage, the mortgagee was only allowed six years' interest out of the purchase-money in Court (*Re Stead*, 2 Ch. D. 713).

(6) Lunacy.

Where a creditor cannot recover by reason of the lunacy of the debtor, time will not run (*Stedman* v. *Hart*, Kay, 607). But where an executor was found lunatic after time had commenced to run against a legatee, time ran during the lunacy (*Boldero* v. *Halpin*, 19 W. R. 320). Proceedings in lunacy were held not to exclude the operation of the statute on a promissory note (*Roch* v. *Cooke*, 1 De G. & Sm. 675). A petition in lunacy, after the death of the lunatic, by his committee, and a reference followed by a report that a sum of money had been expended by the committee in the maintenance of the lunatic, will not take the claim of the committee out of the statute, as against the heir-at-law, who was not a party (*Wilkinson* v. *W.*, 9 Hare, 204). Where funds in the hands of a

lunatic executrix were under an order transferred to the credit of the lunacy to an account in the names of herself and other persons interested, and the income was paid to her, the order preserved the right of the parties interested, but arrears of income could only be recovered for six years (*Re Walker*, 7 Ch. 120). An order for repayment to executors of advances made by their testator for maintenance of a lady found lunatic after his death was limited to six years before the death (*Re Weaver*, 21 Ch. D. 615). Guardians could only recover six years' arrears in respect of the maintenance of a pauper lunatic (*Re Newbegin, Eggleton* v. *N.*, 36 Ch. D. 477; *Re Watson, Stamford* v. *Bartlett*, [1899] 1 Ch. 72; *Re Taylor, Edmonton* v. *Deely*, [1901] 1 Ch. 480; *Re Murphy, Prendergast* v. *M.*, [1913] 1 Ir. R. 504). *Secus* where payments on account had been made by a receiver in lunacy (*Wandsworth* v. *Worthington*, [1906] 1 K. B. 420); or the claim was by the Crown (*Re J.*, [1909] 1 Ch. 574). 56 & 57 Vict. c. 61, s. 1.

IX.—Limitations under the Public Authorities Protection Act, 1893.

A number of limitations under particular provisions in various Acts are set out in Darb. & Bos. 2nd ed., p. 577, and Supplement, p. 24. Many of these provisions, however, have been repealed by the Public Authorities Protection Act, 1893. Having regard to the importance of the last-mentioned Act, the material sections thereof are set out at length, with a note of cases decided under them.

Public Authorities Protection Act, 1893.

56 & 57 Vict. c. 61.

An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties.

[5th December, 1893.]

Be it enacted as follows:

Protection of persons acting in execution of statutory or other public duty.

1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

56 & 57 Vict. c. 61, s. 1.

(b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

[Sub-sects. (*c*) and (*d*) of sect. 1 relate to tender of amends; and sect. 2 provides for the repeal of previous Acts.]

Saving as to Scotland.

3. This Act shall not apply to any action, prosecution, or other proceeding for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding.

Commencement.

4. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Short title.

5. This Act may be cited as the Public Authorities Protection Act, 1893.

Reason for the protection given to public bodies.

The present Act has been largely applied to proceedings against public bodies administering or supported by the rates. A possible reason for the protection which the Legislature has given to such public bodies may be found in the general principle in reference to matters which have to be paid for out of the rates, viz. that each body of ratepayers for the time being should bear its own burden (*Parker* v. *London C. C.*, [1904] 2 K. B. 505).

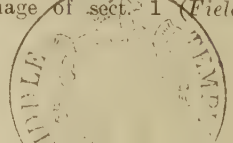
Kind of proceedings in which protection given.

Proceedings in which protection is given include actions in the Chancery Division, whether for an injunction or for damages (*Fielding* v. *Morley*, [1899] 1 Ch. 4), or for a declaration (*Grand Junction Waterworks Co.* v. *Hampton*, 15 T. L. R. 412). As to actions on contract see cases quoted on p. 302 in relation to matters not protected. Proceedings by a local authority in the King's Bench Division for a *certiorari* to quash surcharges by an auditor were held not to be an action within sect. 1 (*Roberts* v. *Battersea*, 110 L. T. 566). Nor was it held applicable to the costs of a local authority who, to vindicate a right of way, had defended successfully an action brought against an individual (*M'Robert* v. *Reid*, [1914] S. C. 633). But an order under Order xxxvi., r. 12, dismissing an action with costs for want of prosecution is a "judgment" within the section (*Gilbert* v. *Gosport*, [1916] 2 Ch. 587). A proceeding for a *mandamus* against a local authority is not within the section (*R.* v. *Port of London*, [1919] 1 K. B. 176). Nor does it apply to proceedings under the Workmen's Compensation Act (*Fry* v. *Cheltenham*, 81 L. J. K. B. 41), nor to actions for compensation under the Riot (Damages) Act, 1886 (*Kauffmann* v. *Liverpool*, [1916] 1 K. B. 860), nor to an action *in rem* which is not a proceeding against a person (*The Burns*, [1907] P. 137). As to claims to land see *Cross* v. *Rix*, 77 J. P. 84.

Kind of persons protected.

Corporations included.

As regards the persons protected, the word "persons" in sect. 1 includes any body of persons corporate or unincorporate (Interpretation Act, 1889, s. 19). It will be observed that the short title of the present Act is "The Public Authorities Protection Act, 1893." And it has been said that the long title (printed above), which "is an important part of the Act," gives the key to the wide language of sect. 1 (*Fielding* v. *Morley*, [1899] 1 Ch. 4).



56 & 57 Vict. c. 61.

Having regard to the titles, the word "person" should, it seems, be construed as excluding traders (*Lyles* v. *Southend-on-Sea*, [1905] 2 K. B. 13): *e.g.* a company of Pier proprietors, who were held to be a commercial company earning dividends for their shareholders (*Att.-Gen.* v. *Margate*, [1902] 1 Ch. 749); or a Railway Co. See *Parker* v. *L. C. C.*, [1904] 2 K. B. 505; *Lanarkshire* v. *Airdrie*, 8 Fraser, 781, where it was said by the Scotch Court of Session that there is a broad distinction between (1) county councils and other bodies who are directed to perform public duties the cost of which is defrayed by rates; and (2) incorporated companies who are empowered with a view to profit to undertake certain works. In the one case the public body is under a legal obligation to proceed with the undertaking, but its members act gratuitously and are neither entitled to make a profit nor are responsible for loss. In the other case the Co. is absolutely free to consider whether the speculation for which Parliamentary powers have been obtained is worth prosecuting with a view to profit.

Commercial companies not protected.

The "persons" protected by the Act have been held to include Highway authorities (*Southwark* v. *Wandsworth*, [1898] 2 Ch. 603; *Harvey* v. *Truro*, [1903] 2 Ch. 646; *Offin* v. *Rochford*, [1906] 1 Ch. 342), Poor Law Guardians (*Sharpington* v. *Fulham*, [1904] 2 Ch. 449), County Councils (*North Metropolitan Co.* v. *London County Council*, [1898] 2 Ch. 145), Harbour authorities (*Williams* v. *Mersey*, [1905] 1 K. B. 804; *The Ydun*, [1899] P. 236), the Tyne Improvement Commissioners (*The Johannesburg*, [1907] P. 65), National Health Insurance committees (*Mitchell* v. *Aberdeen Insurance Committee*, [1918] S. C. 415), commanding officers of tugs (*H.M. Tug Danube II.*, [1920] P. 104), Municipal corporations, even when carrying on work not strictly municipal (*The Ydun*, [1899] P. 241), *e.g.* when using land as a hospital (*Harrop* v. *Ossett*, [1898] 1 Ch. 525), or supplying water (*Fielding* v. *Morley*, [1899] 1 Ch. 1), or electric light (*Jeremiah Ambler* v. *Bradford*, [1902] 2 Ch. 585; *Chamberlain* v. *Bradford*, 83 L. T. R. 518), or gas (*Clayton* v. *Pontypridd*, [1918] 1 K. B. 219), or working a tramway (*Lyles* v. *Southend-on-Sea*, [1905] 2 K. B. 1; *Spittal* v. *Glasgow*, 6 Fraser, 838). An ambulance association is not protected (*Ayr* v. *St. Andrews*, [1918] S. C. 158).

Corporations protected.

Municipal corporations.

The protection extends not only to the public body as principals, but also to individual subordinates carrying out their mandates (*Greenwell* v. *Howell*, [1900] 1 Q. B. 540). But it does not extend to acts done by public bodies or their servants in respect to subject-matters as to which the body has no statutory or public duty but merely power to perform them (*Bradford* v. *Myers*, [1916] 1 A. C. 242), nor to matters merely incidental to the performance of statutory duties (*Clarke* v. *St. Helens*, 85 L. J. K. B. 17), but authorities acting under private as well as public statutes are protected (*Bennett* v. *Stepney*, 107 L. T. 383, and see *R.* v. *Marshland Commrs.*, [1920] 1 K. B. 155), nor to an independent person undertaking for his own profit work under a contract with a public body (*Tilling* v. *Dick Kerr*, [1905] 1 K. B. 570; see *Kent Council* v. *Folkestone Corporation*, *ibid.*, 620). As to the trustees of a Loan Society, see *O'Brien* v. *Mitchelstown*, [1903] 1 Ir. 282.

Individuals protected.

Public officials are not protected by the statute if they act maliciously; but malice cannot be presumed from a mistake as to authority, if they *bona fide* believe that they are acting under their powers (*Newell* v. *Starkie*, [1919] 2 I. R. 325).

The protection also extends to individuals discharging public duties, *e.g.* a commander of volunteers (*Wilson* v. *Mackay*, 7 Fraser, 168), or a doctor giving a statutory notice of illness (*Salisbury* v. *Gould*, 68 J. P. 158).

56 & 57 Vict. c. 61.

Kind of acts or defaults in respect whereof the proceedings must be commenced.

As to the acts or defaults in respect whereof the proceedings must be commenced to bring the case within the protection. It has been held in several cases under this Act that the wide words of sect. 1 extended the protection to proceedings in respect of an act done in the voluntary execution of the powers of an Act of Parliament, even where it was not done in the execution of a public duty (*Jeremiah Ambler* v. *Bradford*, [1902] 2 Ch. 590, 592, 595; *Chamberlain* v. *Bradford*, 83 L. T. R. 519). Thus protection was held to apply where proceedings were brought against a public body to restrain them from using land as a Fire Engine Station in breach of an alleged contract (*Holford* v. *Acton*, [1898] 2 Ch. 240, 249), or as a cemetery (*Toms* v. *Clacton*, 14 T. L. R. 474); also where a school board was sued for libel alleged to be contained in a resolution of the Board (*Reid* v. *Blisland*, 17 T. L. R. 626); and where a lord of a manor claimed from an urban council an account of certain tolls as payable to him under a lease (*Newcastle* v. *Worksop*, [1902] 2 Ch. 145, 162). But see now *Bradford* v. *Myers*, [1916] 1 A. C. 242. See also *Att.-Gen.* v. *Margate*, [1900] 1 Ch. 754; and *per* Vaughan Williams, L.J., in *Lyles* v. *Southend-on-Sea*, [1905] 2 K. B. 13, 18; *National Telephone Co.* v. *Kingston-upon-Hull*, 89 L. T. 294; *Walsh* v. *Southwark*, 72 J. P. 71; *Lanarkshire* v. *Airdrie*, 8 Fraser, 781.

Earlier cases.

Later cases.

Acts or defaults where protection has been given, public duty being involved.

Protection has been given under the section in respect of the following acts or defaults as being acts or defaults where a public duty was involved; *e.g.* the acts or defaults of a Highway Authority in relation to the protection of Highways (*Harvey* v. *Truro*, [1902] 2 Ch. 638; but see *McRobert* v. *Reid*, [1914] S. C. 633; *Leckhampton* v. *Ballinger*, 21 T. L. R. 632; *Offin* v. *Rochford*, [1906] 1 Ch. 342), of a public body in working tramways (*Lyles* v. *Southend-on-Sea*, [1905] 2 K. B. 1; *Spittal* v. *Glasgow*, 6 Fraser, 838; *Hewlett* v. *London C. C.*, 72 J. P. 136), or in managing Harbours or Piers (*Williams* v. *Mersey*, [1905] 1 K. B. 804; *The Johannesburg*, [1907] P. 81), or in managing a Hospital (*Markey* v. *Tolworth*, [1900] 2 Q. B. 454); the acts or defaults of an individual in relation to public medical duties (*Salisbury* v. *Gould*, 68 J. P. 158), or to public military duties (*Wilson* v. *Mackay*, 7 Fraser, 168).

Acts or defaults where protection not given.

But the protection has been refused in the case of actions against a public body for breach of a contract entered into by them with a private individual, although entered into in the execution of a statutory or public duty or authority (*Sharpington* v. *Fulham*, [1904] 2 Ch. 449; *Clarke* v. *Lewisham*, 19 T. L. R. 62; *Macfie* v. *Greenock*, 7 Fraser, 246; *Milford* v. *M.*, 65 J. P. 483; *National Telephone Co.* v. *Kingston-upon-Hull*, 89 L. T. 294); *Hayes* v. *King's County*, [1917] 2 I. R. 496). Nor did the protection extend to an action for false representation whereby the plt. was induced to enter into a contract with a public body (*Pearson* v. *Dublin*, [1907] A. C. 368). Nor was protection given to the Trustees of a Loan Society formed under a statute who made defaults occasioning loss to the members, and who were held not to be acting in execution of a public duty (*O'Brien* v. *Mitchelstown*, [1903] 1 I. R. 282).

Acts or defaults by servant of public body.

The protection applied where the action was brought in respect of a negligent act committed by a person who was a servant of a public body in the execution of a public duty of such body (*Markey* v. *Tolworth*, [1900] 2 Q. B. 454). But not where the person who committed the act was not the servant or agent of the public body, but only a contractor (*Kent Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620).

There must be some act or default by defendant.

The protection only applies where the proceedings are brought in respect of some act or default of the deft. alleged to be unlawful (see *Att.-Gen* v. *West Ham*, [1910] 2 Ch. 560). An action brought

56 & 57 Vict. c. 61.

to set aside an agreement on the ground that it was *ultra vires* the plt. was not within the statute (*Holsworthy* v. *H.*, [1907] 2 Ch. 62). But the section may be construed so as to protect defts. in proceedings commenced in respect of acts done in intended execution of a public duty (*The Johannesburg*, [1907] P. 85, 86; *Cree* v. *St. Pancras*, [1899] 1 Q. B. 693). See as to vexatious actions against public bodies, *Webster* v. *Bakewell*, 86 L. J. Ch. 89.

Intended execution of public duty.

As regards the point from which time runs under sect. 1, sub-s. (*a*). Where there is no "continuance of injury or damage," time runs from the "act, neglect or default complained of." Where proceedings were commenced for damages for an accident which caused subsequent death, time ran from the accident (*Williams* v. *Mersey*, [1905] 1 K. B. 804). And where proceedings were commenced against a Highway Authority who had pulled down a fence and subsequently claimed title to the land within it, time ran from the pulling down of the fence, the claim of title not giving rise to any cause of action (*Offin* v. *Rochford*, [1906] 1 Ch. 342). Where in proceedings against a magistrate damages were claimed for an illegal distress put in for a fine under a conviction, which conviction was subsequently quashed, time ran from the distress and not the conviction (*Polley* v. *Fordham*, [1904] 2 K. B. 345). But where in proceedings against the High Bailiff of a County Court, damages were claimed for negligence in failing to serve a judgment summons on the plt., who was subsequently arrested, time ran from the omission to serve the judgment, not from the arrest (*Turley* v. *Daw*, 22 T. L. R. 231). In an action under the Fatal Accidents Act, 1846, the limitation of time is fixed by that Act (*Venn* v. *Tedesco*, [1926] 2 K. B. 227). (See p. 245, *ante*.)

Point from which time runs.

Where no continuance of injury.

In cases where there is a "continuance of injury or damage" time runs from the ceasing thereof. The words do not mean damage inflicted once and for all which continues unrepaired (*Harrington* v. *Derby*, [1905] 1 Ch. 227), or from the effects of which the plaintiff is still suffering (*Carey* v. *Bermondsey*, 20 T. L. R. 2; *Freeborn* v. *Leeming*, [1925] 1 K. B. 160; *Spittal* v. *Glasgow*, 6 Fraser, 828); but new damage recurring day by day, whether by reason of one act or repeated acts (*Harrington* v. *Derby*, *supra*; see *Pearson* v. *Dublin*, [1907] A. C. 368; *Markey* v. *Tolworth*, [1900] 2 Q. B. 458; and compare *Crumbie* v. *Wallsend*, [1891] 1 Q. B. 503). The action may be brought within six months after the ceasing of a continuing injury for damage done within the previous six years (*Harrington* v. *Derby*, *supra*). See also *Att.-Gen.* v. *Lewes*, [1911] 2 Ch. 495 (periodical pollution of stream by sewer out of repair); *Hart* v. *Marylebone*, 76 J. P. 257; *Huyton Gas Co.* v. *Liverpool*, [1926] 1 K. B. 146.

Where there is continuance of injury.

The limitation in the statute applies though another general statute allows a longer limit of time in respect of the particular act done (*Kent Council* v. *Folkestone Council*, [1905] 1 K. B. 620; *Markey* v. *Tolworth*, *supra*).

Effect of other statutes of limitation.

As to amending defence by pleading the Act see *Aronson* v. *Liverpool*, 29 Times L. R. 325.

Pleading.

X.—Pleading and Practice as to the Statutes of Limitation.

By R. S. C. Ord. 19, r. 15 a party must raise by his pleadings all such grounds of defence or reply as, if not raised, would take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as for instance, Statute of

Raising the statute;

Pleading and Practice as to the Statutes of Limitation.

Limitations. In the County Court the particular statute need not be specified (*Eaton* v. *Tapley*, [1899] 1 Q. B. 953).

by pleading.

In *Dawkins* v. *Penrhyn* (4 App. Cas. 59; an action commenced in 1877, when demurrer was permitted), Earl Cairns held that in personal actions the statute must be pleaded; but that in the case of real property, where it was a question of title, the statute might be raised by demurrer (see further, *Re Burge, Gillard* v. *Lawrenson*, 57 L. T. 364; *Noyes* v. *Crawley*, 10 Ch. D. 31; and see as to the previous rule at common law, *De Beauvoir* v. *Owen*, 5 Exch. 166; *Owen* v. *De Beauvoir*, 16 M. & W. 547). Since *Dawkins* v. *Penrhyn* demurrer has been abolished, but in lieu thereof a party can raise by his pleading a point of law (R. S. C. Ord. 25).

Where an action is brought to recover land of which the defendant is in possession, the statute is often pleaded expressly (*Lyell* v. *Kennedy*, 18 Q. B. D. 796; *Pedder* v. *Hunt*, *ibid.*, 565). In *Heath* v. *Pugh* (6 Q. B. D. 353), it was said that in such a case the defence of the statute might be raised under the plea of possession in a general form (Ord. 21, r. 21; see *Coppinger* v. *Norton*, [1902] 2 I. R. 241). As to the effect of such a plea, see *Danford* v. *McAnulty*, 8 App. Cas. 456. Under the old practice in equity a plea of adverse possession was overruled because it did not state the particular facts constituting the adverse possession on which the defendant relied (*Hardman* v. *Ellames*, 5 Sim. 640; 2 M. & K. 732). Compare the mode in which a plaintiff can plead a possessory title under the modern practice, *Pledge* v. *Pomfret*, [1905] W. N. 56.

Renewal of writ to save statute.

Ord. 8, r. 1 provides that no original writ of summons shall be in force for more than twelve months from the date thereof. Ord. 6, r. 1, provides for the issue of concurrent writs, such writs only to be in force for the period during which the original writ is in force. Under Ord. 8, r. 1, however, upon application before the expiration of the twelve months, the writ or concurrent writ may for good reason be renewed for six months, and so from time to time. Under Ord. 64, r. 7, times may be enlarged. Where the plaintiff's claim would, in the absence of renewal, be barred by statute, the time for renewing a writ will not usually be enlarged (*Doyle* v. *Kaufmann*, 3 Q. B. D. 7, 340; *Hewett* v. *Barr*, [1891] 1 Q. B. 98; see *Magee* v. *Hastings*, 28 L. R. Ir. 288). But the Court has a discretion (*ibid.*). And where the original writ was issued and renewed in proper time, the time for issuing a concurrent writ was enlarged, although the operation of the statute was thereby affected (*Smalpage* v. *Tonge*, 17 Q. B. D. 644).

Where a writ was issued in due time in the Common Pleas to recover a debt, which writ was never served; and six months later (when, unless saved by the writ, the debt was barred) the plaintiff took out an administration summons in Chancery; such summons was held barred, the writ not keeping the debt alive for the purpose of proceedings in another Court (*Manby* v. *M.*, 3 Ch. D. 101. Compare *Hurst* v. *H.*, 21 Ch. D. 291, 295).

Amendments.

In the case of pleadings, a party cannot by amendment set up fresh claims which since the writ have become barred by statute (*Weldon* v. *Neal*, 19 Q. B. D. 394; *Lancaster* v. *Moss*, 15 T. L. R. 476; see *Steward* v. *North Metropolitan Co.*, 16 Q. B. D. 556; *Hudson* v. *Fernyhough*, 61 L. T. 722). As to raising by amendment a case of concealed fraud to meet the statute, see *Lawrance* v. *Norreys* (39 Ch. D. 235).

THE FINES AND RECOVERIES ACT, 1833.

3 & 4 WILL. 4, c. 74, ss. 1—72, 92.

*An Act for the abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.**

[28th August, 1833.]

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2. *Disposition of lands entailed, ss.* 15, 17, 19, 20, 21...310.
3. *Definition of the protector, ss.* 22—28, 32, 33...321.
4. *Powers of the protector, ss.* 34—37...326.
5. *Confirmation of voidable estates created by tenant in tail, s.* 38...329.
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1. *Interpretation Clause.*

3 & 4 Will. 4, c. 74, s. 1.

Meaning of certain words and expressions.

1. Be it enacted, that in the construction of this Act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting money subject to be invested in the purchase of lands (*a*); and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but

"Estate."

"Base fee."

* This Act does not extend to Ireland, but on August 15, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, which corresponds in most particulars with the English statute, and came into operation on October 31, 1834, instead of December 31, 1833.

3 & 4 Will. 4, c. 74, s. 1.

persons claiming estates by way of remainder or otherwise are not barred (*b*); and the expression "estate tail," in addition to its usual meaning (*c*), shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (*d*); and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private Act of Parliament or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement (*e*); and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the

"Estate tail."

"Actual tenant in tail."

"Tenant in tail."

"Tenant in tail entitled to a base fee."

"Money."

"Person."

Number and gender.

Settlement.

time when such settlement was made: provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction. 3 & 4 Will. 4, c. 74, s. 1.

The principal objects of this statute (which was prepared by Mr. Brodie; *Bell* v. *Holtby*, 15 Eq. 189) were to abolish fines and recoveries; to enable a tenant in tail to make an effectual alienation by enrolled deed; and to enable married women to dispose of land by deed acknowledged. See as to the present law of entail note to sect. 15, *post*, p. 311. The principal objects of this statute.

(*a*) In the Irish Act the word "estate" is made to extend to "any interest, charge, *right*, *title*, lien or incumbrance, in, upon, or affecting lands, either at law or in equity, *whether present or vested, or future or contingent.*" The word "estate" includes the reversionary life interest of a married woman in money invested on mortgage of land (*Miller* v. *Collins*, [1896] 1 Ch. 573; overruling *Re Newton*, 23 Ch. D. 187), but not a mere *spes successionis* on a possible intestacy (*Allcard* v. *Walker*, [1896] 2 Ch. 369). See further, as to the definition of "estate" in the present Act, *Briggs* v. *Chamberlain* (11 Hare, 74); *Williams* v. *Cooke* (4 Giff. 343). Estate.

(*b*) The species of base fee here defined (which may be referred to as a statutory base fee) is thus described by Lord Coke:—Where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple as long as the tenant in tail has heirs of his body, derived out of the estate tail; this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it (*Seymour's Case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 433). Base fees. Statutory base fee.

A statutory base fee results from a disposition by an actual tenant in tail made without the consent of the protector (sect. 34, *post*). It may be enlarged into a fee simple absolute either by a subsequent disposition by the person who, if the former disposition had not been executed, would have been actual tenant in tail (sect. 19); or by the owner of the base fee becoming entitled to the immediate reversion (sect. 39). As to the operation of the Stat. Lim. in barring the title of reversioners where persons claiming in respect of a statutory base fee remain in possession, see sect. 6 of the R. P. Lim. Act, 1874, *ante*, p. 186.

Apart from a statutory base fee, there is at common law another estate which also known as a base fee. Thus according to the old authorities a release or bargain and sale by a tenant in tail passed a fee (known as a base fee) which was voidable by the entry of the issue in tail (*Doe* v. *Woodroffe*, 15 M. & W. 793; 2 H. L. C. 829, referring to *Machell* v. *Clarke*, 2 Ld. Raym. 782; s.c. 2 Salk. 619; Com. 720; 7 Mod. 18; 11 Mod. 19; see *Goodright* v. *Mead*, 3 Burr. 1703; *Doe* v. *Rivers*, 7 T. R. 276; *Seymour's Case*, 10 Rep. 95). So in a modern case it has been laid down that a conveyance by a tenant in tail without a disentailing assurance will in general pass a fee determinable by the entry of the issue in tail (*Sturgis* v. *Morse*, 2 D. F. & J. 231; see *Re Gaskell and Walter*, [1906] 1 Ch. 444; and the judgment of Kay, J., in *Hankey* v. *Martin*, 49 L. T. 560). Such a common law base fee created before the present Act by lease and release might have been confirmed and made indefeasible by a fine levied by the releasor after the death of the releasee (*Doe* Common law base fee.

3 & 4 Will. 4, c. 74, s. 1.

v. *Whichelo*, 8 T. R. 211). As to the powers of confirming and enlarging common law base fees given by the present Act, see sect. 38, *post*. A list of the methods by which a base fee arises is given in Challis Real Prop., 2nd ed., p. 298.

Estate tail: the origin of estates tail.

(*c*) By the common law, before the stat. Westm. 2, commonly called the statute *De Donis* (13 Edw. 1, c. 1), there were two kinds of estates of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple *conditional*, where lands were given to a man and to the heirs of his body (see *Willion* v. *Berkeley*, Plowd. 222—252; 2 Prest. on Est. 323—354). In the case of the latter, until issue born, the grantee had not the absolute property in the estate; but the moment issue was born, the condition being performed, the estate became absolutely his property, and he could dispose of it in the same manner as if he had held it in fee simple. The statute *De Donis* declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate (*Att.-Gen.* v. *Marlborough*, 3 Madd. 531, 532). Hence the modern estate tail.

What may be entailed.

Two things were essential to an entail within the statute, viz., that the subject be of a real nature, and that the estate in it be an inheritance (Harg. Co. Litt. 20 a, note (5)). Where a dignity is limited to the heirs of the body, even though no place be named in the creation of the title, the dignity is within the statute *De Donis*, and descendible as an estate tail (*Re Rivett-Carnac*, 30 Ch. D. 136). Lands in ancient demesne are not within the statute *De Donis* (*Creswell* v. *Hawkins*, 3 Jur. (N.S.) 407).

Annuities.

If a purely personal authority be granted to a man and the heirs of his body, a fee conditional was created, and A can alienate the annuity as soon as an heir of his body is born; as he could have done in the case of real estate before the statute *De Donis* (*Stafford* v. *Buckley*, 2 Ves. sen. 180; Co. Litt. 20 A). But such a grant did not create an estate tail, for the statute *De Donis* uses only the word "tenement," and an annuity, although it may be an "hereditament," is not a "tenement" (*Bignold* v. *Giles*, 4 Drew. 347; see *Turner* v. *Turner*, 1 Bro. C. C. 323; *Re Rivett-Carnac*, 30 Ch. D. 141). Annuities granted with words of inheritance have been held to be personal estate where they were granted by the Crown, either out of Barbadoes Duties (*Aubin* v. *Daly*, 4 B. & Ald. 59; *Stafford* v. *Buckley*, 2 Ves. sen. 170), or out of the revenue of the Post Office (*Holderness* v. *Carmarthen*, 1 Bro. C. C. 376), or out of Coal Duties (*Radburn* v. *Jarvis*, 3 Beav. 450). See on the other hand, *Att.-Gen.* v. *Richmond*, [1907] 2 K. B. 973, where the same Coal Duties were held to be realty, and entailable within the statute *De Donis*.

In the case of bequests of personalty to A and the heirs of his body, the ordinary rule was that A took an absolute interest (*Re Walker, Macintosh Walker* v. *W.*, [1908] 2 Ch. 714; see further, *Leventhorpe* v. *Ashbie*, Tud. L. C. Conv. 242, 4th ed. But see now L. P. Act, 1925, s. 130, *post*).

Neither estates *pur autre vie* in lands, nor terms of years, were entailable any more than personal chattels. They might, however, be so settled as to answer the purposes of an entailed estate and be rendered inalienable almost for as long a time as if they were entailable (Harg. Co. Litt. 20 A, note (5); see Fearne, 495—501, 8th ed.). As to chattels settled by reference to limitations of real estate in strict settlement, see *Glenorchy* v. *Bosville* (1 White & Tud. L. C. Eq. 1).

3 & 4 Will. 4, c. 74, s. 1.

A *quasi* tenant in tail in possession of an estate *pur autre vie* may by act *inter vivos* deal with the estate as if there had never been any settlement (*Allen* v. *Allen*, 2 Dru. & War. 307; *Re Barber*, 18 Ch. D. 628; see *Pickersgill* v. *Grey*, 31 L. J. Ch. 394). The *quasi* entail in such an estate may be barred by deed, surrender, or even by articles (*Guy* v. *Mannock*, 2 Eden, 339; see 16 Ves. 313; Coop. C. C. 178; 1 Mer. 665; see *Lynch* v. *Nelson*, I. R. 5 Eq. 192), but not by *will* (*Hopkins* v. *Ramadge*, Batty, 365; *Campbell* v. *Sandys*, 1 Sch. & L. 281; *Creswell* v. *Hawkins*, 3 Jur. (N.S.) 408; *Re Barber*, 18 Ch. D. 628; see *Doe* v. *Luxton*, 6 T. R. 292). Where a tenant in tail in remainder after an estate *pur autre vie* by deed barred such entail, the deed was held also to bar a *quasi* estate tail taken by the same person in the estate *pur autre vie* (*Re Michell, Moore* v. *Moore*, [1892] 2 Ch. 87). A *quasi* entail in a lease for lives may be barred by the first *quasi* tenant in tail surrendering and renewing (*Blake* v. *B.*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox; see Coop. C. C. 184, 185); mortgaging for a term (*Walsh* v. *Studdert*, I. R. 5 C. L. 478), or taking a fee farm grant (*Morris* v. *M.*, I. R. 6 C. L. 73; see further, Tud. L. C. Conv. 102, 4th ed.). But a *quasi* tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person, could not by fine or otherwise, in the lifetime of the tenant for life and without his concurrence, bar the remainders over (*Slade* v. *Pattison*, 5 L. J. Ch. 51; *Allen* v. *A.*, *supra*; see *Wastneys* v. *Chappell*, 3 Br. P. C. 50; *Edwards* v. *Champion*, 3 D. M. & G. 202). So where an estate *pur autre vie* is limited to one for life with remainder over in tail, there the first taker cannot bar the remainder, unless the remainderman in tail joins (*Low* v. *Barron*, 3 P. Wms. 262; *Osbrey* v. *Bury*, 1 Ball. & B. 53).

Quasi entails of estates *pur autre vie.*

Before this Act estates tail were barred by means of fines or recoveries (see the note to this section, *post*).

(*d*) The words "actual tenant in tail" describe the person upon whom sect. 15 confers the power of barring. They do not include a person who has barred an estate tail, either completely so as to convert it into a fee simple, or incompletely so as to convert it into a statutory base fee (see sect. 19, *post*).

Actual tenant in tail.

As to the words "divested or turned to a right," Lord Coke distinguished between those alienations which take away an entry by working a discontinuance, and those which divest an estate (Co. Litt. 327 b). The word "divested" is thus explained in Termes de la Ley: "As invest signifieth to deliver possession of a thing, so devest signifieth the taking away of the possession." The words "turned to a right" have a more extensive signification; for when an estate is turned to a right, the owner has only the "Jus proprietatis" or mere right of property, which could not be regained by a possessory but only by a real action (*Taylor* v. *Horde*, 1 Burr. 107; see Mr. Preston's argument in *Goodright* v. *Forester*, 1 Taunt. 588; *Smith* v. *Clyfford*, 1 T. R. 744; Co. Litt. 239 a, note (1)). Having regard to these words (which were discussed in argument, *Re Gaskell and Walter*, [1906] 2 Ch. 6), the expression "actual tenant in tail" seems to include a tenant in tail who (1) has been ousted by an intruder, or who (2) has by his own conveyance passed to a stranger a common law base fee (see *Re Gaskell and Walter*, [1906] 2 Ch. 5, 6), or who (3) has been convicted of felony, his property thereupon vesting in an administrator (*ibid.*, [1906] 2 Ch. 1).

"Divested or turned to a right."

"Tenant in tail" is so defined as to include the person upon whom sect. 19 confers the power of enlarging base fees (see *Bankes* v. *Small*, 36 Ch. D. 721).

Tenant in tail.

3 & 4 Will. 4, c. 74, s. 1.

Relation of appointment to deed creating a power.

(*e*) It has been established ever since the time of Lord Coke (*Sir Edward Clere's Case*, 6 Rep. 18), that where a power of appointment over real estate is executed, the appointee takes under him who created the power, and not under him who executes it (*Marlborough* v. *Godolphin*, 2 Ves. sen. 78); the appointee, however, does not take from the time of the creation of the power, but from the time of its complete execution, *e.g.*, where the execution is by will from the testator's death (*ibid.*). The estates limited in default of and until the execution of the power are vested until an appointment is made (*Doe* v. *Martin*, 4 T. R. 39; compare *Re Ware, Cumberlege* v. *Cumberlege-Ware*, 45 Ch. D. 269), but are defeated by an appointment (compare *Lovett* v. *L.*, [1898] 1 Ch. 89). Thus, in the case of a power of leasing, the lessee stands in the same relation to all the persons named in the settlement as if that settlement had contained a limitation to his use antecedent to the life estate and the subsequent limitations (*Maundrell* v. *M.*, 10 Ves. 255, 256; see Co. Litt. 216 a, 241 a, notes by Butl.). So a right of dower, which had attached before the execution of a power, was defeated by an appointment (*Ray* v. *Pung*, 5 B. & Ald. 561; 5 Madd. 310).

But the donee of a power cannot by an appointment defeat a lease or other interest granted to him by virtue of his estate (*Snape* v. *Turton*, Sir W. Jones, 392; *Yelland* v. *Ficlis*, Moore, 788; *Goodright* v. *Cator*, Dougl. 477; see Gilb. on Uses, 142; *Edwards* v. *Slater*, Hardr. 415; *R.* v. *Ellis*, 4 Exch. 652; see also the note, *post*, p. 354).

With reference to the rules against perpetuities and remoteness (as to which see now sect. 161 of the L. P. Act, 1925, *post*, p. 605), where an appointment is made in exercise of a special power, the appointment must be read into the instrument creating the power, and its validity tested in that way (*Whitby* v. *Mitchell*, 42 Ch. D. 500; 44 Ch. D. 85; *Re Brown and Sibley*, 3 Ch. D. 159). But where the appointment is made under a general power, time runs from the execution of the power, not from its creation (*Rous* v. *Jackson*, 29 Ch. D. 521, 526; *Re Devon Settled Estates*, [1896] 2 Ch. 567).

[Sects. 2—14, 16, 18, 29—31, 41, 46, 50—54, 59, 66, 73, 74, 76, and 79—90 of this Act were repealed as from January 1, 1926, as being obsolete, by sect. 10 of the L. P. (Amdt.) Act, 1924. See for them (including a short account of the nature and operation of fines and recoveries) the second edition of this work, pp. 267 *et seq.* Sects. 2—12 related to the abolition, amendment, and validity of fines and recoveries, sect. 13 to the custody of records of them, and sect. 14 made estates tail no longer barrable by warranty. The Act of 1924 also repealed parts of other sections. The extent of the repeals will be found noted under them.]

2. *Disposition of Lands Entailed.*

Power after December 31, 1833, to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

15. After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be

claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,* including the King's most excellent Majesty, his heirs and successors, whoe estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made. 3 & 4 Will. 4, c. 74, s. 15.

* The remainder of the corresponding clause in the Irish Act (4 & 5 Will. 4, c. 92), s. 12, runs thus: "whose estates are to take effect after the determination or in defeasance of any such estate tail, including the King's most excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the Crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the Crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this Act authorized to be made." Corresponding clause of Irish Act.

In view of sect. 1, sub-sect. 1 of the L. P. Act, 1925, *post*, p. 598, legal estates tail can no longer subsist or be created. But sect. 130 of the L. P. Act, 1925, *post*, p. 718, authorises the creation of entailed interests by way of trust in any property, real or personal; and also enacts that the right of barring is to continue and that all statutory provisions relating to estates tail in realty shall apply to entailed interests in personalty. Sect. 176 of the same Act enables a tenant in tail (subject as therein mentioned) to dispose by will of property of which he is tenant in tail in possession at his death and of money directed to be invested in the purchase of property of which, if so invested, he would have been tenant in tail in possession at his death.

The words "actual tenant in tail" are defined by sect. 1, *ante*, p. 306. The words include a person who has conveyed away his estate tail by a deed not inrolled. After the conveyance he can still under this section execute a disentailing deed (*Re Gaskell and Walter*, [1906] 2 Ch. 5). As to the effect before the present Act of a tenant in tail's assurance (apart from fine or recovery) in creating a common law base fee, see *ante*, p. 307. And as to the power of tenants in tail to confirm base fees and voidable estates previously created, see sects. 19 and 38, *post*. As to entails where the reversion is in the Crown, see sect. 1, sub-s. 5, and sect. 20 of the S. L. Act, 1925, *post*. Actual tenant in tail.

A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual (*Lilford* v. *Att.-Gen.*, L. R. 2 H. L. 63). A disentailing deed whereby A tenant in tail grants the entailed land to B and his heirs to the use of A his heirs and assigns is not an "alienation" (*Re Gaskell and Walter*, [1906] 2 Ch. 10). As to the Operation of disentailing deeds under this section.

3 & 4 Will. 4, c. 74, s. 15.

destruction of powers by a disposition under the statute, see Sugden, Powers, 91, 8th ed.; *Hill* v. *Pritchard* (Kay, 394); *Re Wright and Marshall* (28 Ch. D. 93).

Equitable tenants in tail.

The word "estate" in the statute extends to estates in equity as well as at law (sect. 1). As to equitable tenants in tail, and the form of assurance made necessary in that case by this Act, see 1 Hayes, Conv. 155, 5th ed. All entailed interests are now equitable (see note on p. 311, *ante*).

Where land was devised to trustees on trust for sale and subject thereto to persons in tail, it was not necessary to bar the entail on a sale by the trustees (*Re Skerrett*, 2 Dru. & War. 585).

Tenant in tail in contingency.

The owner of a contingent estate tail was deemed incompetent to suffer a common recovery with effect (1 Prest. Conv. 142); but tenants in tail in contingency are expressly within the words of this section (see Sugd. R. P. Stat. 192; 1 Hayes, Conv. 194, 5th ed.). Until the contingency happens the only effect of the disposition ought to be to substitute a contingent fee for the contingent estate tail (Sugd. R. P. Stat. 192). Where successive entails were limited subject to a proviso that in a certain event the second entail was to be postponed to the third entail, the operation of the proviso was held to be "in defeasance" of the second entail, and to be barred by a dissentailment thereof (*Milbank* v. *Vane*, [1893] 3 Ch. 79). And where, after the death of A, who was tenant for life, trustees were directed to convey real estate to the use of B in tail, but if B should be then dead to the use of the person who should then be the first heir male of the body of B in tail, with remainder over, it was held that, during the life of A, B had a vested equitable estate tail in remainder expectant on the decease of A, and that the subsequent estates were barred by B's disentailing deed, being estates to take effect in a certain event after, if not in defeasance of, B's estate tail (*Cardigan* v. *Curzon Howe*, [1901] 2 Ch. 479; where it was pointed out that "any such estate tail" means any estate tail in possession or remainder, &c.). In both the last cases it was unsuccessfully argued that the effect of the limitations was to create alternative gifts. See, further, *Doe* v. *Scarborough*, 3 Ad. & Ell. 43, under the old law.

Dispositions under this section —by an alien, lunatic, infant,

An alien might suffer a common recovery (Leon. 404; Shep. Touch. 404), and may execute a disentailing deed (1 Jarm. Wills 59, 6th ed.). Where the tenant in tail is a lunatic, the Court of Lunacy can bar the entail, but the power will not be exercised so as to affect the remainderman (*Re Pares, Lillington* v. *P.*, 12 Ch. D. 333; *Re E. D. S.*, [1914] 1 Ch. 618; see Lunacy Act, 1890, s. 123; Lunacy Act, 1891, s. 27). A base fee has been enlarged where it was for the benefit of the lunatic (*Re Sefton*, [1898] 2 Ch. 378). An infant has been ordered under Debts Recovery Act, 1830, s. 11, to execute a disentailing deed (*Radcliffe* v. *Eccles*, 1 Keen, 130; see *Re Montagu, Faber* v. *M.*, [1896] 1 Ch. 549; *Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620).

married woman.

A married woman is not prevented by a restraint on anticipation from barring an entail (*Cooper* v. *Macdonald*, 7 Ch. D. 288). Where a settlor gives an estate tail, he cannot restrict the power of the tenant in tail to bar it (*Dawkins* v. *Penrhyn*, 4 App. Cas. 64).

Bankruptcy of tenant in tail.

Where a tenant in tail becomes bankrupt, his trustee can bar the entail (see Bankruptcy Act, 1914, sect. 55, sub-s. 5; sect. 56 of the present Act, *post*).

Felony.

And where a tenant in tail is convicted of felony, there notwithstanding that his property has become vested in an administrator, he still remains able to bar the entail by executing a disentailing deed. The fee simple so acquired will vest in the administrator (*Re Gaskell and Walter*, [1906] 2 Ch. 20).

A disentailing deed executed by a tenant for life has no operation under this section (*Slater* v. *Dangerfield*, 15 M. & W. 263; as to the effect of a recovery suffered by a tenant for life, see *Smith* v. *Clyfford*, 1 T. R. 738; *Meredith* v. *Leslie*, 6 Br. P. C. 388; *Doe* v. *Scarborough*, 3 Ad. & Ell. 43). But a proper disentailing deed will bar the entail, though the tenant in tail who executes it is recited in it to be tenant for life (*Evans* v. *Jones*, Kay, 29). **3 & 4 Will. 4, c. 74, s. 15.**

Disposition by tenant for life.

As to the nature and effect of the instrument to be executed by the tenant in tail for the purpose of barring the entail, see cases quoted in the note to sect. 40, *post*, p. 332.

The power of leasing conferred by this section on tenants in tail (see p. 331, *post*) has become less material since the Settled Land Act, 1882, which last Act (sect. 58, sub-sect. 1) enabled a tenant in tail to exercise the powers under that Act of a tenant for life. See now sect. 20, sub-sect. 1 of the S. L. Act, 1925, *post*. Where a tenant in tail is a lunatic, the judge in lunacy may authorise the committee to grant leases binding on all reversioners (Lunacy Act, 1890, ss. 120, 122; see S. L. Act, 1925, ss 28 and 117 (1) (xxviii). Leases by tenant in tail.

"Lands" in this Act includes rents (sect. 1, *ante*). As to the effect of a recovery on entailed rents, see *Smyth* v. *Farnaby*, Carter, 52; Sid. 285; 2 Keb. 29, 55, 84; *Weeks* v. *Peach*, Lutw. 1218, 1224; *S. C.*, Salk. 577; *Chaplin* v. *C.*, 3 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Prest. on Conv. 3; and see *Re Frank's Estate*, [1915] 1 I. R. 387. Entail of rent.

[Sects. 16 and 18 (see second edition of this work, pp. 277—278) were repealed by the L. P. (Amdt.) Act, 1924, and sect. 17 had already been repealed by S. L. Rev. Act, 1874. Sect. 16 related to assents required to dispositions by women tenants in tail, and sect. 18, excluded from the powers given by the Act tenants in tail restrained by statute from barring their estates tail, and tenants in tail after possibility of issue extinct (see sect. 1, sub-s. 5, and sects. 20 and 23 of the S. L. Act, 1925, *post*).]

19. After the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute (*f*): saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made. Power after December 31, 1833, to enlarge base fees; saving rights of certain persons.

(*f*) The remainder of the corresponding section of the Irish statute, 4 & 5 Will. 4, c. 92, s. 16, runs thus:—"including the King's most excellent Majesty, his heirs and successors, as regards the title to * his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or Corresponding clause of Irish Act. [* *Sic.*]

3 & 4 Will. 4, c. 74, s. 19.

remainder shall have come or shall hereafter come to the Crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was, previously to such forfeiture, limited by any settlement or will, but not in any other case, or where the title to the Crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made: provided always, that nothing in this Act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this Act have been granted to any person or persons by his Majesty, or any of his predecessors, in any reversion or remainder which may have come to the Crown by attainder or otherwise."

Cases on sect. 19.

Compare with this section the definition in sect. 1 of "tenant in tail." A tenant in tail can under this section enlarge a statutory base fee, notwithstanding that he has parted with it to a purchaser (*Bankes* v. *Small*, 36 Ch. D. 716). And where the tenant in tail is a woman married since 1882, she may enlarge a base fee without the concurrence or acknowledgment required by sect. 40 (*Re Drummond and Davie*, [1891] 1 Ch. 524).

Issue inheritable not to bar expectancies.

20. Provided always that nothing in this Act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest (*g*) which he may have as issue inheritable to any estate tail therein (*h*).

Corresponding clause of the Irish Act.

(*g*) The words in the corresponding section of the Irish statute, 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or *possibility*."

By sect. 22 of the same statute it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: provided nevertheless, that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition." As to the nature of this provision, see 1 Hayes, Conv. 219, 5th ed., and compare L. P. Act, 1925, s. 4, *post*. This provision is not in terms confined to Ireland, but from the context it would probably be held to be so confined (Sugd. R. P. Stat. 243).

Alienation of expectant interests.

(*h*) Sect. 20 and the abolition of fines put an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple had during the life of his father. A fine levied by a person who afterwards became heir was an estoppel (1 Roll. Abr. 482 (S.) pl. 2; *Helps* v. *Hereford*, 2 B. & Ald. 242; *Doe* v. *Martyn*, 2 Mann. & R. 485; *Doe* v. *Oliver*, 10 B. & C. 181; *Edwards* v. *Rogers*, W. Jones, 756; *Wright* v. *Wright*, 1 Ves. sen. 412); but a grant by a such a person was void (*Wivel's Case*, Hob. 45; Perk. sect. 65; 1 Anst. 11; 3 Term Rep. 365); and the fine did not bind

collateral heirs unless the right to the entail descended to the cognisor or his heirs (*Bradstock* v. *Scovel*, Cro. Car. 434; see 8 Rep. 88 b). **3 & 4 Will. 4, c. 74, s. 20.**

According to the older cases a mere possibility could only be bound or extinguished at law by estoppel, by a fine, or a recovery (*Weale* v. *Lower*, Pollex. 54); or in equity by contract (*Beckley* v. *Newland*, 2 P. Wms. 182; *Hobson* v. *Trevor*, *ibid.*, 191; see *Lyde* v. *Mynn*, 1 M. & K. 693). But when a possibility was coupled with an interest, as where the person was fixed and ascertained, it might be released (*Jewson* v. *Moulson*, 2 Atk. 417), or be devised, though it could not be granted or transferred by the ordinary rules of the common law (*Lampet's Case*, 10 Rep. 46). Alienation of possibilities at law and in equity.

Modern cases have settled the rule that possibilities and expectancies are assignable in equity for value, and an assignment will bind the subject-matter if sufficiently identified (*Tailby* v. *Official Receiver*, 13 A. C. 543). The rule was applied to assignments of expectant interests in legacies under the will of a living person (*Re Dallas*, [1904], 2 Ch. 385; *Re Clarke*, *Coombe* v. *Carter*, 36 Ch. Div. 346). An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal (*Cook* v. *Field*, 15 Q. B. 460), and will be enforced in equity (*Lyde* v. *Mynn*, 1 M. & K. 683; see *Pope* v. *Whitcombe*, 3 Russ. 124). Specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease (*Wethered* v. *Wethered*, 2 Sim. 183; see *Harwood* v. *Tooke*, 2 Sim. 192; *Alexander* v. *Wellington*, 2 R. & M. 55; *Carleton* v. *Leighton*, 3 Mer. 667). But a volunteer cannot enforce a contract made by deed to dispose of an expectancy (*Re Ellenborough*, *Towry Law* v. *Burne*, [1903] 1 Ch. 697; following *Meek* v. *Kettlewell*, 1 Phil. 342).

A *spes successionis* is not a title to property by English law (*Re Parsons*, *Stockley* v. *P.*, 45 Ch. D. 51). So held as to a wife's *spes successionis* under Scotch law in her husband's personal property (*Re Simpson*, *S.* v. *S.*, [1904] 1 Ch. 1). A member of a class of possible next of kin has not a "contingent title" (*Re Parsons*, *supra*); and cannot maintain an action in respect thereof (*Clowes* v. *Hilliard*, 4 Ch. D. 413; *Davis* v. *Angel*, 4 De G. F. & J. 529). See further *Allcard* v. *Walker*, [1896] 2 Ch. 369, quoted under sect. 77, *post*.

A fine by a contingent remainderman did not operate by estoppel only, but when the contingency happened the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied (*Doe* v. *Oliver*, 10 Barn. & Cress. 181; *Doe* v. *Howell*, *ibid.*, 191; *Rawlin's Case*, 4 Rep. 52; *Weale* v. *Lower*, Pollex. 54; *Trevivian* v. *Lawrence*, 6 Mod. 258; Ld. Raym. 1051; *Vick* v. *Edwards*, 3 P. Wms. 372; *Doe* v. *Martyn*, 8 B. & C. 527; *Davies* v. *Bush*, 1 M'Clel. & Y. 58; see Fearne, 365). The estoppel raised by the fine of a contingent remainderman was available only by parties and privies (*Doe* v. *Martyn*, 8 B. & C. 527). Fines by contingent remaindermen.

A contingent interest in terms of years might be assigned in equity for valuable consideration, or for love and affection between parent and child (1 Ves. sen. 411; *Wind* v. *Jekyl*, 1 P. Wms. 572). As to the alienation of contingent interests by married women, see sect. 77, *post*; *Crofts* v. *Middleton*, 8 D. M. & G. 192; *Jones* v. *Frost*, 7 Ch. 773). Contingent, executory or future equitable interests in land may be disposed of (L. P. Act, 1925, s. 4, sub-s. 2, *post*, replacing sect. 6 of the R. P. Act, 1845). And all contingent, executory or other future interests in any real or personal estate are devisable (Wills Act, 1837, s. 3, *post*). Contingent interest now alienable and devisable.

An estoppel is when one is concluded and forbidden in law to

3 & 4 Will. 4, c. 74, s. 20.

Estoppel.

speak against his own act or deed, even though it be to say the truth (Terms of the Law, 157; Litt. s. 667; Co. Litt. 352 a). It is a rule of evidence which prevents a man saying what is true (*Onward Society* v. *Smithson*, [1893] 1 Ch. 14). There are three kinds of estoppels, (1) by matter of record; (2) by deed, whether an indenture or a deed poll (*Bonner* v. *Wilkinson*, 5 B. & Ald. 682; Co. Litt. 47 b; *Lewis* v. *Willis*, 1 Wils. 314; Litt. s. 693); and (3) by matter *in pais*. Estoppel by matter of record is discussed at length, 2 Smith, L. C. 728, 10th ed. See Co. Litt. 352; and see *Cooke* v. *Rickman*, [1911] 2 K. B. 1125.

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(1) Estoppel by deed.

According to the doctrine of estoppel by deed (which will not be extended, *General Finance Co.* v. *Liberator Society*, 10 Ch. D. 21), a fictitious statement is treated as true (10 Ch. D. 20). The principle is that where a man has entered into a solemn engagement under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (*Bowman* v. *Taylor*, 2 Ad. & El. 291; see *Goodtitle* v. *Bailey*, Cowp. 600; Co. Litt. 47 b; *Gwyn* v. *Neath Canal Co.*, L. R. 3 Ex. 209). The estoppel binds persons claiming under the person estopped (*Taylor* v. *Needham*, 2 Taunt, 278; *Doe* v. *Stone*, 3 C. B. 176). But where by a deed which erroneously recited A's title A granted land to B, persons claiming under B were not (as between themselves and a stranger) estopped from showing what interest passed under the deed (*Trinidad Co.* v. *Coryat*, [1896] A. C. 587; where it was said that recitals are not representations of fact on which a stranger is entitled to act without inquiry).

Estoppel arising from a recital.

In accordance with the above doctrine, the recital of a particular fact in a deed will estop the party making the statement (*Bowman* v. *Taylor*, 2 Ad. & El. 278; *Hill* v. *Manchester Waterworks Co.*, 2 B. & Ad. 544; *Pargeter* v. *Harris*, 7 Q. B. 708; *Horton* v. *Westminster*, 7 Exch. 780), *e.g.*, the recital of an ante-nuptial contract to settle property (*Re Holland, Gregg* v. *H.*, [1902] 2 Ch. 360, 387; see *Re Maddy, M.* v. *M.*, [1901] 2 Ch. 822). Where a lease recited a will, the lessee who executed the counterpart was estopped from denying the execution of the will (*Bringloe* v. *Goodson*, 5 Bing. N. C. 738). The doctrine of estoppel by recital applies to the case of an easement (*Poulton* v. *Moore*, [1915] 1 K. B. 400). The recital must be precise and unambiguous, *e.g.*, that a grantor is seised of the legal estate (*Heath* v. *Crealock*, 10 Ch. 30; *Right* v. *Bucknell*, 2 B. & Ad. 278; *Onward Society* v. *Smithson*, [1893] 1 Ch. 1; *Re Holland*, [1901] 2 Ch. 159; *Re Horton, H.* v. *Perks*, 51 L. T. 420); and since every deed must be construed according to the intention of the parties as appearing by the whole deed, when a recital is intended to be the statement of one party only, the estoppel is confined to that party (*Stroughill* v. *Buck*, 14 Q. B. 781; *S. E. Ry. Co.* v. *Wharton*, 6 H. & N. 526; see *Brandon Hill* v. *Lane*, [1915] 1 K. B. 250). There was no estoppel from a recital which, though accurate so far as it went, was incomplete (*Lovett* v. *L.*, [1898] 1 Ch. 82). As a general rule no estoppel arises by a deed upon the face of which the truth appears (*Doe* v. *Scarborough*, 3 Ad. & El. 2; *Doe* v. *Lawrence*, 4 Taunt. 23; *Jolly* v. *Arbuthnot*, 4 D. G. & J. 237). As to the application of this rule to the case where the creation by estoppel of a tenancy between mortgagor and mortgagee was in question, see *Morton* v. *Woods* (L. R. 4 Q. B. 293, 303); *Ex p. Punnett* (16 Ch. D. 226, 234). Where an untrue recital has been introduced into a deed by mistake and without fraud there is

no estoppel (*Brooke* v. *Haymes*, 6 Eq. 25; *Empson's Case*, 9 Eq. 597; *Scholefield* v. *Lockwood*, 31 L. J. Ch. 106). Again, a recital will not estop a party in an action not founded on the deed, but wholly collateral to it (*Carpenter* v. *Buller*, 8 M. & W. 209; *Carter* v. *C.*, 3 K. & J. 645; *Ex p. Morgan, Re Simpson*, 2 Ch. D. 72; see *Doe* v. *Shelton*, 3 Ad. & El. 265; *Melbourne* v. *Brougham*, 7 A. C. 307). A married woman may be estopped by a recital in a deed duly executed and acknowledged by her (*Jones* v. *Frost*, 7 Ch. 773). **3 & 4 Will. 4, c. 74, s. 20.**

As to an estoppel arising from the operative words of a grant, apart from the effect of the recitals. In the case of leaseholds it is settled that where A. by deed leases to B Blackacre wherein he has no interest at the time of the lease, and afterwards acquires the legal fee, the lease which was at first a good lease by estoppel becomes (from the feeding of the estoppel) a good lease in interest (*Webb* v. *Austin*, 7 M. & G. 724; see *Goodtitle* v. *Morse*, 3 T. R. 371). But the doctrine of feeding the estoppel does not apply where in the first instance some interest has passed (Co. Litt. 47B; *Doe* v. *Seaton*, 2 C. M. R. 730). In the case of freeholds where A purported to convey Blackacre to B, and subsequently by fraud himself obtained the legal estate which B claimed on the ground of estoppel, it was held that the doctrine of feeding the estoppel did not apply where the estate from which it was sought to feed the estoppel arose from a conveyance obtained fraudulently (*Heath* v. *Crealock*, 10 Ch. 30, 33; see *Onward Society* v. *Smithson*, [1893] 1 Ch. 13). Nor did the doctrine apply where A subsequently acquired the legal estate as trustee (*Keate* v. *Phillips*, 18 Ch. D. 577). In *Heath* v. *Crealock* (*supra*) it was said that the operative words of a grant would create no estoppel. (*See Right* v. *Bucknell*, 2 B. & Ad. 283.) Compare with the above, the rule that where A sells land and his title is afterwards defeated but A subsequently acquires the same land under another title, there is an equity arising out of the contract to fasten it upon the new title (*Jones* v. *Kearney*, 1 Dr. & War. 159; see *Smith* v. *Baker*, 1 Y. & C. Ch. 223; *Noel* v. *Bewley*, 3 Sim. 103). So where a person who had purported to assign one-sixth of a fund, being at the time only entitled to one-ninth, afterwards acquired one-eighteenth, the whole interest was bound (*Re Hoffe*, 82 L. T. 556). From operative words.

No estoppel arose from covenants for title (*General Finance Co.* v. *Liberator Society*, 10 Ch. D. 15). As to estoppel by covenant, see *Doe* v. *Ford*, 3 Ad. & Ell. 649. From covenants for title.

An estoppel may arise from the parcels of a deed of grant, *e.g.*, where land was described as "bounded by the seashore" (*Mellor* v. *Walmesley*, [1905] 2 Ch. 175; *Roberts* v. *Karr*, 1 Taunt. 494; see *ante*, p. 77). As to estoppel in regard to the alteration of a lease, see *Rudd* v. *Bowles*, [1912] 2 Ch. 60). From parcels.

A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration if not inconsistent with the deed (*Re Leifchild*, 1 Eq. 231). Before the Judicature Acts the parties were bound by a receipt for the consideration money in the body of the deed (*Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704); but not by an indorsed receipt, which, being no part of the deed, was not an estoppel, but only evidence (*Lampon* v. *Corke*, 5 B. & Ald. 606; *Graves* v. *Key*, 3 B. & Ad. 313). In either case it might be shown in equity that the money was not paid (*Ryle* v. *Haggie*, 1 Jac. & W. 234; *Wilson* v. *Keating*, 27 Beav. 121). The rule of equity now prevails. In favour, however, of third parties acting on the faith thereof, a receipt may be binding (*Bickerton* v. *Walker*, 31 Ch. D. 151; see *Gordon* v. *James*, 30 Ch. D. 249; *Lloyd's Bank* v. *Bullock*, Consideration.

3 & 4 Will. 4, c. 74, s. 20.

[1896] 2 Ch. 192; *King* v. *Smith*, [1900] 2 Ch. 425; *Rimmer* v. *Webster*, [1902] 2 Ch. 173).

Forged deed.

Where a man executes a deed by forging the name of another, representing himself to be that other, he is bound by an estoppel, as to the nature of which see *Re Cooper, C.* v. *Vesey* (20 Ch. D. 633).

Cases where there is no estoppel.

The rule which requires a man to be bound by his deliberate representations of fact may be overbalanced by weightier considerations. Thus, if a trustee, deriving his authority from a public Act of Parliament, grants by a deed unauthorised by the Act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power (*Fairtitle* v. *Gilbert*, 2 T. R. 169; see *Doe* v. *Hares*, 4 B. & Ad. 435; *Webb* v. *Herne Bay*, L. R. 5 Q. B. 642; *Re Eddystone Co.*, [1893] 3 Ch. 19; *Islington* v. *Hornsey*, [1900] 1 Ch. 706). So a party to the deed is not estopped from pleading its illegality (*Collins* v. *Blantern*, 2 Wils. 347; *Paxton* v. *Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an Act of Parliament or public policy (*Prole* v. *Wiggins*, 3 Bing. N. C. 230). So a party is not estopped from showing that a deed is void under a statute (*Doe* v. *Howells*, 2 Ad. & Ell. 744; see *Doe* v. *Ford*, 3 Ad. & El. 649). But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game (*Doe* v. *Roberts*, 2 B. & Ald. 367). See also the cases, *Doe* v. *Skirrow*, 7 Ad. & Ell. 157; *Gaunt* v. *Wainman*, 3 Scott, 413; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; *Bringloe* v. *Goodson*, 4 Bing. N. C. 726; see an article on Estoppel by Deed, 5 Jur. 858, 1170.

Copyholds not bound by estoppel.

A surrender of copyholds did not operate by estoppel (*Taylor* v. *Phillips*, 1 Ves. sen. 230; *Goodtitle* v. *Morse*, 3 T. R. 365; *Morse* v. *Faulkner*, 3 Swans. 429; *Doe* v. *Tomkins*, 11 East, 185; *Doe* v. *Wilson*, 4 B. & Ald. 303; see *Doe* v. *Rolfe*, 8 Ad. & El. 650).

(2) Estoppel by matter *in pais*.

Parties can be estopped by matters *in pais*, such as livery, entry, acceptance of an estate, and the like (Co. Litt. 352 a). Estoppels *in pais* often arise between landlord and tenant. As against the tenant, a man who accepts a lease is estopped from disputing the title of his landlord (*Langford* v. *Selmes*, 3 K. & J. 220), or of his landlord's heir (*Weeks* v. *Birch*, 69 L. T. 759; see *Tadman* v. *Henman*, [1893] 2 Q. B. 168). In a wider form the rule is that a tenant cannot deny that the person by whom he is let into possession had title at that time (*Doe* v. *Barton*, 11 Ad. & Ell. 307; see *R.* v. *Swifte*, [1913] 2 I. R. 113). Again, where a tenant pays rent to a person by whom he was not let into possession, a tenancy by estoppel may arise (*Jump* v. *Payne*, 68 L. J. Q. B. 607); apparently on the ground that it is a representation by the tenant that the relation of landlord and tenant exists (see *Serjeant* v. *Nash*, [1903] 2 K. B. 312, 316). But in such a case the payment of rent may only amount to an admission which can be explained (*Ib.* 315). A voluntary payment made under a mistake of money by way of rent does not create any obligation on the ground of estoppel (*Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 268). As regards estoppels arising against the landlord; it has been laid down that the estoppel must be mutual (*Green* v. *James*, 6 M. & W. 660; see Co. Litt. 352 a). And a landlord has been held estopped from denying that he was reversioner, or from setting up an overriding title (*Keith* v. *Gancia*, [1904 1 Ch. 790). See further as to estoppel between landlord and tenant, Woodfall, 21st ed. 264; Foa, 6th ed. 521.

Between landlord and tenant.

As to estoppel where a person enters on land under an invalid title, see *ante*, p. 154.

3 & 4 Will. 4, c. 74, s. 20.

Estoppel in mercantile transactions.

In mercantile transactions an estoppel may arise by representations or conduct, as to which several propositions are given by Brett, J., in *Carr* v. *L. & N. W. Ry.*, 10 C. P. 316; as to these see *Dixon* v. *Kennaway*, [1900] 1 Ch. 837; *Whitechurch* v. *Cavanagh*, [1902] A. C. 130, 135. As to estoppel in regard to transfers signed on blank certificates, see *Colonial Bank* v. *Cady*, 15 App. Cas. 267; *Fuller* v. *Glyn Mills*, [1914] 2 K. B. 168.

Estoppel by representation.

A representation of an intention does not create an estoppel (*Chadwick* v. *Manning*, [1896] A. C. 231; *Coleman* v. *North*, 47 W. R. 57). But if A makes a representation of fact to B intending it to be acted upon by B, and it is acted upon by B, A is estopped from saying that it is not true (*Low* v. *Bouverie*, [1891] 3 Ch. 110; *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1026; *Seaton* v. *S.*, 13 App. Cas. 74; *Bateman* v. *Faber*, [1898] 1 Ch. 147); compare Lord Selborne's statement of equitable estoppel by representation (*Citizens' Bank* v. *First National Bank*, L. R. 6 H. L. 360). The representation must be unambiguous (*Low* v. *Bouverie*, [1891] 3 Ch. 106, 113; *Whitechurch* v. *Cavanagh*, [1902] A. C. 145). And B cannot rely by way of estoppel on A's statement where it was induced by B's own misrepresentation or concealment or where the circumstances would have deterred a reasonable man from acting on it (*Porter* v. *Moore*, [1894] 2 Ch. 367). The onus of proving that the representation was acted on lies on B (*Re Lewis, L.* v. *L.*, [1904] 2 Ch. 602).

The representation may be made not merely by language but by conduct, and conduct may include negligence (*Bell* v. *Marsh*, [1903] 1 Ch. 541). But the negligence must be the proximate cause of B's mistaken action (*Longman* v. *Bath*, [1905] 1 Ch. 646; see also *Lancs. & Yorks. Ry. Co.* v. *MacNicoll*, 88 L. J. K. B. 601). A client could not rely on an estoppel alleged to arise from his solicitor's negligence in investigating title and preparing conveyance so as to compel the solicitor to give him (the client) the benefit of a mistake in the original contract (*Bell* v. *Marsh*, [1903] 1 Ch. 528).

On the above principle, where a company issues to A a certificate for shares, upon which he acts, the company will be estopped from denying, either that A is the proprietor of these shares (*Balkis* v. *Tomkinson*, [1893] A. C. 396; see *Dixon* v. *Kennaway*, [1900] 1 Ch. 833; *Foster* v. *Tyne Co.*, 63 L. J. Q. B. 50); or (unless A be affected with notice to the contrary) that the amount certified to have been paid on the shares has been paid (*Parbury's Case*, [1896] 1 Ch. 100; *Bloomenthal* v. *Ford*, [1897] A. C. 156; see *Markham and Darter's Case*, [1899] 1 Ch. 414). Even where A is affected with such notice, the above rule applies in the case of a transferee from him for value without notice (*Burkinshaw* v. *Nicolls*, 3 A. C. 1004; see *McKay's Case*, [1896] 2 Ch. 757). As to a company's duty in the custody of share certificates, see *Longman* v. *Bath*, [1905] 1 Ch. 646. Where A, by fraudulent misrepresentation, induced B to guarantee A's banking account, a finding of the jury that B was negligent did not prevent him from setting up the defence of misrepresentation to an action by the bank (*Carlisle, &c. Banking Co.* v. *Bragg*, [1911] 1 K. B. 489).

Negligence of party setting up misrepresentation.

Estoppel in the case of agency.

Where a person holds out another as his agent, and the agent acts within his agency, the principal may be estopped from denying the agency. Thus where a person by an agreement authorised another to apply for shares, but imposed a condition in a covering letter, he was estopped as against one who had acted on the faith of the agreement without notice of the letter (*Ex p. Harrison*, 69 L. T. 204; see *Re Consort Mines*, [1897] 1 Ch. 575, where there was no estoppel; *Farquharson* v. *King*, [1902] A. C. 325; *Rimmer* v. *Webster*, [1902] 2 Ch. 171). And a person who leaves in the hands

3 & 4 Will. 4, c. 74, s. 20.

of his brokers securities and executed transfers, may be estopped from denying authority to deal with them (*Bentinck* v. *London Bank*, [1893] 2 Ch. 120; see *Robinson* v. *Montgomeryshire*, [1896] 2 Ch. 841; *Bechuanaland* v. *London Bank*, [1898] 2 Q. B. 658). So also a man who leaves in the hands of his solicitor a mortgage deed executed by himself and containing a receipt for the money (*King* v. *Smith*, [1900] 2 Ch. 425; compare *Gordon* v. *James*, 30 Ch. D. 249). But where the secretary of a company acted outside the scope of his agency, the company was not estopped (*Whitechurch* v. *Cavanagh*, [1902] A. C. 117; *Ruben* v. *Great Fingall*, [1906] A. C. 439). A person having notice of an agent's want of authority was estopped by his own negligence in dealing with him (*Jacobs* v. *Morris*, [1902] 1 Ch. 830).

Miscellaneous cases of estoppel.

A warehouseman who attorned to a purchaser was held to be estopped from denying the latter's title (*Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521; see *Ross* v. *Edwards*, 73 L. T. 100). As to estoppel in case of delivery orders, see *Union Credit Bank* v. *Mersey Board* ([1899] 2 Q. B. 205); in case of bills of exchange, see *Scholfield* v. *Londesborough* ([1896] A. C. 514); and in case of a customer who withholds from his bankers information about forged cheques, see *M'Kenzie* v. *British Linen Co.* (6 App. Cas. 82); *Ogilvie* v. *West Australian Corporation* ([1896] A. C. 257).

The Court refused to apply equitable estoppel in favour of a volunteer (*Lovett* v. *L.*, [1898] 1 Ch. 82); or to permit a married woman's restrained property to be bound by estoppel (*Bateman* v. *Faber*, *Ib.* 149).

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

21. Provided always, that if a tenant in tail of lands shall make a disposition of the same under this Act by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this Act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate *pur autre vie*, or for years absolute or determinable, or if, by a disposition under this Act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

Effect of this section.

This section was intended to put an end to such questions as arose in *Jackson* v. *Innes* (1 Bligh. 104), as to whether an equity of redemption was resettled by the mortgage deed (*Plomley* v. *Felton*, 14 App. Cas. 66).

By this section, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be

entitled to the equity of redemption discharged from the entail; but if he creates an estate *pur autre vie*, or for years only, or an "*interest, charge*, or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge, although there be an express declaration that the deed shall operate as a complete bar (see 1 Hayes, Conv. 183; 9 Bythewood & Jarm. Conv. 404, 405). 3 & 4 Will. 4, c. 74, s. 21.

Where a tenant in tail subject to charges for portions was lunatic, the Court directed the charges to be raised by a mortgage for a term of years without a power of sale (*Re Pares*, 2 Ch. D. 61; and see *S. C.*, 12 Ch. D. 333). But it cannot authorise a mortgage of the interest of an infant tenant in tail in remainder for raising maintenance (*Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620).

Mortgage of entailed copyholds.

It seems that if a legal tenant in tail of copyholds mortgaged by conditional surrender which was not followed by admittance, but the money was paid off and the surrender vacated by the entry of satisfaction, the estate tail remained unaffected; but that the estate tail would be barred if the surrender were followed by admittance (see Davidson, Mortgages, 4th ed. 39).

Interest, charge, lien or incumbrance.

Interest, charges, liens or incumbrances may be created by a tenant in tail under the Act; but they must be created, and not left to rest in contract (Sugd. R. P. Stat. 197). Sect. 40 (*post*) expressly requires in every case a formal legal assurance; it would seem, therefore, that the words "interest, charge, lien or incumbrance," do not include an equitable mortgage by mere deposit of title deeds.

Equitable mortgages.

3. *Definition of the Protector.*

The owner of the first existing estate under a settlement, prior to the estate tail under the same settlement, to be the protector of the settlement.

22. If at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then, the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this Act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this Act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the

3 & 4 Will. 4, c. 74, s. 22.

same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.

In cases of Lunacy the Lord Chancellor is protector (see *post*, ss. 33, 48). Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder (*Re Blewitt*, 6 D. M. & G. 187).

Where the owner of the only prior estate holds under a different settlement from the tenant in tail, he is not the protector (*Berrington* v. *Scott*, 32 L. T. 125). The owner of the prior estate referred to in this section is the owner of the beneficial interest (*Re Dudson*, 8 Ch. D. 632; compare *Clarke* v. *Chamberlain*, 16 Ch. D. 176; *Re Hughes*, [1906] 2 Ch. 642). Thus, where an equity of redemption was limited to trustees in trust for A for life, with remainder to the use of B in tail, A was the protector, not the trustees (*Re Dudson*, *supra*; compare the old law of recoveries, 2nd ed., pp. 268, 273). So, where lands were devised to trustee for a term on trust to pay an annuity, and manage the estate, and pay the surplus to A, who was also the life tenant, subject to the term, A was the protector (*Re Ainslie*, A. v. A., 54 L. J. Ch. 8). Where, however, a trustee is given an estate during the life of a person on trust to pay the rents to the settlor's creditors, it was said that the trustee would be the protector (*Re Dudson*, 8 Ch. D. 633).

Where land was devised to trustees during certain lives on trusts for accumulation, which became avoided under the Thellusson Act (see now L. P. Act, 1925, s. 164, *post*), there was after the avoidance no protector. The trustees had no beneficial interest. And as to the heir (1) he was excluded by sect. 27; (2) he did not claim under a "resulting use or trust," nor could he be said to take "under the same settlement" (*Re Hughes*, [1906] 2 Ch. 642). Compare as to the last point, *Vine* v. *Raleigh*, [1896] 1 Ch. 37, quoted under sects. 1 and 20 of S. L. Act, 1925, *post*. Where lands were vested in trustees for a term of 99 years if A should so long live on trusts for management, &c., with remainders in tail male, it was held that there was no protector (*Re Jenkins*, [1917] 1 Ch. 46).

An instance of a "resulting use" will be found in *Lynch* v. *Clarkin*, [1900] 1 I. R. 178. The Statute of Uses was repealed by L. P. Act, 1925, *post*.

Each of two or more owners of a prior estate to be the sole protector as to his share.

23. Provided always, that where two or more persons shall be owners, under a settlement, within the meaning of this Act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this Act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share.

Where A had for life one-fifth of an estate with a remainder in tail in one-fifth, and had also one-fourth of another fifth for life, with a more remote remainder in tail in one-fourth of one-fifth, he was protector of the identical undivided share of which he was

tenant in tail, and not merely protector of an equivalent aliquot share of the estate (*Tufnell* v. *Borrell*, 20 Eq. 196). See *Church* v. Edwards, 2 Br. C. C. 180; *Oakley* v. *Smith*, Amb. 90; 3 Prest. Conv. 90 *et seq.* **3 & 4 Will. 4, c. 74, s. 23.**

24. Provided always, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement. Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

See *Keer* v. *Brown* (Johns. 138). Where several persons constitute the protector, the term protector is applicable equally to the entire body and to each individual (*Re Wainwright*, 1 Phill. 258; see *Re Bayley Worthington and Cohen*, [1908] 1 Ch. 30). In the case of disentailments after 1882, a married woman is alone protector in respect of a prior estate made separate by M. W. P. Act, 1882 (M. W. P. Act, 1907, sect. 3, *post*).

25. Provided always, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this Act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement. As to estates confirmed or restored by settlement.

26. Provided always, that where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement. As to leases at rent created by settlement.

27. Provided always, that [no woman in respect of her dower, and] (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three), no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement. No tenant in dower, heir, executor, &c., to be protector, except in the case of a bare trustee.

There is a discrepancy between this date and the date given in sect. 31 (August 28, 1833). It seems doubtful which enactment must control the other (1 Hayes, Conv. 180, 5th ed.; Sugd. R. P. Stat. 203). See as to this section the argument in *Re Dudson*, 8 Ch. D. 628, and *Re Hughes*, [1906] 2 Ch. 642, *ante*, p. 322. The

3 & 4 Will. 4, c. 74, s. 27.

bracketed words were repealed by the Administration of Estates Act, 1925, *post;* as to cases where the death occurred after December 31, 1925, dower being abolished in those cases by sect. 45 of the same Act.

Who shall be the protector where the owner of the prior estate shall by the two last clauses, be excluded.

28. Provided always, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this Act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

See *Re Dudson* (8 Ch. D. 633).

[Sections 29 to 31 (for which see the 2nd ed. of this work, pp. 288-89) were repealed as obsolete by the Law of Property (Amendment) Act, 1924. They related to settlements made before 1834.]

Power to any settlor to appoint the protector.

32. Provided always, that it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person

who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

3 & 4 Will. 4, c. 74, s. 32.

This section is repealed by the L. P. Act, 1925, *post*, as respects settlements made or coming into operation after 31st December, 1925.

Trustee of executory settlement a settlor within this section.

The trustee of an executory settlement is a settlor within this section of the Act, and as such is entitled to appoint a protector at his discretion. A protector should not be appointed by the Court, unless upon a special case (*Bankes* v. *Le Despencer*, 11 Sim. 527). If all the persons appointed under this section die, the owner of the first life estate is protector (*Clarke* v. *Chamberlin*, 16 Ch. D. 176). If one of them die the survivors can act as protector (*Bell* v. *Holtby*, 15 Eq. 178). And this rule was not altered by a power in the settlement to appoint protectors to fill up vacancies "to the intent that the full number of three persons might from time to time fill the office" (*Cohen* v. *Bayley Worthington*, [1908] A. C. 97). The final proviso in the section only applies when the "natural protector" is included in the persons appointed protectors (*Ib.* 99).

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c., the Court of Chancery to be the protector.

33. Provided always, that if any person, protector of a settlement, shall be a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid (*i*); or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid (*k*); or if any settlor entailing lands shall in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in

3 & 4 Will. 4, c. 74, s. 33.

which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

(*i*) As to the persons by whom the jurisdiction here conferred on the Lord Chancellor can be exercised, see Lunacy Act, 1890, s. 108.

The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, was held to be the protector of a settlement in the place of a lunatic of estates situate in Wales, although the party was resident in Ireland, and had been found lunatic by inquisition issued by the Lord Chancellor of Ireland (*Re Graydon*, 1 Mac. & G. 655). The cases as to the exercise by the Lord Chancellor of his power of consenting are stated in the note to sect. 48, *post*, p. 335.

(*k*) On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement (*Re Wainwright*, 1 Phill. C. C. 258). There is an omission in this section of *the case of a person convicted of treason or felony*. But the omission must be supplied by implication, otherwise no effect can be given to the previous words, "if any person, protector of a settlement, shall be convicted of treason or felony" (*Ib.* pp. 261, 262).

As to the form of petition, evidence and order on an application to the Court to consent as a protector of a settlement to the barring of an entail, see *Re Gravenor* (1 De G. & S. 700; Seton, 7th ed., 1715).

4. *Powers of the Protector.*

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

34. Provided always, that if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this Act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorised to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this Act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

3 & 4 Will. 4, c. 74, s. 34.

Advantage of *consent* to a conveyance.

Formerly, where an estate tail was being barred, a tenant for life was a conveying, not merely a consenting, party, which occasioned inconvenience; as to which, see Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4th ed.; *Pelham's Case* (1 Rep. 14 b); *Smith* v. *Clifford* (1 T. R. 738); *Doe* v. *Mulgrave* (5 T. R. 320); *Jersey* v. *Deane* (5 B. & Ald. 575); *Roper* v. *Halifax* (8 Taunt. 845); *Doe* v. *Scarborough* (3 Ad. & Ell. 43); *Tyrrell* v. *Marsh* (3 Bing. 31); Sug. Pow. 71—78, 8th ed.

Where in a settlement there was a power of sale and exchange with the assent of the tenant for life, her concurrence in a disentailing deed did not prevent her assenting to a subsequent exercise of the power (*Hill* v. *Pritchard*, Kay, 394).

Vesting order.

Where there is an adult tenant for life, and an infant tenant in tail, a vesting order under the Trustee Act, 1925, will, if the protector consents to it, bar all estates in remainder, and not pass a base fee only under the Act (*Powell* v. *Matthews*, 1 Jur. (N.S.) 973; *Re Montagu, Faber* v. *M.*, [1896] 1 Ch. 549, where see form of order; see also *Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620).

Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

35. Provided always, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands, in respect of which there shall be such protector, the power of disposition hereinbefore contained.

The protector to be subject to no control in the exercise of his power of consenting.

36. Any device, shift, or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

It seems that a contract under seal by a protector to give his consent might be such a consent as is required by the Act (*Bankes* v. *Small*, 36 Ch. D. 724). It has been said that this section enables a protector to act from mere caprice, ill-will, or any bad motive (*Bankes* v. *Le Despencer*, 11 Sim. 527).

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

37. Provided always, that the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this Act.

3 & 4 Will. 4, c. 74, s. 37.

The rules of equity as to frauds on powers were not extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an *immediate benefit* was conferred on the son as a consideration for his barring the entail (*Tweddell* v. *Tweddell*, T. & R. 1; *Davis* v. *Uphill*, 1 Sw. 129). As to the circumstances under which a tenant in tail in remainder can sue to set aside a disentailing deed alleged to have been made in fraud, see *Bellamy* v. *Sabine*, 2 Phill. 425; *Cornewall* v. *Prioleau*, 20 Times L. R. 606.

Frauds on powers.

Corrupt bargain.

The rules of equity above referred to are rules relating to special or limited powers. According to these rules an appointment under a power is invalid where the appointee has agreed with the appointor that a benefit shall thereby accrue to the appointor (*Marlborough* v. *Godolphin*, 2 Ves. sen. 70; *Boyle* v. *Peterborough*, 1 Ves. 310; *Farmer* v. *Martin*, 2 Sim. 502; *Arnold* v. *Hardwich*, 7 Sim. 343), or to a stranger to the power (*Pryor* v. *Pryor*, 2 D. J. & S. 205; *Salmon* v. *Gibbs*, 3 D. G. & S. 343; *Birley* v. *B.*, 25 Beav. 299; *Re Kirwan*, 25 Ch. D. 373; *Crawshay* v. *C.*, 43 Ch. D. 624; *Re Wright, Hagan* v. *Bloor*, [1920] 1 Ch. 108). A mere suspicion, however, of a corrupt agreement will not be sufficient to invalidate an appointment (*Palmer* v. *Locke*, 15 Ch. D. 300; *Hamilton* v. *Kirwan*, 2 Jo. & Lat. 393). Again, an appointment will not be invalidated (1) by the mere fact of a bargain between the appointor and appointee (*Langston* v. *Blackmore*, Amb. 288; *Roach* v. *Trood*, 3 Ch. D. 429; see *Cooper* v. *C.*, 5 Ch. 203), as where the bargain did not induce the appointment (*Re Turner*, 28 Ch. D. 205), or where the bargain related to a jointure which was not thereby diverted from the wife (*Saunders* v. *Shafto*, [1905] 1 Ch. 126). Nor will an appointment be invalidated (2) by a bargain between the appointor and all the objects of the power, being *sui juris* (*Davis* v. *Uphill*, 1 Sw. 136); or (3) by reason of the appointor having covenanted to appoint (*Bulteel* v. *Plummer*, 6 Ch. 160; *Palmer* v. *Locke*, 15 Ch. D. 294; *Robinson* v. *Ommanney*, 21 Ch. D. 780). In some cases an appointment to a stranger may be valid if made with the assent of an object of the power; as where it can be considered as in effect an appointment to an object and a settlement by that object (*Daniel* v. *Arkwright*, 2 H. & M. 95; *Wright* v. *Goff*, 22 Beav. 207; *Goldsmid* v. *G.*, 2 Hare, 187). Where the invalidity arises by reason of a corrupt agreement, the appointment will be wholly bad, even as to the benefit appointed to an object (*Jackson* v. *J.*, Dru. 113); unless some consideration (*e.g.*, marriage) has been given which cannot be restored, when the appointment may be good as to the appointee (*Daubeny* v. *Cockburn*, 1 Mer. 643); or unless the honest part of the appointment can be separated from the dishonest part, when the former may be good (*Topham* v. *Portland*, 1 D. J. & S. 572; *Viant* v. *Cooper*, 76 L. T. 768). Where a corrupt appointment has been carried into effect, the appointor may be liable for loss to the trust estate (*Re Deane, Bridger* v. *D.*, 42 Ch. D. 9).

Corrupt intention.

An appointment is void where there is no bargain, but it is clear that the appointor intends to benefit either himself (*Henty* v. *Wrey*, 21 Ch. D. 342; *Wellesley* v. *Mornington*, 2 K. & J. 143; *Re Little, Harrison* v. *H.*, 40 Ch. D. 424; *Re Cohen, Brookes* v. *C.*, [1911] 1 Ch. 37), or a stranger to the power (*Re Marsden*, 4 Drew. 594; see *Topham* v. *Portland*, 5 Ch. 40; *Whelan* v. *Palmer*, 39 Ch. D. 648; *Re Perkins, P.* v. *Bagot*, [1893] 1 Ch. 283; *Re Buckley* (1893), W. N. 95; but see *Vatcher* v. *Paull*, [1915] A. C. 372). A release of a power by the donee with a view to his own benefit is valid (*Re Radcliffe, R.* v. *Bewes*, [1892] 1 Ch. 227; *Re Somes, Smith* v. *Somes*, [1896] 1 Ch. 250; but see *Re Jones' Settlement, Stunt* v.

J., [1915] 1 Ch. 373). A *bona fide* appointment is not necessarily void merely because a benefit in fact accrues to the appointor (*Henty* v. *Wrey, supra; Re Huish*, 10 Eq. 5; *Beere* v. *Hoffmeister*, 23 Beav. 101), or to a stranger (*Fearon* v. *Debrisay*, 14 Beav. 635; *Roach* v. *Trood*, 3 Ch. D. 440). 3 & 4 Will. 4, c. 74, s. 37.

A purchaser with notice of the invalidity of an appointment will not get a good title (*Palmer* v. *Wheeler*, 2 Ba. & Be. 18), nor will a purchaser without notice, in the case of an equitable interest (*Daubeny* v. *Cockburn*, 1 Mer. 626; *Cloutte* v. *Storey*, [1911] 1 Ch. 18; but see sect. 157 of the L. P. Act, 1925, *post*). But a mere suspicion of a fraudulent appointment is not a good objection by a purchaser to title (*M'Queen* v. *Farquhar*, 11 Ves. 467; *Green* v. *Pulsford*, 2 Beav. 70). Purchasers.

5. *Confirmation of Voidable Estates created by Tenant in Tail.*

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this Act, but not against a purchaser without notice.

38. Provided always, that when a tenant in tail of lands under a settlement, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards under this Act, by any assurance other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this Act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this Act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this Act of confirming the same without such consent (*l*): provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him (*m*).

(*l*) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in

3 & 4 Will. 4, c. 74, s. 38.

such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

Old rule as to the effect of recoveries in confirming prior acts of tenant in tail.

(*m*) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue (*Capel's Case*, 1 Rep. 60; *S. C.*, Poph. 5, 6; *Beck* v. *Welsh*, 1 Wils. 277; *Tourle* v. *Rand*, 2 Bro. C. C. 652; *Goodright* v. *Mead*, 3 Burr. 1703; *Cheney* v. *Hall*, 3 Atk. 9; Ambl. 526; *Stapleton* v. *S.*, 1 Atk. 2); but not if the settlement was voluntary (*Cormick* v. *Trapaud*, 6 Dow. 60). As to the similar effect of a fine in such a case, see *Shelburne* v. *Biddulph* (6 Br. P. C. 356, Toml. ed.); *Symonds* v. *Cudmore* (Show. 370; 1 Salk. 338; Skin. 284, 317, 328; 3 Salk. 335; Carth. 257; 12 Mod. 32; Holt, 666; 1 Freem. 503; 2 Atk. 204); see 7 Ves. 497; *Lloyd* v. *L.* (4 Dru. & War. 374); *Browne* v. *Blake* (1 Molloy, 368).

Effect of fines.

Cases on s. 38.

Where after this statute A tenant in tail in remainder created a common law base fee (see *ante*, p. 307) in favour of a purchaser for value, and then became bankrupt, but the commissioners did not bar the entail, a disentailing deed subsequently executed by A was held to confirm the common law base fee under this section (*Hankey* v. *Martin*, 49 L. T. 560).

The proviso at the end of this section does not require that the disentailing instrument should pass the estate to the purchaser. It is sufficient if the instrument forms part of a transaction in respect of which the person claiming the benefit of the proviso is a purchaser (*Crocker* v. *Waine*, 5 B. & S. 697).

6. *Enlargement of Base Fees.*

Base fee, when united with the immediate reversion, enlarged, instead of being merged.

39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this Act, or at any time afterwards, be united in the same person, and at any time after the passing of this Act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by any disposition under this Act if such remainder or reversion had been vested in any other person.

Merger of base fees.

"If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense" (1 Real Property Report, p. 28; but see *Sperling* v. *Trevor*, 7 Ves. 497). This difficulty is removed by this section.

Merger of estates tail.

Estates tail were an exception to the ordinary rule as to merger (see as to this sect. 185 of L. P. Act, 1925, and note, *post*). Thus where an estate tail in freeholds and the reversion in fee vested

in the same person, the estate tail was by the operation of the statute *De Donis* kept alive and did not merge (*Roe* v. *Baldmere*, 5 T. R. 109; 2 Rep. 61; *Foxwell* v. *Van Grutten*, [1897] A. C. 679); *secus*, in the case of copyholds, *Parker* v. *Turner*, 1 Vern. 458; *Dunn* v. *Green*, 2 P. W. 9. If, however, a tenant in tail with a reversion in fee to himself, levied a fine, the effect was to create a base fee, which merged in the other fee, and let in all the incumbrances of the ancestor (*Shelburne* v. *Biddulph*, 6 Br. P. C. 356; *Foxwell* v. *Van Grutten*, *supra*). An estate tail after possibility of issue extinct was merged by the acquisition of the fee (Co. Litt. 27 b; see 3 Preston Conv. 240). 3 & 4 Will. 4, c. 74, s. 39.

7. *Modes in which Dispositions of Land under this Act by Tenants in Tail are to be effected.*

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

40. Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided, nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity under this Act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this Act, notwithstanding such disposition shall be made or evidenced by deed (*n*); and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed (*o*).

Old rule as to effect of contracts by tenant in tail.

(*n*) This section adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete contracts made by his ancestor, respecting the entailed land, because the issue claims by a paramount title *per formam doni*, from the creator of the estate tail, and not from his own ancestors (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *Att.-Gen.* v. *Day*, 1 Ves. sen. 218). Such rule applied, although the ancestor had received the whole purchase-money, and a decree had been made to levy a fine (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104; 1 Ves. sen. 224; see *Franks* v. *Mainwaring*, 2 Beav. 115); and even where tenant in tail, in pursuance of a covenant had acknowledged a fine, but died before it was perfected (2 Vern. 3). The rule was applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold (see Sugd. V. & P. 227, 11th ed.; 1 Prest. Conv. 153).

Effect of this section upon contracts by tenant in tail.

There is nothing in this section to affect contracts as such. Therefore, although they will not bar the entail under the Act, nor can equity give to them that operation, yet they may be recovered upon at law, or be the foundation of a specific performance against the tenant in tail. Thus the Court will decree, as against the tenant

3 & 4 Will. 4, c. 74, s. 40.

in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes* v. *Small*, 36 Ch. D. 716; see *Davis* v. *Tollemache*, 2 Jur. (N.S.) 1181). Where a tenant in tail of copyholds deposited his title deeds with an agreement to "make a formal surrender" to secure a loan, a remainderman who joined in the deposit was held bound to carry out the agreement (*Bryce* v. *Bury*, 2 Drew. 11). See further the note to sect. 47, *post*; and Sugd. R. P. Stat. 197, 2nd ed.

No particular form of disentailing deed necessary.

No particular form of disentailing deed is necessary; any deed which by its legal operation would have conveyed the fee simple, if the grantor had been seised in fee, will, if executed by a tenant in tail in possession and duly inrolled, bar the entail (*Nelson* v. *Agnew*, I. R. 6 Eq. 232). The word "disposition" is not a technical word; but in this section it is limited to such an instrument *inter vivos* as would be effectual to pass a legal estate in fee simple (*Carter* v. *C.*, [1896] 1 Ch. 67, 69). Accordingly in this section the word does not include a mere declaration of trust (*Green* v. *Paterson*, 32 Ch. D. 108), *secus* in sect. 77, *post* (*Carter* v. *C.*, *supra*). As to the form of disentailing assurance necessary under this Act, see further, 1 Hayes, Conv. 154 *et seq.* As to the effect of an order under the Trustee Act, 1893 (see now Trustee Act, 1925, s. 49, *post*), vesting the estate of an infant tenant in tail, see *Re Montagu*, *Faber* v. *M.* ([1896] 1 Ch. 549), and cases there cited; *Re Hambrough*, *H.* v. *H.* ([1909] 2 Ch. 620). Forms of disentailing assurances will be found in 3 Davidson, Conv. 1166 *et seq.*

Where a disentailing deed operates as a common law grant, and not by the Statute of Uses, it must be executed by the grantees; if not, it may be rendered inoperative by the subsequent disclaimer by the grantees (*Peacock* v. *Eastland*, 10 Eq. 21). But where the disentailing deed operated by the Statute of Uses, it was not necessary that it should be executed by the grantees to uses, and a subsequent disclaimer by them would not affect the operation of the deed (*Nelson* v. *Agnew*, *supra*; *Re Dudson*, 8 Ch. D. 631). As to the distinction between common law assurances, and assurances under the Statute of Uses, see further *Savill* v. *Bethell*, [1902] 2 Ch. 540; *Mallott* v. *Wilson*, [1903] 2 Ch. 494. See now sects. 1 and 4 of the L. P. Act, 1925, *post*, by which Act the Stat. of Uses is repealed.

Acknowledgment by married woman, tenant in tail, need not precede inrolment.

(*o*) In the case of a married woman tenant in tail, it was not necessary that the acknowledgment should precede the inrolment (*Ex parte Tavener*, 7 De G. M. & G. 627). Now by sect. 167 of the L. P. Act, 1925, *post*, acknowledgment is unnecessary in the case of deeds executed after December 31, 1925; and where the Court dispenses with the husband's concurrence under sect. 91, *post*, it may by the order declare, as to separate property, that the disposition shall take effect as if the husband had concurred. Independently of the Married Women's Property Act, 1882, the concurrence of the husband was held necessary in the case of separate property (*Cooper* v. *Macdonald*, 7 Ch. D. 295). The husband might concur, though a discharged bankrupt (*ibid.*, 298). But in the case of women married since 1882, or of property acquired by a married woman since 1882, no concurrence or acknowledgment is necessary (*Re Drummond and Davie*, [1891] 1 Ch. 531).

[Sect. 41, requiring the inrolment within six months after execution of assurances by tenants in tail, is repealed by the L. P. (Amdt.) Act, 1924. By sect. 133 of the L. P. Act, 1925, *post*, inrolment is unnecessary in the case of assurances and instruments executed or made after December 31, 1925. A deed was valid if inrolled within the six months, even after the death of the tenant in tail (*Whitmore Searle* v. *W. S.*, [1907] 2 Ch. 332).]

42. The consent of the protector of a settlement to the disposition under this Act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void. 3 & 4 Will. 4, c. 74, s. 42.

Consent of the protector to be given by the same assurance or by a distinct deed.

Where the tenant in tail and the protector were both made parties to a disentailing deed and, the tenant in tail having executed the deed and died, the protector subsequently executed it, the bar was effectual (*Whitmore Searle* v. *W. S.*, [1907] 2 Ch. 332).

43. If the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

A contract under seal by a protector to give his consent might amount to a consent within the Act (*Bankes* v. *Small*, 36 Ch. D. 724).

44. It shall not be lawful for the protector of a settlement who under this Act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Protector not to revoke his consent.

45. Any married woman, being either alone or jointly with her husband protector of a settlement, may under this Act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

A married woman protector to consent as a feme sole.

[Sect. 46, requiring any separate deed by which a protector gave his consent to be inrolled, was repealed by the L. P. (Amdt.) Act, 1924. See sect. 133 of the L. P. Act, 1925, *post*.]

47. In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in Courts of law would not be effectual.

3 & 4 Will. 4, c. 74, s. 47.

a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this Act; and that no disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this Act in a court of law.

This section prevents the Court from holding that a contract to disentail is, as against the issue in tail and remaindermen, as effectual as if a disentailing deed had been executed; or from remedying any defects in the execution of a deed intended to bar an estate tail (*Bankes* v. *Small*, 36 Ch. D. 723; see *Mills* v. *Fox*, 37 Ch. D. 162). But the section does not prevent the Court from ordering, as against a tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes* v. *Small*, *supra*; see *Petre* v. *Duncombe*, 7 Hare, 24; *Re Montagu*, *Faber* v. *M.*, [1896] 1 Ch. 549). An infant has been ordered under Debts Recovery Act, 1830, s. 11, to execute a disentailing deed (*Radcliffe* v. *Eccles*, 1 Keen, 130; see *Hargreaves* v. *Wright*, 1 W. R. 408). To give effect to an election an infant tenant in tail was declared a trustee and a person was appointed to convey his estate so as to bar the entail (*Re Montagu*, *Faber* v. *M.*, [1896] 1 Ch. 549; see *Re Hambrough*, *H.* v. *H.*, [1909] 2 Ch. 620). As to lunatics, see *ante*, p. 312. Under the ordinary covenant, however, to settle after-acquired property a married woman cannot be compelled to execute a disentailing deed (*Re Dunsany*, *Nott* v. *D.*, [1906] 1 Ch. 578, approving *Hilbers* v. *Parkinson*, 25 Ch. D. 200; see *Re Anstis*, *Chetwynd* v. *Morgan*, 31 Ch. D. 605; *Mills* v. *Fox*, 37 Ch. D. 162; *Dering* v. *Kynaston*, 6 Eq. 210). The above section does not prevent the rectification, on the ground of mistake, of a deed enrolled under the Act (*Hall-Dare* v. *H.-D.*, 31 Ch. D. 251; *Meeking* v. *M.*, [1917] 1 Ch. 77).

Lord Chancellor, &c., to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

48. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons entrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so entrusted as aforesaid (*p*), or the said Court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this Act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or

the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary (*q*); and if such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this Act required to be given. 3 & 4 Will. 4, c. 74, s. 43.

(*p*) See sect. 33, *ante*, p. 325.

(*q*) The cases *Re Blewitt* (3 M. & K. 259); *Re Wood* (3 My. & Cr. 266); deciding that the Lord Chancellor has no jurisdiction where the tenant in tail in possession is a lunatic, have been overruled (*Re Blewitt*, 6 D. M. & G. 187; see note to sect. 22, *ante*).

As protector of the settlement, the only duty of the Court is to see what, in reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to benefit one member of the family to the exclusion of the others (*Re Newman*, 2 My. & Cr. 112). So, consent was refused to a disposition which would benefit the husband of the tenant in tail to the detriment of the brother of the lunatic (*ibid.*; *Re Graydon*, 1 Mac. & G. 655). Consent was also refused to the sale of the next presentation to a family living, the sale not being for the benefit of the lunatic tenant for life (*Re Tharp*, 3 Ch. D. 59). Consent, however, was given, for carrying out a reasonable arrangement likely to have been made by the lunatic (*Re Blewitt*, 6 D. M. & G. 198); also, for enabling a tenant in tail in remainder to secure by mortgage the repayment to the estate of a lunatic tenant for life of an allowance made to the tenant in tail out of the surplus income of the tenant for life (*Re Sparrow*, 20 Ch. D. 320; *Re Beridge*, 50 L. T. 653); also, for advancing a son of the lunatic (*Grant* v. *Yea*, 3 M. & K. 245). Cf. L. P. Act, 1925, s. 171.

49. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind (*r*), or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made. Order of the Lord Chancellor, &c., to be evidence of consent.

(*r*) See note (*i.*) to sect. 33, *ante*, p. 326.

3 & 4 Will. 4, c. 74, s. 49.

[Sections 50—54, relating to estates tail in copyholds (for which see the second edition of this work, pp. 302—305), were repealed by the L. P. (Amdt.) Act, 1924, copyhold tenure being abolished as from January 1, 1926, by Part V. of the L. P. Act, 1922, and sect. 55 was repealed by the S. L. Rev. Act, 1874.]

8. *Bankrupt's Estate Tail.*

The commissioner, in the case of an actual tenant in tail becoming bankrupt after December 31, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

56. Any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said Act (1 & 2 Will. 4, c. 56), under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this Act at the time of such disposition: provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this Act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this Act in such lands without the consent of the protector.

Clauses in 3 & 4 Will. 4, c. 74, with respect to the disposition of estates tail under bankruptcies, extended to proceedings under subsequent bankruptcy Acts.

Sect. 55 of the Bankruptcy Act, 1914, re-enacting sect. 56 of the Bankruptcy Act, 1883, empowers the trustee of the bankrupt's estate to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same. And the same section provides that sects. 56—73 (both inclusive) of the Fines and Recoveries Act, 1833, shall extend and apply to proceedings in bankruptcy under the Bankruptcy Act, 1914, as if those sections were there re-enacted and made applicable in terms to such proceedings. (Parts of these sections have, however, been repealed by the L. P. (Amdt.) Act, 1924, as noted under them.) In the absence of provisions of the above nature, the estate tail of a bankrupt could not have been reached (*Sturgis* v. *Morse*, 2 D. F. & J. 233; *Re Gaskell & Walter*, [1906] 1 Ch. 445). Compare the effect of the Forfeiture Act, 1870,

where a tenant in tail is convicted of felony (*Re Gaskell & Walter*, [1906] 2 Ch. 1). 3 & 4 Will. 4, c. 74, s. 56.

Where in the case of copyholds, the entail in which by custom could not be barred until it fell into possession, the tenant in tail in remainder (who had become bankrupt) obtained his certificate and purchased from his assignees an estate in the copyhold to continue during his own life only, the assignees could not on the death of the original tenant for life bar the entail and acquire the ultimate remainder in fee (*Johnson* v. *Smiley*, 17 Beav. 223).

Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

57. Any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this Act by the person so entitled if he had not become bankrupt.

As to the consent of the protector in case of bankruptcy.

58. The commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining the certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this Act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said Acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any Acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this Act with the consent of such protector; and all

3 & 4 Will. 4, c. 74, s. 58.

the previous clauses in this Act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, [and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected,] shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

The bracketed words were repealed by the L. P. (Amdt.) Act, 1924, s. 46 (which required such inrolment) being also repealed thereby. That Act also repealed sect. 59, requiring the enrolment of dispositions of lands (see sect. 133 of the L. P. Act, 1925, *post*).

Subsequent enlargement of base fees created by the disposition of the commissioner.

60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this Act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this Act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankruptcy Acts.

61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said Acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other Acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this Act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this Act.

62. Provided always, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this Act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this Act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said Acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other Acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this Act; and if at the time of the disposition by such commissioner in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this Act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this Act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this Act: provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have

3 & 4 Will. 4, c. 74, s. 62.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

3 & 4 Will. 4, c. 74, s. 62.

express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

See the following cases decided under old Bankruptcy Acts: *Beck* v. *Walsh* (1 Wils. 276); *Pye* v. *Daubuz* (3 Br. C. C. 595); *Edwards* v. *Appleby* (2 Br. C. C. 652, n.); *Ex parte Fripp* (1 D. G. 293); *Ex parte Wise* (1 Mont. & M. 65).

An insolvent tenant in tail executed in 1825 a conveyance under 1 Geo. 4, c. 119. In 1831 he became bankrupt, and under the bankruptcy a statutory conveyance was executed barring the entail. The disentailing assurance under the bankruptcy was held not to confirm or enlarge the determinable fee created by the conveyance of 1825 (*Sturgis* v. *Morse*, 2 D. F. & Jo. 223, where see judgment of Turner, L.J.). See also *Hankey* v. *Martin* (49 L. T. 560), quoted *ante*, p. 330.

Acts of a bankrupt tenant in tail void against any disposition under this Act by the commissioner.

63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this Act by such commissioner as aforesaid.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

64. Provided always, that, subject and without prejudice to the powers of disposition given by this Act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this Act in regard to such lands as he would have had if he had not become bankrupt.

See *Davis* v. *Tollemache* (2 Jur. (N.S.) 1181).

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if

65. Any disposition under this Act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands,

shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this Act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this Act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this Act, shall consent to the disposition.

3 & 4 Will. 4, c. 74, s. 65.

the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

[Sect. 66, relating to dispositions of copyholds, was repealed by L. P. (Amendment) Act, 1924, copyhold tenure being abolished after 1925 by Part V. of the L. P. Act, 1922. A trustee in bankruptcy was not compellable to be admitted to copyholds of the bankrupt (B. Act, 1914, s. 48, sub-s. 4, re-enacting s. 50, sub-s. 4, of B. Act, 1883), but might deal with them as if they had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee might appoint, any appointee being admitted to or otherwise invested with the property accordingly (*ibid*, and see *Poole* v. *Bursell*, 10 W. R. 861).]

67. The rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this Act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this Act or other special matter in evidence, and also, in case any such distress shall be replevied, shall

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to make disposition, and to enforce covenants as if entitled to the reversion. This clause to apply to all copyhold lands, but as to other lands only to such as the com-

3 & 4 Will. 4, c. 74, s. 67.

missioner may dispose of after the bankrupt's death.

have power to avow or make cognisance generally in such manner and form as any landlord may now do by virtue of the statute 11 Geo. 2, c. 19, or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents and servants, shall also have all such and the same remedies, powers, privileges and advantages of pleading, avowing and making cognisance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof as landlords, their bailiffs, agents and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this Act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions and agreements as the bankrupt would have had in case he had not been adjudged a bankrupt; provided always that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this Act after the bankrupt's decease.

This section does not apply to a case where there has been, before the bankruptcy, a voidable estate created in favour of a purchaser (*Hankey* v. *Martin*, 49 L. T. 560).

All the provisions of the Act in regard to bankrupts shall apply to their lands in Ireland.

68. All the provisions in this Act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this Act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the Crown in lands in Ireland.

Provisions of the Irish Act as to bankrupts apply

Sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59 of the 4 & 5 Will. 4, c. 92, as to bankrupts' lands in Ireland, with the omission of copyholds, agree in substance and effect with sects. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 67 of the 3 & 4 Will. 4,

c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that Act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (i.e. *issued under Irish stat.* 11 & 12 *Geo.* 3, *c.* 8,) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them shall extend, and apply to the lands of any tenure in England of such persons, as fully and effectually as if the Act had throughout extended to land of any tenure in England.

3 & 4 Will. 4, c. 74, s. 68. to their lands in England.

69. Provided always, that in all cases of bankruptcy, every deed of disposition under this Act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides, that in all cases of bankruptcy every deed of disposition under that Act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

Deeds relating to Irish bankrupts' lands in England to be inrolled in Court of Chancery there.

9. *Money to be laid out in Lands to be Entailed.*

[Sect. 70, which repealed 7 Geo. 4, c. 45, was itself repealed by S. L. Rev. Act, 1874, without reviving the former statute.]

71. Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this Act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; [and shall, in the case of the lands to be sold as aforesaid being

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

3 & 4 Will. 4, c. 74, s. 71.

held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled;] and shall in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed [which shall have no operation under this Act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof]; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner [and completed by inrolment] in the same manner as hereinbefore required in regard to lands [not held by copy of court roll].

Old mode of barring estates tail in entailed money.

The bracketed words were repealed by L. P. (Amendment) Act, 1924, copyhold tenure being abolished by Part V. of the L. P. Act, 1922, and the necessity of inrolment abolished by sect. 133 of the L. P. Act, 1925, *post*.

Money subject to an imperative direction for investment in the purchase of freehold land is considered by a court of equity as converted into real estate (*Re Walker, Mackintosh Walker* v. *W.*, [1908] 2 Ch. 712; and *Re Twopeny's Settlement*, [1924] 1 Ch. 522; see further, *Fletcher* v. *Ashburner*, 1 L. C. Eq.; and as to entailed money see also *Mosley* v. *Ward*, 29 Beav. 407).

Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery (5 Ves. 12; 6 Ves. 116; *In re Lord Somerville*, 2 Sim. & Stu. 470; 3 Russ. 369, 416; 5 Russ. 5). The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stats. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45.

Cases under this section.

Where entailed land had been sold and the money paid into Court, a subsequent disentailing assurance whereby the tenant in tail purported to "grant and dispose of" the hereditaments did not disentail the money; the Court pointing out that this section requires the assurance to be an "assignment by deed," and not a grant (*Mills* v. *Fox*, 37 Ch. D. 162). Compare the case where in a will money subject to a trust for investment in land to be entailed was held to be referred to under the word "hereditaments" (*Re Gosselin, G.* v. *G.*, [1906] 1 Ch. 120; see *Re Cleveland*, [1893] 2 Ch. 250; *Re Upton-Cottrell-Dormer*, 84 L. J. Ch. 861). Having regard to this section the rule that in an executed document the same words

of limitation were necessary to convey an equitable as to convey a legal estate in fee-simple was held not to apply to personalty subject to a trust for investment in land (*Re Monckton's Settlement, M.* v. *M.*, [1913] 2 Ch. 636); see now as to words of limitation, sect. 60 of the L. P. Act, 1925, *post*, which applies to all instruments executed after 1925. 3 & 4 Will. 4, c. 74, s. 71.

Where a disposition is to be made of money subject to be invested in the purchase of land to be settled on a tenant in tail, there under this section the money is, as to the disponee, to be treated as personal estate. Compare the case of capital money which under sects. 21 and 24 of the Settled Land Act, 1882, was subject to be invested in the purchase of land to be settled on a tenant in tail. There by sect. 22, sub-sect. 5 of the last-mentioned Act the money was to be considered as "land" (see now sects. 73, 75 (5) of S. L. Act, 1925, *post*, in which Act the provisions in S. L. Act, 1882, s. 24, are not re-enacted). And see *Re Walker, Macintosh Walker* v. *W.*, [1908] 2 Ch. 705; *Re Twopeny's Settlement*, [1924] 1 Ch. 522.

Under this section an entail may be barred of lands to be purchased with rents hereafter to become due to trustees (*Fordham* v. *F.*, 34 Beav. 59; see the order in this case, Seton, 7th ed., 1716) or to be purchased under a trust for investing money in land at a future date (*Re Harvey, H.* v. *H.*, [1901] 2 Ch. 290).

Payment out of Court of entailed money.

A fund in Court representing entailed land will not be paid out to a tenant in tail without a disentailing deed having been executed (*Re Butler*, 16 Eq. 479; *Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. D. 61; *Re Norcop*, 31 L. T. 85; *Re Tylden*, 11 W. R. 869; *Re Smythe*, 3 M. & K. 249; see *contra*, *Sowry* v. *S.*, 8 W. R. 339; *Re Row*, 17 Eq. 300; *Re Wood*, 20 Eq. 372; *Stead* v. *Harper*, [1896] W. N. 46). An affidavit proving the execution has been required (*Bishop* v. *De Burgh*, 15 L. J. Ch. 35; *Re Field*, 11 W. R. 927; see, however, *Re Butler, supra; Re Reynolds, supra*). As to an affidavit of no incumbrances, see *Thornhill* v. *Milbank* (12 W. R. 523).

Where the money had been paid into Court by a company and a disentailing deed had been executed, the company was ordered to pay the costs of the deed (*Re Brooking*, 2 Giff. 31); *Re North Staffordshire Ry. Co.*, 3 Giff. 224; *Re Navan & Kingscourt Co.*, [1906] 1 I. R. 557).

Lands of any tenure in Ireland to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money under the control of a Court of equity in Ireland, subject to be invested in like manner, to be subject to this Act in cases of bankruptcy.

72. So far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subjected to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this Act had throughout extended to Ireland: provided always, that every deed

3 & 4 Will. 4, c. 74, s. 72.

to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold, as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the Crown in lands in Ireland to be sold.

This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

The necessity for inrolment in England was abolished by sect. 133 of the L. P. Act, 1925, *post*. Sects. 73, 74, and 76, relating to inrolment, were repealed by L. P. (Amendment) Act, 1924, and sect. 75 had been repealed by sect. 29 of the Judicature (Officers) Act, 1879.

[*For sects.* 77, 78 *and* 91, *see post, pp.* 347 *et seq.*]

10. *Ireland.*

Ireland.

92. This Act shall not extend to Ireland, except where the same is expressly mentioned.

By 4 & 5 Will. 4, c. 92, the provisions of this Act were extended to Ireland, with the omission of sects. 4, 5 and 6, relating to lands, held by ancient demesne, and sects. 50—54, 66, 76, 90, relating to copyholds. The other variations between the two statutes are noticed *ante*, pp. 305, 311, 314, 329, 342, 343, and *post*, pp. 348, 352.

The clauses in 4 & 5 Will. 4, c. 92, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58, s. 50).

This Act applies to lands locally situate in the town of Berwick-upon-Tweed (the Berwick-on-Tweed Act, 1836).

MARRIED WOMEN'S PROPERTY.

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A married woman, with her husband's concurrence, may dispose of lands and money subject to be invested in the purchase of lands and any estate therein; and may release and extinguish powers as a feme sole.

77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this Act (*a*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release (*b*), surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole, [save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always that this Act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and

This Act shall not extend to copyholds of

3 & 4 Will. 4, c. 74, s. 77. married women in certain cases.

entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.]

(*a*) See sects. 15 and 40, *ante*, pp. 310, 331.

(*b*) The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the word "disclaim." See now sect. 168 of the L. P. Act, 1925, *post*, p. 350. and p. 353, *post*.

The bracketed words were repealed by L. P. (Amendment) Act, 1924. By sect. 167 of the L. P. Act, 1925, *post*, the necessity of acknowledgment is abolished as regards all deeds executed after December 31, 1925. The mode of acknowledgment was prescribed by sects. 79 to 90 of the present Act, also repealed. See as to the effect of an acknowledgment, *Tennant* v. *Welch*, 37 Ch. D. 622; *Roberts* v *Cooper*, [1891] 2 Ch. 335; *Cahill* v. *C.*, 8 App. Cas. 428; and for the rules made as to the taking of acknowledgments the 2nd ed. of this work, pp. 335-7. Copyhold tenure was abolished by L. P. Act, 1922, Part V., as from the same date.

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(1) Disposal of married women's land before this Act.

As to the disposal of a married woman's land before this Act. According to the common law, having surrendered her will to her husband, a married woman in attempting to deal with her own land was presumed not to be exercising that free will which was necessary to voluntary alienation or contract. In early times several methods for conveying such land were adopted, such as fines and customary forms of alienation; all of which involved a separate examination directed to ascertain (for the purpose of rebutting the above presumption) that she was acting of her own free will (*Johnson* v. *Clark*, [1908] 1 Ch. 313 *et seq.*). This separate examination was so essential that a local custom purporting to enable a married woman to dispose of her land without it was held unreasonable and bad (*Id.* [1908] 1 Ch. 303; but see now sect. 167 of the L. P. Act, 1925, *post*). As to the effect of fines, see *May* v. *Roper*, 10 Sim. 360; *Forbes* v. *Adams*, 9 Sim. 462.

(2) Cases since Act where the statutory method of disposition applies.

Under the present section, read in connection with the interpretation clause, a married woman may dispose of any interest in land either at law or in equity, or any charge, lien or incumbrance in or upon or affecting land either at law or in equity (*Briggs* v. *Chamberlain*, 11 Hare, 74); including a right to dower (*Dent* v. *Clayton*, 12 W. R. 903); but not a mere *spes successionis* (*Allcard* v. *Walker*, [1896] 2 Ch. 369). This power of disposition includes (1) the married woman's equitable interest in a mortgage debt (*Williams* v. *Cooke*, 4 Giff. 343; *Miller* v. *Collins*, [1896] 1 Ch. 573; overruling *Re Newton*, 23 Ch. D. 181; *secus*, where the charge had been paid off: *Re Algeo*, I. R. 2 Eq. 485); (2) the married woman's interest whether in possession or reversion in proceeds of real estate devised on trust for sale, whether the sale be or be not made (*Briggs* v. *Chamberlain*, 11 Ha. 69; *Tuer* v. *Turner*, 20 Beav. 560; *Re Jake-*

man, 23 Ch. D. 344). So where personalty in which the married woman had a reversionary interest under a settlement prior to M. W. Rev. Int. Act, 1857 (*post*, p. 362), had in breach of trust been invested in land, she could dispose of her interest under this section (*Re Durrant and Stonor*, 18 Ch. D. 106). And a conveyance by *cestui que trusts* of land held on immediate trust for sale to the trustee for sale who had purchased it, was held void as against a married woman *c. q. t.* who had not acknowledged the deed (*Franks* v. *Bollans*, 3 Ch. 717; subsequently compromised, see *Re Clinton*, 13 Eq. 301). 3 & 4 Will. 4, c. 74, s. 77.

By Real Prop. Act, 1845, s. 6, contingent and other like interests, and also rights of entry, might be disposed of by a married woman conformably to this Act (*Crofts* v. *Middleton*, 8 D. M. & G. 192). Section 6 of the Act of 1845 is replaced by sect. 4, sub-sect. 2 of the L. P. Act, 1925, *post*, and sect. 167 of that Act makes acknowledgment unnecessary as to deeds executed after December 31, 1925.

Contracts.

The present section also enabled a married woman, with the concurrence of her husband, to contract by an acknowledged deed so as to bind her non-separate land, but not herself personally (*Crofts* v. *Middleton*, 8 D. M. & G. 192; *Pride* v. *Bubb*, 7 Ch. 64). A contract unacknowledged did not bind her so far as regards non-separate land (*Castle* v. *Wilkinson*, 5 Ch. 534; *Cahill* v. *C.*, 8 App. Cas. 420; *Williams* v. *Walker*, 9 Q. B. D. 576); even where she was a trustee for sale (*Avery* v. *Griffin*, 6 Eq. 606; *Re Harkness and Allsopp*, [1896] 2 Ch. 358; see now L. P. Act, 1925, s. 170 (2), *post*, replacing s. 1 of M. W. P. Act, 1907). Nor did her husband's contract bind her (*Barnes* v. *Wood*, 8 Eq. 424; *Nicholl* v. *Jones*, 3 Eq. 696). As to the property of all women married since 1882, see M. W. P. Act, 1882, s. 1 (1), *post*. In cases falling within that Act, see as to contracts, sect. 1 (2) (*post*, p. 371), and M. W. P. Act, 1893, s. 1, *post*, p. 393.

(3) Disposition under the section.

A declaration of trust whereby the married woman effectually parts with the entire equitable interest in property is a "disposition" within this section (*Carter* v. *C.*, [1896] 1 Ch. 67). And where the property was copyhold the declaration bound her heir, the case not falling within the final proviso (*ibid.*). The fact that the husband was a discharged bankrupt did not prevent him from concurring (*Re Jakeman*, 23 Ch. D. 344). As to the effect of a lease by a husband and wife of the wife's land not acknowledged by her, see *Toler* v. *Slater*, L. R. 3 Q. B. 42.

(4) Cases where acknowledgment was unnecessary.

The formalities of this section were unnecessary before 1926 in the following cases: (1) Generally in the case of separate estate whether independently of, or under, the M. W. P. Act, 1882 (see *post*, pp. 355, 372); including the cases where a married woman was dealing as a mortgagee with land on the security whereof her separate money had been advanced (*Re Brooke and Fremlin*, [1898] 1 Ch. 647), and where, as one of two mortgagees on joint account, she executed a transfer (*Re West and Hardy*, [1904] 1 Ch. 145). (2) Where she was disposing of real property held by her as trustee or personal representative (M. W. P. Act, 1907, sect. 1; see now L. P. Act, 1925, s. 170 (2), *post*). (3) Where she was conveying land as bare trustee under sect. 16 of the Trustee Act, 1893 (*Re Howgate and Osborn*, [1902] 1 Ch. 451; *Re Docwra, D.* v. *Faith*, 29 Ch. D. 693). (4) In cases within the proviso at the end of this section; see *Green* v. *Paterson*, 32 Ch. D. 95; *Carter* v. *C.*, *supra*; or where an order was made under sect. 91, *post* (*Goodchild* v. *Dougal*, 3 Ch. D. 650). (5) Where an Act of Parliament substituted other proceedings (*Ex p. Ellison*, 2 Y. & Coll. 528). (6) Under sect. 52 of the Conv. Act, 1881, a married woman might by

3 & 4 Will. 4, c. 74, s. 77.

deed unacknowledged release her power over any property, whether real or personal, and whether in possession or reversion and (where the power was coupled with an interest) whether in respect of such interest she was restrained from anticipation or not (*Re Chisholm, Hemphill* v. *H.*, [1901] 2 Ch. 82; see now sects. 155 and 160 of the L. P. Act, 1925, *post*). As to leases or sales of a married woman's property under S. E. Act, 1877 (repealed by S. L. Act, 1925, *post*), see sects. 12, 22, 50 and 51 of that Act, pp. 639, 643, and 655—56 of the second edition of this work. In the case of conveyances by a married woman under the S. L. Act, 1882, sect. 61 of that Act (second edition of this work, pp. 717—718) seems to have rendered an acknowledgment unnecessary. See now sect. 25 of the S. L. Act, 1925, *post*. Where her property was sold in a partition action, she could, without deed acknowledged, request a sale under sect. 6 of the Partition Act, 1876 (repealed by the L. P. Act, 1925; see for it the second edition of this work, pp. 750—753; and see L. P. Act, 1925, s. 34, and notes, *post*), and elect by examination in Court to take the proceeds as personalty (*Standering* v. *Hall*, 11 Ch. D. 652; *Wallace* v. *Greenwood*, 16 Ch. D. 362; but see *Hopkinson* v. *Richardson*, [1913] 1 Ch. 234). She and her husband could also convey land for school sites without acknowledgment (School Sites Act, 1841, s. 5).

Affirmation of settlements.

Where a married woman executed but did not acknowledge a separation deed purporting to deal with her real estate, she could not by acting upon it make the deed binding (*Harle* v. *Jarman*, [1895] 2 Ch. 419). Similarly in the case of a postnuptial settlement purporting to deal with a married woman's reversionary interest in personalty (*Scaton* v. *S.*, 13 A. C. 61, see p. 73). With the above should be compared the cases where the difficulty arose not from coverture but from infancy. Thus where previous to the marriage of a female infant a settlement was executed of her land, the settlement was not void but voidable (*Cooke* v. *C.*, 38 Ch. D. 209; see *Edwards* v. *Carter*, [1893] A. C. 364), and on attaining her majority, she could by acts during coverture and without acknowledged deed affirm the settlement so as to bind the property (*Barrow* v. *B.*, 4 K. & J. 409; see *Re Hodson, Williams* v. *Knight*, [1894] 2 Ch. 421; *Wilder* v. *Pigott*, 22 Ch. D. 263, the case of a reversionary interest in personalty). The last-mentioned decisions have been said to proceed on the ground of election; but this is election in a general, not in a technical sense of the term; see *Harle* v. *Jarman*, [1895] 2 Ch. 427. Where previous to the marriage of an adult female there was an agreement for settlement which did not comply with the Statute of Frauds, a reversionary interest of the married woman in personalty was held bound by her subsequent acts (*Greenhill* v. *North British Co.*, [1893] 3 Ch. 474). This decision purported to follow *Barrow* v. *B.*, and *Wilder* v. *Pigott, supra*; but *quære* whether it is consistent with *Scaton* v. *S.* and *Harle* v. *Jarman, supra*.

(5) Disclaimer by married women.

The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *disclaim*, after the words "dispose of." By L. P. Act, 1925, s. 168, *post*, a married woman may disclaim by deed any estate or interest in land with or without her husband's concurrence as the case may require. She may, since the M. W. P. Act, 1882, disclaim a gift by will of personalty though given with a restraint on anticipation (*Re Wimperis*, [1914] 1 Ch. 502). As to the release and extinguishment of powers, see *post*, p. 353.

Disclaimer generally.

An interest devised vests in the devisee by presumption of law before entry (Co. Litt. 111 a). The old doctrine was, that an estate of freehold could be disclaimed only by matter of record (*Butler and Baker's Case*, 3 Rep. 26). But it is now established

that a deed is sufficient for that purpose (*Townson* v. *Tickell*, 3 B. & Ald. 31; *Begbie* v. *Crook*, 2 Bing. N. C. 70). The disclaimer must be clear and unequivocal (*Doe* v. *Smyth*, 6 B. & C. 112). A disclaimer after the exercise of various acts of ownership is void (*Bence* v. *Gilpin*, L. R. 3 Ex. 76). A devise of copyholds could be disclaimed by word of mouth only before the devisee had been admitted (*R.* v. *Wilson*, 10 B. & C. 5; see Shepp. Touchs. 452). A gift of personal chattels or a term of years, may be waived and avoided by parol (1 Ventr. 128). A husband's disclaimer gave effect to a wife's disposition of her personalty (*Rycroft* v. *Christy*, 3 Beav. 238). On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainderman (*ibid.* 116). And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other (*Smith* v. *Wheeler*, 1 Vent. 128). 3 & 4 Will. 4, c. 74, s. 77.

The disclaimer of one of several trustees has the effect of vesting the estate in the other trustees exclusively (*Small* v. *Marwood*, 9 B. & C. 300; *Browell* v. *Reed*, 1 Hare, 435; see *Re Birchall; B.* v. *Ashton*, 40 Ch. D. 436; *Doe* v. *Harris*, 16 M. & W. 517); and a discretionary power of sale may be exercised by them (*Affleck* v. *James*, 13 Jur. 739). A trustee cannot disclaim part of a trust, *e.g.*, as to all property in England (*Re Lord and Fullerton*, [1896] 1 Ch. 228). It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, but there may be conduct which amounts to a clear disclaimer (*Re Birchall; B.* v. *Ashton*, 40 Ch. D. 436; *Re Clout and Frewer*, [1924] 2 Ch. 230). As where a trustee purchased the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust (*Stacey* v. *Elph.* 1 M. & K. 195). A disclaimer executed after a lapse of time by one of the three executors of a will was held to be a refusal *ab initio* (*Peppercorn* v. *Wayman*, 5 De G. & S. 230; see *Harris* v. *Watkins*, 2 K. & J. 473, as to presuming a disclaimer by a devisee; and see now as to renunciation by a personal representative sects. 5, 6, and 23 of the Administration of Estates Act, 1925, *post*). The execution of a conveyance of trust premises has been held sufficient evidence of acceptance of the trust (*Urch* v. *Walker*, 3 M. & C. 702; see *Sharp* v. *S.*, 2 B. & Ald. 405). In *Crewe* v. *Dickin* (4 Ves. 97), one of two trustees released and conveyed to his co-trustee; the trustee was considered as having accepted the trust (see *Nicholson* v. *Wordsworth*, 2 Swanst. 371). A trustee of real estate, who disclaimed all estate, powers, &c., in the estate devised, was held not to be a necessary party in a conveyance to a purchaser (*Adams* v. *Taunton*, 5 Madd. 433). See, in addition to the cases cited, Litt. ss. 684, 685; Co. Litt. 113 a; *Bonifant* v. *Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.*, 4 Leon. 207; *Hawkins* v. *Kemp*, 3 East, 410. Disclaimer by trustees.

In the case of a common law grant the land passes to the grantee in the first instance, though by a subsequent disclaimer it may be divested (*Thompson* v. *Leach*, 2 Vent. 198; Carth. 211, 230; 2 Salk. 616; Show. P. C. 151; 3 Lev. 284; 1 Show. 296; Rep. temp. Holl. 665). On this ground a voluntary settlement of real estate was supported notwithstanding disclaimer by the trustee (*Mallott* v. *Wilson*, [1903] 2 Ch. 494, 501).

The final proviso, now repealed, excepting from the Act in certain cases a married woman's copyholds, was held to apply, *Green* v. *Paterson*, 32 Ch. D. 104.

78. Provided always, that the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently of this Act, may be The powers of disposition given to a married

3 & 4 Will. 4, c. 74, s. 78.

vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

woman by this Act not to interfere with any other powers.

Irish statute.

Restraint on anticipation.

In the corresponding clause in the Irish statute, 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." This has been said to be an expression by the Legislature of what was meant by the English Act (*Baggett* v. *Meux*, 1 Phil. 628). As regards powers of appointment, it was held under the Irish statute, that a restraint imposed on a life interest would not prevent the release of a power (*Heath* v. *Wickham*, 5 L. R. Ir. 285; see as to England, *Re Chisholm, Hemphill* v. *Hemphill*, [1901] 2 Ch. 82, *ante*, p. 350). By S. L. Act, 1925, s. 25, *post*, the powers of a tenant for life under that Act may be exercised by a married woman of full age, notwithstanding a restraint on anticipation. And by sect. 37 of L. P. Act, 1925, *post*, a husband and wife are, for all purposes of acquisition of any interest in property under a disposition made or coming into effect after December 31, 1925, to be treated as two persons.

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(2) *Dominion of Married Women over Property by means of Powers*...352.
(3) *Different Kinds of Powers, their Release and Extinguishment*...353.
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(1) Former statutory powers.

By the custom of London, confirmed by statute 34 & 35 Hen. 8, c. 22, and of several other cities and boroughs, as Norwich, &c., &c., a married woman on being privately examined before the mayor might bind herself by a deed acknowledged and inrolled (Hobb. 225; Com. Dig. London (N. 3); 2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. xxxii. ch. 2, pl. 33). By statute 32 Hen. 8, c. 28 (repealed by L. P. (Amendment) Act, 1924), the husband and wife were empowered to make leases of the wife's lands (see *Doe* v. *Weller*, 7 T. R. 478). As to married women's powers under the Settled Land Act, 1925, see sect. 25 of that Act.

(2) Dominion of married women over their property by means of powers.

Prior to the M. W. P. Act, 1882, the disabilities of married women at common law, independently of statute or particular customs, to alien their property, whether real or personal, either by deed or will, were well known (see Harg. Co. Litt. 111 b, n. (4)). The wife of a man who had abjured the realm, or been transported, might act as if her husband were dead (Co. Litt. 132; 2 Vern. 104; 3 P. Wms. 37). Through the medium of powers and trusts, however, a married woman was long allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife might, without her husband, execute a naked authority to sell lands whether given before or after coverture, and though no special words were used to dispense with the disability of coverture (Co. Litt. 112 a, and n. (6)). The rule was the same where both an *interest* and an authority passed to the wife, if the authority was

collateral to and did not flow from the interest, because then the two were unconnected, as if they were vested in different persons (Rep. temp. Finch. 346). As, too, a *feme covert* might convey lands in execution of a mere power, so she might with equal effect in performance of a *condition*, where land was vested in her on condition to convey to others (W. Jones, 137, 138). As regards estates of freehold which a married woman had as trustee, no effectual conveyance could formerly be made by her without fine or recovery, nor, after the present Act, without a deed duly acknowledged (1 Prest. on Abs. 337; *Re Caine*, 10 Q. B. D. 284; see *Avery* v. *Griffin*, 6 Eq. 606). This was altered by the M. W. P. Act, 1907, s. 1 (see now L. P. Act, 1925, s. 170, *post*). 3 & 4 Will. 4, c. 74, s. 78.

Powers of appointment to married women.

Before the M. W. P. Act, 1882, a power of disposing of real estate was often given to a married woman (1) by way of trust, *e.g.*, by a proper conveyance of an estate to trustees in trust for her for life, and afterwards in trust for such person as she should appoint; or (2) by way of power over a use, as where an estate was conveyed to the use of herself for life, remainder to the use of such persons as she should appoint (*Peacock* v. *Monk*, 2 Ves. sen. 191). Where by articles before marriage it was agreed that the wife should have a power of appointment over her property, the power was held well created and exercisable (*Ripon* v. *Dawding*, Amb. 565; *Wright* v. *Cadogan*, 1 Br. P. C. 486; Amb. 468; 2 Eden, 239; see *Doe* v. *Staple*, 2 T. R. 684; Sug. Pow. 158).

(3.) Different kinds of powers.

A power may be (1) *appendant*, when the exercise of it takes effect out of the estate of the donee, as a power of leasing; (2) *in gross*, when the exercise of it takes effect after the determination of the estate of the donee, as a power of a tenant for life to jointure; or (3) simply *collateral*, when the donee has no estate at all in the property the subject of the power (1 Saund. on Uses, 4th ed. 169; Sug. Pow. 8th ed. 46; Tudor, L. C. Conv. 4th ed. 539).

Exercise of powers by married women.

It has long been settled, that a married woman may execute a power whether appendant, in gross or simply collateral (*Harris* v. *Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons* v. *Moulton*, Finch, 346; *Daniel* v. *Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Travel* v. *Travel*, 3 Atk. 711; cited 2 Ves. sen. 191; *Doe* v. *Eyre*, 5 C. B. 741, 745); unless a contrary intention appears in the instrument creating it (*Antrim* v. *Buckingham*, 1 Ch. Cas. 17). She might exercise power as well over a copyhold as a freehold estate (*Driver* v. *Thompson*, 4 Taunt. 294). See further Sug. Pow. 154, 8th ed.; *Wood* v. *W.*, 10 Eq. 220.

Release of powers.

The Fines and Recoveries Act, s. 77 (*ante*, p. 347), provided a machinery whereby a married woman could release or extinguish certain powers as if she were a *feme sole*. And as regards release of powers by *femes sole*, it was settled, prior to the Conv. Act, 1881, that powers appendant or in gross could be released (*Albany's Case*, 1 Rep. 111; *Leigh* v. *Winter*, Sir W. Jones, 411; Sug. Pow. 8th ed. 82). But powers simply collateral could not (Co. Litt. 265 b; 11 Rep. 111a; see *Weller* v. *Ker*, L. R. 1 H. L. Sc. 11; *Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); unless the power was for the benefit of the donee (*West* v. *Berney*, 1 R. & M. 434). Further provisions as to releasing and disclaiming powers were contained in Conv. Act, 1881, s. 52, and Conv. Act, 1882, s. 6 (re-enacted by ss. 155, 156 of the L. P. Act, 1925, *post*); under which it was held that a married woman could release any power by deed unacknowledged (*Re Chisholm, Hemphill* v. *H.*, [1901] 2 Ch. 82).

Extinguishment of powers—

Formerly a power appendant or in gross could be extinguished by a fine or a recovery (*Digge's Case*, 1 Rep. 173; *Bird* v. *Christopher*, Styles, 389; *King* v. *Melling*, 1 Ventr. 225; *Tomlinson*

3 & 4 Will. 4, c. 74, s. 78.

v. *Dighton*, 1 P. Wms. 149; *Saville* v. *Blackett*, *ibid.* 777); even where the power was for the benefit of the donee's children (*Bickley* v. *Guest*, 1 Russ. & M. 440; *Smith* v. *Death*, 5 Madd. 371; see, however, *Jesson* v. *Wright*, 2 Bligh, 15).

appendant;

A power appendant to a life estate—including a power of leasing (*Simpson* v. *Bathurst*, 5 Ch. 193; *Lonsdale* v. *Lowther*, [1900] W. N. 165), a power to consent to a sale of the corpus (*Alexander* v. *Mills*, 6 Ch. 124; *Re Bedingfield and Herring*, [1893] 2 Ch. 332), or to consent to an advancement thereout to children (*Re Cooper, C.* v. *Slight*, 27 Ch. D. 565)—is not extinguished by an alienation of the donee's interest. It is immaterial whether the alienation is by the donee's assignment (*Alexander* v. *Mills*, *supra*; *Ren* v. *Bulkeley*, 1 Dougl. 292; *Simpson* v. *Bathurst*, 5 Ch. 193), or upon his bankruptcy (*Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdale* v. *Hammersley*, 31 Beav. 255; *Doe* v. *Britain*, 2 B. & Ald. 93; *Hole* v. *Escott*, 2 Keen, 444). The power, however, cannot be exercised without the consent of the alienee (*Re Cooper, C.* v. *Slight*, 27 Ch. D. 565; *Re Bedingfield and Herring*, [1893] 2 Ch. 332), unless the power is expressly reserved upon the alienation (*Warburton* v. *Farne*, 16 Sim. 625; *Long* v. *Rankin*, Sug. Pow. 8th ed. 899; *Morgan* v. *Rutson*, 16 Sim. 234; see *Re Wright and Marshall*, 28 Ch. D. 93); or the exercise of it does not derogate from the donee's grant, as in the case of a power to appoint new trustees (*Hardaker* v. *Moorhouse*, 25 Ch. D. 417). As to the powers of a tenant for life under S. L. Act, 1925, see sect. 104 of that Act, *post*, p. 960).

in gross.

A power in gross may be exercised notwithstanding the alienation of the donee's interest (*Parsons* v. *P.*, 9 Mod. 464), whether by his assignment (*Re Stone*, I. R. 8 Eq. 621), or by means of a clause of forfeiture on bankruptcy (*Wickham* v. *Wing*, 2 H. & M. 436; *Re Aylwin*, 16 Eq. 585; see *Jones* v. *Winwood*, 3 M. & W. 653; *Haswell* v. *H.*, 2 D. F. & J. 456; *Re Evans*, [1897] 1 I. R. 410).

Bankruptcy.

The trustee in bankruptcy can exercise a power which the bankrupt could have exercised for his own benefit (Bankcy. Act, 1914, s. 38). This does not include a power to grant a renewed lease (*Simpson* v. *Bathurst*, 5 Ch. 208). Nor a husband's right to administer to his wife's estate (*Re Turner*, 12 P. D. 18). Nor it seems the right of releasing for the benefit of the bankrupt's estate a limited power of appointment (*Re Rose*, [1904] 2 Ch. 348; [1905] 1 Ch. 94). In the case of a general power of appointing by deed or will, which is vested in the bankrupt, this cannot be exercised by the trustee after the bankrupt's death (*Nichols* v. *Nixey*, 29 Ch. D. 1005), nor where a married woman has been made bankrupt under the M. W. P. Act, 1882 (*Ex parte Gilchrist*, 17 Q. B. D. 521). In the case of a general power of appointing by will only in pursuance of which a will was made before bankruptcy by a man who died undischarged, the appointed fund was not divisible among the creditors in the bankruptcy but passed to the executor (*Re Guedalla*, *Lee* v. *G.*, [1905] 2 Ch. 331). A judicial separation does not prevent a wife from joining in the exercise of any joint power given to herself and her husband (Matrim. Causes Act, 1857, s. 26).

Judicial separation.

See further as to the extinguishment of powers, Sug. Pow. 8th ed. 57 *et seq.*; Farwell, 12 *et seq.* 3rd ed.

(4) Trust for separate use of married woman.

A further power conferred on a married woman by the general law (independently of the M. W. P. Acts, 1870 and 1882, which see *post*, pp. 364, 371) was the power of disposing of separate estate, whether real or personal. Thus, by the general law, a married woman, in the absence of any clause against alienation, can deal with the equitable interest in real property to which she is entitled to her separate use, as if she were a *feme sole* (*Taylor* v. *Meads*, 4 D. J. & S. 597; *Hall* v. *Waterhouse*, 5 Giff. 64; *Pride* v. *Bubb*,

7 Ch. 64; *Cooper* v. *Macdonald*, 7 Ch. D. 288; *Adams* v. *Gamble*, 12 Ir. Ch. 102; see *Major* v. *Lansley*, 2 R. & M. 355). Her power exists not only as to strangers, but as to her husband (*Logan* v. *Birkett*, 1 M. & K. 220). As to the legal estate in such property where there are no trustees, see the note to sect. 91, *post*, p. 361.

3 & 4 Will. 4, c. 74, s. 78.

Realty.

Again, by the general law, a married woman entitled to personal property to her separate use, without any restraint on alienation, may not only receive and apply to her separate use the income, but dispose of the corpus, either by an act *inter vivos* or by will (*Rich* v. *Cockell*, 9 Ves. 369; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock* v. *Monk*, 2 Ves. sen. 191; *Hearle* v. *Greenbank*, 3 Atk. 696; 1 Ves. sen. 298). And her power of disposition extends to reversionary interests in personalty settled to her separate use as well as to interests in possession (*Keene* v. *Johnstone*, 1 Jones & Carey, I. R. 255; *Sturgis* v. *Corp*, 13 Ves. 190; see *King* v. *Lucas*, 23 Ch. D. 712); and to contingent as well as vested interests (*Lechmere* v. *Brotheridge*, 32 Beav. 353; but see *Batt* v. *Cuthbertson*, 4 Dr. & War. 392; *Stamford Co.* v. *Ball*, 10 W. R. 196); but not to property to which she has no title whatever at the date of the disposition (*Smith* v. *Lucas*, 18 Ch. D. 545). As to gifts to a husband by his wife of her separate personalty whether capital or income, see *Woodward* v. *W.*, 3 D. J. & S. 672; *Re Flamank, Wood* v. *Cock*, 40 Ch. D. 461; *Edwards* v. *Cheyne* (No. 2), 13 App. Cas. 385. There was a presumption of resulting trust for the wife's benefit where her separate income had been applied in purchasing land in the husband's name (*Mercier* v. *M.*, [1903] 2 Ch. 98). A purchase in joint names is dealt with in *Re Scott, Palmer* v. *Vicker*, 97 L. T. 537. As to an assignment of leaseholds by a wife to her husband, see *Re Marlborough, Davis* v. *Whitehead*, [1894] 2 Ch. 133.

Personalty.

Further, by the general law the contract of a married woman bound her separate estate, when it appeared that such contract was made with reference to and upon the faith or credit of that estate (*Johnson* v. *Gallagher*, 3 D. F. & J. 515; *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C. 597; *Wainford* v. *Heyl*, 20 Eq. 324); such a contract, however, being enforceable only against so much of the separate estate to which at the time of the contract the married woman was entitled, free from restraint, as remained at the time of judgment (*Pike* v. *Fitzgibbon*, 17 Ch. D. 454). See as to property appointed by her the note to M. W. P. Act, 1882, sect. 4, *post*, p. 380.

Contracts binding separate estate.

No particular form of words was necessary to create separate use (*Stanton* v. *Hall*, 2 R. & M. 175). As to what words would do so, see *Massy* v. *Rowen* (L. R. 4 H. L. 288); *Re Peacock* (10 Ch. D. 490); *Bland* v. *Dawes* (17 Ch. D. 794), and the cases there referred to; *Williams* v. *Waters* (14 M. & W. 166); *Acton* v. *White* (1 Sim. & Stu. 429); *Carnegie* v. *Carnegie* (22 W. R. 783). A trust for separate use will not be inferred from the existence of a restraint on alienation (*Stogdon* v. *Lee*, [1891] 1 Q. B. 661). An immediate gift by a husband to his wife was said to raise a presumption of separate use; but not in the case of an interest commencing after his death (*Re Turner, T.* v. *Fitzroy*, 66 L. T. 758). As to wearing apparel given or lent by a husband to his wife, see *Masson* v. *De Fries*, [1909] 2 K. B. 831; *Rondeau Legrand* v. *Marks*, [1918] 1 K. B. 75; quoted, p. 373, *post*.

Creation of separate use.

As to whether a trust for separate use can be created by parol, see, in the case of real estate, *Dye* v. *D.* (13 Q. B. D. 147); and in the case of personal estate, *Simmons* v. *S.* (6 Ha. 352); *Warden* v. *Jones* (2 De G. & J. 76); *Re Whitehead* (14 Q. B. D. 419) (cases of ante-nuptial agreements); and *Haddon* v. *Fladgate* (27 L. J. Prob. 21, a post-nuptial agreement).

3 & 4 Will. 4, c. 74, s. 78.

There is no such thing as separate property of an unmarried woman (*Pelton* v. *Harrison*, [1891] 2 Q. B. 425; *Re Price, Stafford* v. *S.*, 28 Ch. D. 712; *Axford* v. *Reid*, 22 Q. B. D. 553; *Clarke* v. *Hastie*, 16 Times L. R. 23; see, however, *Re Wheeler, Briggs* v. *Ryan*, [1899] 2 Ch. 722). But a trust for separate use will apply to any existing coverture and to all subsequent covertures (*Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, 11 Eq. 5). Such a trust may be destroyed during discoverture, *e.g.*, by conversion of the property (*Wright* v. *W.*, 2 J. & H. 647). And on its creation it may be confined to an existing coverture (*Moore* v. *Morris*, 4 Drew. 33; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661), or to future covertures (*King* v. *Lucas*, 23 Ch. D. 712; see *Steedman* v. *Poole*, 6 Ha. 193).

Duration of separate use.

Restraint on anticipation.

Operation of.

A restraint may be imposed on the alienation or anticipation of property given to a woman for her separate use (*Tullett* v. *Armstrong*, 4 M. & Cr. 377; *Baggett* v. *Meux*, 1 Phil. 627). Such a restraint can never exist except as an accessory to a gift for separate use (*Stogdon* v. *Lee*, [1891] 1 Q. B. 670; *Pike* v. *Fitzgibbon*, 17 Ch. D. 464); but the character of separate property arising under the M. W. P. Act, 1882, is sufficient to support it (*Re Lumley, Ex parte Hood-Barrs*, [1896] 2 Ch. 690). The principle recognised in *Pike* v. *Fitzgibbon* (*supra*) is that a married woman can in no way dispose by way of anticipation of property subject to such a restraint. She cannot dispose of it by making an engagement authorising another person to intercept it (*Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 539; see the form of judgment in *Scott* v. *Morley*, 20 Q. B. D. 132). She cannot do so even by practising a fraud (*Stanley* v. *S.*, 7 Ch. D. 589; *Bateman* v. *Faber*, [1898] 1 Ch. 144, 151). Nor can she bind her restrained property by estoppel (*Bateman* v. *Faber*, *supra*). She cannot be compelled to elect in respect of restrained property (*Re Wheatley, Smith* v. *Spence*, 27 Ch. D. 606; *Re Vardon*, 31 Ch. D. 275); even where subsequently to the instrument of gift coming into operation she becomes discovert (*Haynes* v. *Foster*, [1901] 1 Ch. 361; see, however, *Hamilton* v. *H.*, [1892] 1 Ch. 396; *Re Hargrove*, [1915] 1 Ch. 398; *Re Tongue*, [1915] 2 Ch. 283; *Bolster* v. *B.*, [1916] 1 Ir. 57). A purported dealing with property subject to the restraint being invalid, did not cause a forfeiture (*Re Adamson, Public Trustee* v. *Billing*, 109 L. T. 25). If she is the "true owner" of restrained property, she cannot "consent" to its being in the "order or disposition" of a bankrupt (*Re Mills*, [1895] 2 Ch. 564). The restraint may control a married woman's statutory powers of disposition (see note, *ante*, p. 352). The restraint did not prevent a married woman from releasing a power (*Re Chisholm, Hemphill* v. *H.*, [1901] 2 Ch. 82), nor from barring an entail (*Cooper* v. *Macdonald*, 7 Ch. D. 288); nor, where the fee is given to her, did it make the land settled land, so as to give her the powers of a tenant for life under the S. L. Acts (*Bates* v. *Kesterton*, [1896] 1 Ch. 159. But see now S. L. Act, 1925, s. 1, sub-s. 1 (iv)). The effect may be to prevent alienation only during a particular period (*Re Bown*, 27 Ch. D. 411; see *Re Spencer, Thomas* v. *S.*, 30 Ch. D. 183). A restraint on anticipation will be void if it transgresses the rule against perpetuities (*Re Ridley, Buckton* v. *Hay*, 11 Ch. D. 645; *Cooper* v. *Laroche*, 17 Ch. D. 368; *Shute* v. *Hogge*, 58 L. T. 546; see *Re Game, G.* v. *Tennant*, [1907] 1 Ch. 276, and cases there referred to).

Property on which imposed.

The restraint may be imposed on any property whether real (*Baggett* v. *Meux*, 1 Phil 627), or personal (*ibid.*), *e.g.* an annuity secured by a personal covenant (*Macnaghten* v. *Paterson*, [1907] A. C. 492), and whether the property be absolute or for life (*Baggett* v. *Meux*, 1 Phil. 627). Where the restraint is attached to an

absolute bequest, the question whether it is effectual does not depend on whether the gift is of an income-bearing fund or of a sum of cash (see this distinction taken in the older cases, *Re Ellis*, 17 Eq. 409; *Re Benton, Smith* v. *S.*, 19 Ch. D. 277; *Re Clarke*, 21 Ch. D. 748); but on whether the testator has shown an intention that the trustees are to keep the fund and pay only the income to the married woman, or, on the other hand, an intention that the capital shall be paid to her (*Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411). Accordingly, if the intention be that the capital shall be paid to her, this may be done (*ibid.*; *Re Fearon, Hotchkin* v. *Mayor*, 45 W. R. 232; *Re Milward, Steedman* v. *Hobday*, 87 L. T. 476; *Russell* v. *Lawder*, [1904] 1 I. R. 328; see *Re Croughton*, 8 Ch. D. 460); but payment will be refused if this intention is absent (*Re Grey, Acason* v. *Greenwood*, 34 Ch. D. 712; *Re Tippett and Newbold*, 37 Ch. D. 444; *Re Holmes, Hallows* v. *Holmes*, 67 L. T. 335; see *Re Currey, Gibson* v. *Way*, 32 Ch. D. 361, a case of real estate; and see *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333). **3 & 4 Will. 4, c. 74, s. 78.**

What words will create a restraint on anticipation.

No particular form of words is necessary to impose a restraint on anticipation, the question being one of intention (*Baker* v. *Bradley*, 25 L. J. Ch. 7). As to what words will create a restraint, see *Harrop* v. *Howard* (3 Hare, 624); *Moore* v. *Moore* (1 Coll. 54); *Medley* v. *Horton* (8 Jur. 853); *Brown* v. *Bamford* (1 Phil. 620); *Field* v. *Evans* (15 Sim. 375); *Harnett* v. *Macdougall* (8 Beav. 187); *Steedman* v. *Poole* (6 Hare, 193); *Re Ross* (1 Sim. 190); *Sturgis* v. *Corp* (13 Ves. 190); *Parkes* v. *White* (11 Ves. 222); *Alexander* v. *Young* (6 Hare, 393); *Goulder* v. *Camm*, (1 D. F. & G. 146); *Re Lavender* ([1898] 1 Ir. R. 175); *Bolster* v. *B.* ([1916] 1 I. R. 57). A life estate in land without impeachment of waste is not inconsistent with a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, [1896] 2 Ch. 690), except in a case of waste (*ibid.*; *Clive* v. *C.*, 7 Ch. 433).

Duration of the restraint.

A restraint on anticipation is in force only during coverture (*Barton* v. *Briscoe*, Jac. 603; *Brown* v. *Pocock*, 2 M. & K. 189; *Massey* v. *Parker*, *ibid.*, 174; *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Young*, 18 Beav. 199), and does not therefore prevent a disposition by will (*Re Grey, Acason* v. *Greenwood*, 34 Ch. D. 714; *Re Currey, Gibson* v. *Way*, 56 L. T. 80). The restraint continues in force after a decree for judicial separation or a protection order, except (during the separation or protection) as to property acquired after the decree or order (*Waite* v. *Morland*, 38 Ch. D. 135; *Hill* v. *Cooper*, [1893] 2 Q. B. 85). If property be given to a woman for her separate use subject to a restraint on anticipation, the restraint will operate during any existing or subsequent coverture (*Tullett* v. *Armstrong*, 4 M. & C. 377; see *Hamilton* v. *H.*, [1892] 1 Ch. 396; *Stroud* v. *Edwards*, 77 L. T. 280). It may, however, be destroyed by the acts done during discoverture, *e.g.*, by the woman converting the property from its original form (*Wright* v. *W.*, 2 J. & H. 647), or by entering into a covenant to settle it (*Re Wood, W.* v. *Hooper*, 61 L. T. 197; and see *Re Chrimes*, [1917] 1 Ch. 30). On the creation of the restraint it may be confined to a particular coverture (*Re Gaffee*, 1 Mac. & G. 541; *Shafto* v. *Butler*, 19 W. R. 595). The restraint does not affect income of a married woman which has accrued due (*Hood-Barrs* v. *Heriot*, [1896] A. C. 174). A judgment can be enforced against income which has accrued due at the date of the judgment whether it has come to her hands or not (*ibid.*), but cannot be enforced against income which accrues afterwards (*Bolitho* v. *Gidley*, [1905] A. C. 98).

Dispensing with the restraint.

When a trustee has committed a breach of trust at the request of a *cestui que trust* who is a married woman restrained from anticipation, the Court may, under sect. 62 of the Trustee Act, 1925 (*post*,

3 & 4 Will. 4, c. 74, s. 78.

where see note), impound her interest to indemnify him. Restrained property may in some cases be made available for payment of costs (Solicitors Act, 1860, sect. 28; M. W. P. Act, 1893, s. 2 (*post*, p. 394)). The Court may also in certain cases dispense with the restraint, under sect. 169 of the L. P. Act, 1925, *post*. Independently of these provisions, the Court cannot dispense with the restraint, even where it would be for the benefit of the married woman (*Robinson* v. *Wheelwright*, 6 D. M. & G. 535; *Peillon* v. *Brooking*, 25 Beav. 218; *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. D. 532; see *Michell* v. *M.*, [1891] P. 208); even in cases of fraud (*Arnold* v. *Woodhams*, 16 Eq. 29; *Stanley* v. *S.*, 7 Ch. D. 589).

In the case of an executory trust for the separate use of a married woman, the Court has directed a restraint on anticipation to be inserted in the settlement (*Turner* v. *Sargent*, 17 Beav. 515; *Dunnill* v. *D.*, I. R. 6 Eq. 323; *Loch* v. *Bagley*, 4 Eq. 122; *Re Parrott, Walter* v. *P.*, 33 Ch. D. 274). See further as to the restraint, the notes to the M. W. P. Act, 1882, *post*, pp. 371 *et seq.*

Restraint on alienation in the case of men and unmarried women.

Neither a *feme sole* nor a man can be restrained from disposing by way of anticipation of any property to which she or he is entitled (*Pike* v. *Fitzgibbon*, 17 Ch. D. 464; see *Brandon* v. *Robinson*, 18 Ves. 429, the case of a life interest; and *Re Fitzgerald, Surman* v. *F.*, [1904] 1 Ch. 573, the case of a Scotch "alimentary provision"). Further, a gift over upon an attempt to alien an absolute interest previously given is void as a condition, both in the case of real and personal estate (*Re Dugdale, D.* v. *D.*, 38 Ch. D. 180; *Re Machu*, 21 Ch. D. 838; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; and see *Re Smith, S.* v. *S.*, [1916] 1 Ch. 369). But such a gift over will be good if it follows a life interest (*Dugdale* v. *D.*, *sup.*; *Hurst* v. *H.*, 21 Ch. D. 278). So property may be well limited to a man until he shall become bankrupt, and after his bankruptcy over (*Brandon* v. *Robinson*, 18 Ves. 433). The effect of gifts for life determinable on bankruptcy or alienation was discussed in *Samuel* v. *S.* (12 Ch. D. 158); *Robertson* v. *Richardson* (30 Ch. D. 623); *Metcalfe* v. *M.* ([1891] 3 Ch. 1); *Sartoris* v. *S.* ([1892] 1 Ch. 11); *Re Cotgrave, Mynors* v. *C.* ([1903] 2 Ch. 705); *Re Baker, B.* v. *B.* ([1904] 1 Ch. 157); *Re Laye, Turnbull* v. *L.* ([1913] 1 Ch. 298). See also Trustee Act, 1925, s. 33, *post*.

Condition restraining alienation of realty.

A condition in a feoffment or grant not to alien to any person is void (6 Rep. 41 b; see *Bradley* v. *Peixoto*, Tudor's L. C. Conv. 514, 4th ed.). A grantee may, however, be restrained from aliening to a particular person (*Large's Case*, 2 Leon. 82; 3 Leon. 182; *Muschamp's Case*, Bridgm. 134). So, a devise in fee on condition that the devisees should not alien, except to their sisters or their children, is good (*Doe* v. *Pearson*, 6 East, 172; *Cuthbert* v. *Purrier*, Jac. 417; *Ross* v. *R.*, 1 Jac. & W. 158; *Re Macleay*, 18 Eq. 186; *Martin* v. *M.*, 19 L. R. Ir. 72; see, however, *Attwater* v. *A.*, 18 Beav. 330). But a condition in absolute restraint of alienation during a particular time is void (*Rosher* v. *R.*, 26 Ch. D. 801).

[Sects. 79 to 90, which prescribed the mode of acknowledgment and required a separate examination of the married woman, were repealed by L. P. (Amendment) Act, 1924. See for them the second edition of this work, pp. 327 *et seq.* For the provisions of sects. 84 to 88 there had been substituted those of sect. 7 of the Conv. Act, 1882, itself repealed by L. P. Act, 1925. Sect. 167 of the latter Act (*post*) provides that as to deeds executed and orders made after December 31, 1925, acknowledgments and separate examination of married women before payments or transfers to them, shall be unnecessary].

3 & 4 Will. 4, c. 74, s. 91.

Court of Common Pleas, in the case of a husband being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

91. Provided always, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, [or of making a surrender of lands held by copy of court roll,] or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred: provided always, that this clause shall not extend to the case of a married woman where under this Act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind, or His Majesty's High Court of Chancery, shall be the protector of the settlement in lieu of her husband.

The words in square brackets were repealed by L. P. Act (Amendment) Act, 1924. By sect. 167, sub-sect. 3 of the L. P. Act, 1925, *post* (which removes the necessity of acknowledgment as to deeds executed after 1925), where the Court under any statutory power dispenses with the husband's concurrence, and the Court is satisfied that the wife is entitled to the property for her separate use, the Court may by the order declare that the disposition shall have the same effect as if the husband had concurred therein. See also as to dispositions requiring the husband's concurrence, the Married Women's Reversionary Interests Act, 1857, *post*. Sect. 2 of that Act, which expressly applied the provisions of this Act for dispensing with the husband's concurrence, was repealed by L. P. Amdt. Act, 1924; but in view of the words "or otherwise" the present section seems to remain applicable.

Application for orders under this section should now be made to the King's Bench Division of the High Court (see Jud. Act, 1873, ss. 16 and 34; Order in Council of 16 Dec. 1880; *Re Caine*, 10 Q. B. D. 284; *Re Giles*, [1894] W. N. 73; 70 L. T. 757), though it may be that the Chancery Division has jurisdiction under special

3 & 4 Will. 4, c. 74, s. 91.

circumstances (*ibid.*; *Re Hart* (1882), W. N. 36). This section gives no authority to the Court to grant a dispensation order unless the land is actuallly contracted to be sold or conveyed (*Re Graham*, 13 W. R. 782; see, however, *Re Hart* (1882), W. N. 36). Where the concurrence of the husband was dispensed with under this section, the deed had not to be acknowledged (*Goodchild* v. *Dougal*, 3 Ch. D. 650). A dispensation order under this section does not deprive the husband of his common law rights in the property (*Fowke* v. *Draycott*, 29 Ch. D. 996). If an order is obtained by fraud it may be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

Husband of unsound mind.

Where the application is on the ground that the husband is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is a lunatic *at the time of the application* (*Re Turner*, 3 C. B. 166). The Court refused to act upon an affidavit merely stating that the husband and wife were living apart, and that the former was in a very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed, but required an affidavit showing an ineffectual application to him for the purpose (*Re Murphy*, 4 M. & G. 635; *Re Clare*, 49 L. J. C. P. 557). The affidavit as to mental condition should be by a medical man (*Re Reeves*, 24 W. R. 848; *Re Clare*, *supra*).

Husband abroad—

dispensation granted;

Orders have been made in the following cases:—Where the husband had absconded after committing an act of bankruptcy, and had never been heard of since (*Ex p. Gill*, 1 Bing. N. R. 168; see Cruise's Dig. vol. vii. p. 1, 4th ed.). Where the husband had resided abroad for more than twenty years with another woman (*Ex p. Shirley*, 5 Bing. (N.S.) 226). Where the husband had absconded from home, and had since sailed for a foreign port, and had been made a bankrupt (*Ex p. Stone*, 9 Dowl. P. C. 843). Where it appeared that the parties lived together only seventeen weeks after marriage, when the husband went away, and the wife after many inquiries was not able to find him (*Anon.*, 2 Jur. 945). Where the affidavit stated that about two months previously the husband went to Australia with the intention of never returning (*Re Kelsey*, 16 C. B. 197).

dispensation refused.

The Court refused to dispense with the concurrence of a husband in the following cases:—Where the wife's affidavit merely stated that her husband entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand; and that she believed it was his intention never to return (*Ex p. Gilmore*, 3 C. B. 967). Where it appeared that the husband was in correspondence with the wife, and remitting sums of money for her support, however small (*Re Squires*, 17 C. B. 176). Where, in 1852, the husband went to Australia and had not been heard of since 1857, and the wife deposed to her belief that he would never return to this country, it also appearing that no application had been made to him to concur (*Re Eden*, 5 C. B. (N.S.) 232). Upon the mere statement that the husband, a seaman, had gone abroad, and had not been heard of for some years, and that the wife had been informed that he was dead. The affidavit must show some reasonable ground for presuming the statement to be true (*Ex p. Taylor*, 7 C. B. 1).

Husband and wife separated.

Under the words of the section as to living apart, orders have been made in the following cases:—Where she and her husband lived separate from each other, and he had been found lunatic by inquisition (*Ex p. Thomas*, 4 M. & Scott, 331). Where the husband left his wife, and she had never heard of him since, and his present residence was altogether unknown to her; and where, if the application were not granted, the wife would be liable to incur

a forfeiture (*Ex p. Shuttleworth*, 4 M. & Scott, 332, n. (b); see *Re Hart* (1882), W. N. 36). Where she held the property as trustee for sale, and they were living apart, and the husband contributed to her support, but refused to concur except on payment (*Re Caine*, 10 Q. B. D. 284). Where the husband had deserted the wife, but they were in communication (*Ex p. Sutcliffe*, 29 L. T. 747; see, however, *Re Horsfall*, 3 M. & G. 132). An order was refused where the wife had left her husband in consequence of his violence (*Re Price*, 13 C. B. (N.S.) 286). In addition to an affidavit that the parties were living apart, the Court has required a further affidavit that the husband has refused to concur (*Ex p. Trenery*, 1 C. B. (N.S.) 187), and that he contributes nothing to the wife's support (*Ex p. Fish*, 9 C. B. (N.S.) 715; *Re Carburton*, 16 W. R. 84; *Re Fletcher*, 17 W. R. 319; *Ex p. Robinson*, L. R. 4 C. P. 205). An order having been made upon the usual affidavit that the husband and wife were living apart by mutual consent, the Court refused to rescind the order after it had been acted upon, and the rights of third parties had intervened, upon the application of the husband, who swore that though he resided apart from his wife (upon an allowance made to him out of her separate estate) he occasionally visited and slept with her (*Re Rogers*, L. R. 1 C. P. 47). **3 & 4 Will. 4, c. 74, s. 91.**

Wife's separate property.

In cases not within the M. W. P. Act, 1882, where there are no trustees of separate property, the husband is trustee of the legal estate (*Bennet* v. *Davis*, 2 P. Wms. 316). Orders under this section to enable a married woman to convey the legal estate in her separate property have been made in the following cases:—Where the husband was a minor (*Re Haigh*, 2 C. B. (N.S.) 198). Where he had absconded, and had not been heard of for eighteen years, although it also appeared that she had in the meantime married again (*Ex p. Yarnall*, 17 C. B. 189). Where the husband lived separate from his wife and had refused to execute the deed (*Re Perrin*, 14 C. B. 420; *Re Woodcock*, 1 C. B. 437). As to conveyance of separate property by a married woman when living apart by a sentence of judicial separation without alimony, see *Ex p. Andrews* (19 C. B. (N.S.) 371). As to the equitable interest in a married woman's separate property, see *ante*, p. 354.

Affidavits.

The Court will not dispense with the affidavit of the married woman herself (*Ex p. Bruce*, 9 Dowl. P. C. 840), and if speechless, she must be examined (*Re Williams*, 1 M. & G. 881). The affidavit is sufficient if sworn (where the party is residing abroad) before an officer, whom the certificate of a notary public certifies to be a person empowered by law to take affidavits (*Re Schiff*, 1 Dowl. & L. 911). The affidavit must describe the deponent as "the wife of, &c.," even though circumstances are disclosed showing a well-grounded belief that the husband is dead (*Ex p. Sparrow*, 12 C. B. 334; *Re Noy*, 7 Scott, N. R. 434; *Re Anderson*, 2 C. B. (N.S.) 811). The affidavit must contain the addition or description of the husband (*Re Gardner*, 1 C. B. (N.S.) 215; see also *Re Firth* (1872), W. N. 220).

Form of rule to dispense with husband's concurrence.

An order under this section was made in the following form:—"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to dispose of, release, surrender or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the Court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce" (*Ex p. Duffill*, 5 M. & G. 378).

Final proviso

See, in connection with the final proviso in the above section, sects. 24, 33, and *Re Wainwright* (1 Phil. 258).

II.—The Married Women's Reversionary Interests Act, 1857.

20 & 21 Vict. c. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [25th August, 1857.]

20 & 21 Vict. c. 57, s. 1.

Be it enacted as follows:

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of (*d*) every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (*e*) (except such a settlement as after mentioned), and also to release or extinguish any power (*f*) which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, [nor unless the deed be acknowledged by her as hereinafter directed]: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same.

The bracketed words were repealed by L. P. (Amendment) Act, 1924. Sect. 167 of L. P. Act, 1925, *post*, makes acknowledgment unnecessary in the case of deeds executed after 1925.

Married woman unable to dispose of reversionary choses in action not settled to her separate use, except under 20 & 21 Vict. c. 57.

(*d*) For a married woman's power of disposition over reversionary interests in personalty settled to her separate use, see the note to Fines and Recoveries Act, s. 78, *ante*, p. 355. As regards her reversionary interests in personalty not settled to her separate use, it was well established before the present Act that a husband could not assign or release his wife's reversionary choses in action so as to bind her surviving (*Honner* v. *Morton*, 3 Russ. 65); and the fact of her joining in the assignment made no difference (*Purdew* v. *Jackson*, 1 Russ. 1; *Cresswell* v. *Dewell*, 4 Giff. 460; see *Winter* v. *Easum*, 2 D. J. & S. 272; *Bolitho* v. *Hillyar*, 34 Beav. 180; *Rogers* v. *Acaster*, 14 Beav. 445; *Hore* v. *Becher*, 12 Sim. 465; *Fitzgerald* v. *Fitzgerald*, L. R. 2 P. C. 87). Nor could a married woman by election part with her reversionary choses in action (*Williams* v. *Mayne*, I. R. 1 Eq. 519; see *Harle* v. *Jarman*, [1895]

2 Ch. 419; quoted, *ante*, p. 350). A husband and wife could not effectually dispose of the life interest of the wife in a fund not settled to her separate use beyond the duration of the coverture (*Stiffe* v. *Everitt*, 1 M. & C. 37; *Re Godfrey*, I. R. 1 Eq. 533). A husband and son, having surrendered their respective interests in a fund to the wife, for the purpose of enabling her to assign it to the son, the Court refused to permit a merger (*Whittle* v. *Henning*, 2 Phill. C. C. 731; *Story* v. *Tonge*, 7 Beav. 91; *Hanchett* v. *Briscoe*, 22 Beav. 496; see, however, 14 Sim. 592—599; *Bishop* v. *Colebrooke*, 16 Sim. 39; and see *Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361, a case since the M. W. P. Act, 1882, and dealing with separate property). As to binding by covenant in an ante-nuptial settlement the reversionary interests acquired by a married woman during coverture but not falling into possession until after its termination, see *Lloyd* v. *Pritchard*, [1908] 1 Ch. 265. **20 & 21 Vict. c. 57, s. 1.**

An assignment under this Act ought not to be regarded as that of the husband and wife according to their respective interests (*Re Batchelor, Sloper* v. *Oliver*, 16 Eq. 485). The real disposing party is the wife (*Re Jakeman*, 23 Ch. D. 351). Where the property assigned consisted of a wife's reversionary interest under a will, the assignment prevented the executors from exercising any right of retainer over the interest assigned in respect of a debt due from the husband to the testator (*Re Batchelor, supra*; compare the effect on such retainer of the wife's equity to a settlement: *Re Briant, Poulter* v. *Shackel*, 39 Ch. D. 471). A policy of insurance effected by a married woman in her own name may be disposed of under this Act (*Witherby* v. *Rackham*, 60 L. J. Ch. 511; 39 W. R. 393; see *Re Turner, T.* v. *Fitzroy*, 66 L. T. 758). But mere possibilities or expectancies are not within this Act (*Allcard* v. *Walker*, [1896] 2 Ch. 369). Cases under section.

If the Infant's Settlement Act, 1855, applies to post-nuptial settlements, it does not enable a married woman to evade the formalities of this Act (*Seaton* v. *Seaton*, 13 App. Cas. 70).

An acknowledgment under this Act by a married woman of an assignment was taken into consideration even where the Act did not apply (*Roberts* v. *Cooper*, [1891] 2 Ch. 335).

(*e*) An appointment of a reversionary interest in personalty by deed after 1857, under a special power in a deed dated before 1857, does not bring the interest within this Act, even if the prior life interest is assigned at the same time (*Re Butler*, I. R. 3 Eq. 138); nor did the powers of the Act apply where the reversionary interest arose under a will dated before 1857, but the testator had made a codicil (not confirming the will) since 1857 (*Re Elcom, Layborn* v. *Grover Wright*, [1894] 1 Ch. 303). But where a woman was entitled to a reversionary interest created before 1857, and after 1857 while unmarried re-settled that interest, the power of the Act applied (*Re Bennett, Capes* v. *Ferrand*, 73 L. T. 17).

(*f*) As to the various kinds of powers, their suspension and extinction, and as to the execution of powers by married women, see the note to Fines and Recoveries Act, s. 78, *ante*, p. 353. Powers.

[Sect. 2, requiring deeds executed by married women to be acknowledged in manner required by the Fines and Recoveries Act, *ante*, and applying the provisions of that Act, was repealed by L. P. (Amendment) Act, 1924. Sect. 167, sub-sect. 1 of L. P. Act, 1925, post, makes acknowledgment unnecessary in the case of dispositions under this Act, made after 1925, if made with the husband's concurrence. See as to dispensing with that concurrence, sect. 91 of the Fines and Recoveries Act, 1833, *ante*, and sect. 167, sub-sect. 3 of the L. P. Act, 1925, *post*].

20 & 21 Vict. c. 57, s. 3.

The powers of disposition given by this Act not to interfere with any other powers.

3. Provided always, that the powers of disposition given to a married woman by this Act shall not interfere with any power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

Act not to extend to settlements of married women upon marriage.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

An agreement in contemplation of marriage was executed by the husband and wife to settle a money fund of the wife's for her separate use—to return to the husband if he should survive. The Court considered that the wife was to have the absolute interest in the event of her surviving, and that the case fell within the exception contained in this section (*Clarke* v. *Green*, 2 H. & M. 474).

Not to extend to Scotland.

5. This Act shall not extend to Scotland.

III.—The Married Women's Property Act, 1870.

33 & 34 Vict. c. 93.

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.]

33 & 34 Vict. c. 93, s. 1.

Whereas it is desirable to amend the law of property and contract with respect to married women:

Be it enacted as follows:

Earnings of married women to be deemed their own property.

1. The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

This Act has been repealed, saving all Acts done and rights or liabilities acquired thereunder (M. W. P. Act, 1882, s. 22, *post*,

p. 392). As to the object of the Act see *R.* v. *Harrald*, L. R. 7 Q. B. 361. **33 & 34 Vict. c. 93, s. 1.**

Under the law before this Act a husband might in his own name recover his wife's wages (*Dengate* v. *Gardiner*, 4 M. & W. 7), or the profits of a business carried on by her (*Savile* v. *Sweeny*, 4 B. & Ad. 524). And payment to her of her own earnings was not good, unless she had her husband's authority to receive them (*Offley* v. *Clay*, 2 M. & G. 172). As to a married woman's separate trading before this Act under her husband's agreement, see 2 Bright's Husband and Wife, 292; and under the custom of the city of London, see 2 Bright, 76. Law before the section.

The question whether a trade was carried on by a married woman separately from her husband was held to be one of fact, to be determined on the circumstances of the case (*Petty* v. *Anderson*, 3 Bing. 170; *Smallpiece* v. *Dawes*, 7 C. & P. 40; *Lovell* v. *Newton*, 4 C. P. D. 7; *Laporte* v. *Cortick*, 31 L. T. 434; 23 W. R. 131; *Whittaker* v. *W.*, 46 L. T. 802; 30 W. R. 787; *Re Dearmer, James* v. *D.*, 53 L. T. 905). All the stock-in-trade and property connected with the trade was protected by this section, as well as the earnings (*Ashworth* v. *Outram*, 5 Ch. D. 923). The earnings were equitable assets (*Re Poole, Thompson* v. *Bennett*, 6 Ch. D. 739). This section did not protect the earnings from an unlawful industry (*Mason* v. *Mitchell*, 34 L. J. Ex. 68). As to the liability of the husband in respect of a separate trade of his wife, see *Re Shepherd* (39 L. T. 652). And as to a married woman's bankruptcy, see the note to sect. 125 of the Bankruptcy Act, 1914, *post*, p. 377. Cases under the section.

[By sect. 2, deposits in savings banks and government annuities in the name of a married woman were deemed to be her separate property, subject to a power for the Court to order payment to the husband when his money had been used without his consent. By sect. 3, a married woman or woman about to be married might require any sum she was entitled to in the public funds to be placed in her name as a married woman entitled to her separate use, and while so entered it was to be deemed her separate property, subject to a power for the Court to order transfer to the husband of investments made with his money without his consent. (For orders under this section, see *Re Bartholomew*, 23 L. T. 433; *Re Butlin, ibid.*, 523; *Re Tanner* (1874), W. N. 198; *Howard* v. *Bank of England*, 19 Eq. 295). Sect. 4 contained similar provisions in regard to shares, debentures, &c., in joint stock companies (see *R.* v. *Carnatic Ry. Co.*, L. R. 8 Q. B. 299; and as to previous law, *Re Matthewman*, 3 Eq. 788; *Butler* v. *Cumpston*, 7 Eq. 16; *Dalton* v. *Midland Ry. Co.*, 13 C. B. 474). Sect. 5 contained similar provisions in regard to a woman's interest in industrial and other societies. Sect. 6 provided for the case of investments made in fraud of creditors. See, now, as to these matters, sects. 6—10 of the M. W. P. Act, 1882.] Sects. 2—6.

7. Where any woman married after the passing of this Act shall, during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same. Personal property not exceeding £200 coming to a married woman to be her own.

33 & 34 Vict. c. 93, s. 7.

The words "become entitled" include the case of a reversionary legacy falling into possession (*Lane* v. *Oakes*, 30 L. T. 726; 22 W. R. 709). The limit of £200 applies only to sums given by deed or will (*Re Voss, King* v. *V.*, 13 Ch. D. 504). Where a married woman was entitled under the same will to a reversionary legacy and also to a share of residue, which, taken separately, were each of them less than £200, but taken together exceeded £200 they were not aggregated, but each was made "separate" by the section (*Re Davies, Harrison* v. *D.*, [1897] 2 Ch. 204).

Before this Act, a legacy left to a married woman in general terms must have been paid to her husband (*Palmer* v. *Trevor*, 1 Vern. 262). Where, however, she had obtained a protection order under 20 & 21 Vict. c. 85, s. 25, payment to herself was ordered (*Re Kingsley*, 6 W. R. 849; *Re Rainsdon*, 4 Drew. 446).

The inaccuracy of the marginal note to this section should be observed. The marginal note forms no part of the Act (*Sutton* v. *S.*, 22 Ch. D. 511; *Claydon* v. *Green*, L. R. 3 C. P. 511; *Re Venour, V.* v. *Sellon*, 2 Ch. D. 522; *Att.-Gen* v. *G. E. Ry. Co.*, 11 Ch. D. 461, 465; see, however, as to private Acts, *Re Woking Urban Council Act*, [1914] 1 Ch. 322). But the title is an important part of the Act (*Fielding* v. *Morley*, [1899] 1 Ch. 41), and should be looked at to ascertain its objects (*R.* v. *Cockerton*, [1901] 1 Q. B. 731; *Jones* v. *Sherrington*, [1908] 2 K. B. 547). The scope of an Act may be limited by the title (*Fielding* v. *Morley*, *supra*) or not (*Re Groos*, [1904] P. 273). The preamble also may be referred to where the enacting words of the sections are not clear (*Re Griffith, Carr* v. *G.*, 12 Ch. D. 661; see further *Re Harkness and Allsopp*, [1896] 2 Ch. 361; *Powell* v. *Kempton Co.*, [1897] 2 Q. B. 265; *Att.-Gen.* v. *Margate Co.*, [1900] 1 Ch. 749).

Freehold property coming to a married woman, rents and profits only to be her own.

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

This section did not enable a married woman to convey the fee simple of descended freeholds by an unacknowledged deed. The "rents and profits" are only such as can be personally enjoyed by her (*Johnson* v. *J.*, 35 Ch. D. 345; see *Re Voss, King* v. *V.*, 13 Ch. D. 504).

[*Sect* 9 *contained provisions for settling questions between husband and wife. See now sect.* 17 *of the M. W. P. Act*, 1882.]

Married woman may effect policy of insurance.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

As to insurance of a

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for

the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

33 & 34 Vict. c. 93, s. 10.

husband for benefit of his wife.

Old law.

Independently of this Act it has been held that a wife has an insurable interest in the life of her husband (*Reed* v. *Royal Exchange Co.*, Peake's Add. Cases, 70), and a husband in that of his wife (*Griffiths* v. *Fleming*, [1909] 1 K. B. 805).

As to policies effected since January 1, 1883, see the further provisions of sect. 11 of the M. W. P. Act, 1882 (*post*, p. 384). The following cases have been decided under the above section of the Act of 1870. Where a policy taken out by a married woman contained a recital that she was desirous of effecting an insurance in terms of the provisions of this Act for the benefit of her children, it was held that no interest passed to them by reason merely of the mention of them (*Re Burgess' Policy*, 85 L. J. Ch. 273).

Cases under this section

Where the husband substituted for a policy he already had a policy expressed to be for the benefit of his wife, the latter was within this section (*Holt* v. *Everall*, 2 Ch. D. 266). Under a policy expressed to be for the benefit of wife and children, the wife and children took as joint tenants (*Re Seyton, S.* v. *Satterthwaite*, 34 Ch. D. 511; *Re Davies*, [1892] 1 Ch. 90). Where the trust was for the wife and children as the husband should appoint, but no appointment was made, the wife and children took in equal shares (*Re Edwards*, 41 L. T. 434). An after-taken wife is within the trust created by the words of this Act (*Re Parker*, [1906] 1 Ch. 526). But on the words of a particular policy she did not participate (*Re Griffith*, [1903] 1 Ch. 739). Policies under this Act were not a satisfaction of a covenant to settle money on the settlor's wife and children (*Cartwright* v. *C.*, [1903] 2 Ch. 306).

On an application under this section to appoint trustees there is no jurisdiction to declare the rights of the parties (*Re Adams*, 23 Ch. D. 525; but see *Re Mellor*, 6 Ch. D. 127). When the husband became of unsound mind, trustees were appointed and authorised to surrender the policy for a fully paid one of less amount (*Schultze* v. *S.*, 56 L. T. 231). A single trustee will not be appointed (*ibid.*; *Re Howson* (1885), W. N. 213). As to a policy effected by a husband for the benefit of his wife who was subsequently convicted of murdering him, see *Cleaver* v. *Mutual Association* ([1892] 1 Q. B. 147.) In the case of policies effected under this Act, sect. 11 of the

33 & 34 Vict. c. 93, s. 10.

M. W. P. Act, 1882, does not apply, and on the death of the husband a trustee must be appointed under this section; the petition being entitled under the Act of 1870 only (*Re Adams*, 23 Ch. D. 525; *Re Turnbull, T.* v. *T.*, [1897] 2 Ch. 415; *Re Kuyper*, [1899] 1 Ch. 38; see *contra*, *Re Soutar*, 26 Ch. D. 236). The application may be made by petition (*Re Atkinson*, 13 R. 285).

[*Sect.* 11 *contained provisions as to a married woman suing. See now the M. W. P. Act*, 1882, *s.* 1, *sub-s.* 2, *and note, p.* 374, *post.*]

Husband not to be liable on his wife's contracts before marriage.

12. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried.

Old law.

According to the old law a husband was liable at law for the debts of his wife contracted before marriage (2 Bright, Husband and Wife, 2). And in equity her separate property was liable to satisfy such debts (*Biscoe* v. *Kennedy*, 1 Bro. C. C. 17, n.; *Chubb* v. *Stretch*, 9 Eq. 555).

Cases under this section.

Having regard to sects. 22 and 13 of the M. W. P. Act, 1882, this section and the decisions thereunder remain of importance with respect to women married before the last-mentioned Act. Under this section such a married woman's separate property was made liable at law to satisfy debts contracted by her before marriage. The section was held to extend to property settled to her separate use without power of anticipation (*Sanger* v. *S.*, 11 Eq. 470; *London Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgely, Small* v. *H.*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q. B. D. 548). See as to women married since 1882, *Birmingham* v. *Lane*, [1904] 1 K. B. 38. An order under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, may be made upon such a married woman (*Dillon* v. *Cunningham*, L. R. 8 Ex. 23). As to her arrest in execution for a debt contracted *dum sola*, see *Nagle* v. *O'Donnell* (I. R. 7 C. L. 79). A judgment may also be given against a married woman under R. S. C., Ord. 14, r. 1, without proof of the existence of separate estate (*Downe* v. *Fletcher*, 21 Q. B. D. 11). But this section does not make her liable to the bankruptcy law (*Re Grissell*, 12 Ch. D. 484; *Ex p. Holland, Re Heneage*, 9 Ch. 307; see *Day* v. *Freunel*, 35 L. T. 551; *R.* v. *Robinson*, L. R. 1 C. C. 80). Where a woman joined with a surety in making a promissory note which fell due and on which judgment was recovered before her marriage, the surety who had paid the full amount after her marriage could not recover against the husband (*Conlon* v. *Moore*, I. R. 9 C. L. 190). As to the liability of the husband in the case of marriages from 1874 to 1882, see M. W. P. Act, 1874 (*post*, p. 369). And in the case of marriages after 1882, see M. W. P. Act, 1882, s. 14, *post*, p. 387).

[*Sects.* 13 *and* 14 *rendered a married woman liable for the maintenance of her husband and children. See now sects.* 20 *and* 21 *of the M. W. P. Act*, 1882, *post, p.* 392.]

Commencement of Act.

15. This Act shall come into operation at the time of the passing of this Act.

16. This Act shall not extend to Scotland. 33 & 34 Vict. c. 93, s. 16.

Act not to extend to Scotland.

17. This Act may be cited as the Married Women's Property Act, 1870.

Short title.

IV.—The Married Women's Property Act, 1870, Amendment Act, 1874.

37 & 38 Vict. c. 50.

An Act to amend the Married Women's Property Act (1870).

[30th July, 1874.]

Whereas it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted as follows:

37 & 38 Vict. c. 50, s. 1.

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt.

Husband and wife may be jointly sued for her debts before marriage.

This Act has been repealed saving all acts done and rights or liabilities acquired thereunder (M. W. P. Act, 1882, sect. 22, *post*, p. 392).

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned.

Extent to which husband liable.

The liability of the husband under this Act ceases on the death of his wife (*Bell* v. *Stocker*, 10 Q. B. D. 129). An Englishman marrying a native of Jersey, where a husband is liable for his wife's ante-nuptial debts, is protected in England by this Act (*De Greuchy* v. *Wills*, 4 C. P. D. 363). Notwithstanding this Act a husband was, under sect. 78 of the Companies Act, 1862, liable as

37 & 38 Vict. c. 50, s. 2.

a contributory in his own right on shares registered in the name of his wife, though acquired by her before her marriage (*Ex p. Hatcher*, 12 Ch. D. 284). See now, as to women married before the M. W. P. Act, 1882, Companies (Consolidation) Act, 1908, sect. 128; Buckley, 9th ed., 298, 68. And see as to the law under the M. W. P. Act, 1882, sects. 7 and 13 of that Act, *post*, pp. 382, 386.

Under this section it is sufficient to allege in the statement of claim that the husband is liable for the debts, without alleging that he has received assets from his wife (*Matthews* v. *Whittle*, 13 Ch. D. 811).

If husband without assets he shall have judgment for costs.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

Creditors were allowed to add to their debt and recover against the wife costs which they had to pay to the husband under this section (*London Bank* v. *Bogle*, 7 Ch. D. 773).

Joint and separate judgment against husband and wife for debt.

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

Assets for which husband liable.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

(1.) The value of the personal estate in possession of the wife which shall have vested in the husband:

(2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife:

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:

(5.) The value of the husband's estate or interest in any property, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:

(6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife or has a judgment *bona fide* recovered

against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable. **37 & 38 Vict. c. 50, s. 5.**

6. This Act shall not extend to Scotland. Extent of Act.

7. This Act may be cited as the Married Women's Property Act (1870) Amendment Act, 1874. Short title.

V.—The Married Women's Property Act, 1882.

45 & 46 Vict. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

Be it enacted as follows:

1. (1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee (*e*). **45 & 46 Vict. c. 75, s. 1.** Married woman to be capable of holding property and of contracting as a *feme sole*.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise (*f*).

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown* (*g*).

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire* (*g*).

[(5.) Every married woman carrying on a trade separately from her husband shall in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole (*h*).]

45 & 46 Vict. c. 75, s. 1.

This sub-section was repealed by the Bankruptcy Act, 1914, and the following section (reproducing sect. 12, sub-sects 1 and 2 of the Bankruptcy Act, 1913) substituted:—"Sect. 125 (1). Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole; (2) Where a married woman carries on a trade or business and a final judgment or order for any amount has been obtained against her, whether or not expressed to be payable out of her separate property, that judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid."

The phraseology of this Act appears to have been taken from Lord Thurlow's judgment in *Hulme* v. *Tenant*, 1 Br. C. C. 16 (Farwell, Powers, 182).

Sub-sect. (1).

(*e*) Sub-sect. 1 is to be construed along with sects. 2 and 5 (*Re Cuno, Mansfield* v. *M.*, 43 Ch. D. 12). Accordingly, in the case of a woman married before 1883, sub-sect. 1 applies only to property acquired since 1882 (*ibid.*; sect. 5, *post*; *Re Harris*, 28 Ch. D. 171). Similarly, it has been held to apply only to what is done by the married woman during coverture in relation to property of which during coverture she is possessed (*Re Price, Stafford* v. *S.*, 28 Ch. D. 712). A gift or conveyance to a married woman and her husband since the Act created a joint tenancy, not a tenancy by entireties as before the Act, the share of the wife being for her separate use (*Re Jupp, Jupp* v. *Buckwell*, 39 Ch. D. 148; *Thornley* v. *T.*, [1893] 2 Ch. 229). But the capacity of a married woman was only altered as between herself and her husband; so in the case of a gift to a husband and wife and a third person, the construction, as regards the amount taken by the husband and wife, was not altered by the Act (*Re Jupp, supra; Re March, Mander* v. *Harris*, 27 Ch. D. 166, 170; see *Re Dixon, Byram* v. *Tull*, 42 Ch. D. 306; *Re Gue, Smith* v. *G.*, 61 L. J. Ch. 510; 67 L. T. 823; *Re Jeffery, Nussey* v. *J.*, [1914] 1 Ch. 375). But by sect. 37 of the L. P. Act, 1925, *post*, a husband and wife are, for all purposes of acquisition of any interest in property under a disposition made or coming into operation after 1925, to be treated as two persons. In the disposition of land to which the wife was beneficially entitled the Act of 1882 (where it applied) abolished the necessity of the husband's concurrence and an acknowledged deed (*Re Drummond and Davie*, [1891] 1 Ch. 531). This rule governs the case of real estate conveyed to her by way of mortgage to secure money which was her separate property (*Re Brooke and Fremlin*, [1898] 1 Ch. 647); and also the case of real property held by her as trustee or personal representative (L. P. Act, 1925, s. 170 (2)); and as to all deeds executed after 1925, acknowledgment is unnecessary (L. P. Act, 1925, s. 167, *post*).

The "separate property" referred to in the Act does not include an unexercised general power of appointment by deed or will (*Ex p. Gilchrist*, 17 Q. B. D. 521; compare sect. 4, *post*).

The separate use arising by virtue of this Act is sufficient to support a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, [1896] 2 Ch. 690).

Where money was bequeathed in trust as to the income for a woman married since 1882 for life, and as to the capital as she should appoint by will, and in default for her executors, administrators and assigns, it was held that the reversion was under the Act her separate property, and that on her releasing her power the two interests would coalesce, and she would be absolutely entitled

(*Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361; see *Re Williams, Williams* v. *Grant*, 76 L. T. 150). **45 & 46 Vict. c. 75, s. 1.**

Since this Act wearing apparel given by a husband to his wife is *prima facie* her separate property (*Masson* v. *De Fries*, [1909] 2 K. B. 831). As regards paraphernalia it was pointed out that under the old common law all the wife's personal chattels were the husband's property. As an exception the common law gave a widow paraphernalia (something over and above dower), namely a right after her husband's death to keep as her own property certain personal chattels of which she had had the use during coverture. The husband's common law rights having been destroyed by the present Act, the above exception was said by Farwell, L.J., to exist no longer (*Masson* v. *De Fries*, [1909] 2 K. B. 836). A husband may discharge his obligation to provide his wife with necessary wearing apparel by lending it to her (*Rondeau Legrand* v. *Marks*, [1918] 1 K. B. 75). Paraphernalia.

The provisions of this Act relating to the wills of married women are sect. 1, sub-sect. 1, and sect. 4; see also sect. 23, and M. W. P. Act, 1893, s. 3, *post*, p. 395. Sect. 1, sub-sect. 1, did not enable a married woman by a will made during coverture to dispose of property acquired after coverture (*Re Price, Stafford* v. *S.*, 28 Ch. D. 709; see *Re Cuno, Mansfield* v. *M.*, 43 Ch. D. 12; see now M. W. P. Act, 1893, s. 3, *post*, p. 395). A married woman can by will make a good gift for the maintenance of a churchyard (*Re Douglas, D.* v. *Simpson*, [1905] 1 Ch. 279). A direction for payment of debts in the will of a married woman made the arrears of a restrained annuity assets for paying damages for a breach of her covenant (*Sprange* v. *Lee*, [1908] 1 Ch. 424). Having regard to the testamentary power conferred by statute on a married woman, her will can now raise a case of election against her husband (*Re Harris, Leacroft* v. *H.*, [1909] 2 Ch. 206). Wills and intestacy.

As to the effect of this Act on a will dated prior to its passing, see *Re Bowen, James* v. *J.* ([1892] 2 Ch. 291); and as to the wills of married women independently of this Act, and the present form of probate of wills of married women, see note to sect. 8 of the Wills Act, *post*.

As regards the beneficial title to a married woman's property after her death, it has been decided that, notwithstanding this Act, a husband is entitled to recover from his wife's executor separate personalty undisposed of by her (*Re Lambert, Stanton* v. *L.*, 39 Ch. D. 626), and also non-separate choses in action, not reduced into possession during the coverture (*Smart* v. *Tranter*, 43 Ch. D. 587; see *Miners* v. *Lawry*, 60 S. J. 666). On the death intestate of a married woman, her separate leaseholds may be taken by her husband, without taking out administration, subject, however, to any contracts binding them (*Surman* v. *Wharton*, [1891] 1 Q. B. 491); see *Re Bellamy, Elder* v. *Pearson*, 25 Ch. D. 620). A husband is still entitled to curtesy in real estate as to which his wife has died intestate (*Hope* v. *H.*, [1892] 2 Ch. 336).

(*f*) The word "contract" in the M. W. P. Act, 1882, includes the acceptance of the office of trustee or executrix (sect. 24, *post*). It was said that the words of sub-sect. 2 do not create any personal liability; they only subject the married woman to a "proprietary liability"—*i.e.*, in respect of her separate property (*Scott* v. *Morley*, 20 Q. B. D. 128; *Draycott* v. *Harrison*, 17 Q. B. D. 153. But see as to this *Pelton* v. *Harrison*, [1892] 1 Q. B. 118; *Holtby* v. *Hodgson*, 24 Q. B. D. 103). Sub-sect. (2).

Under this sub-section a married woman can with her husband enter into a joint contract with a stranger (*Hoare* v. *Niblett*, [1891] 1 Q. B. 781). Such a joint liability cannot be implied from the fact Joint contracts by married woman.

45 & 46 Vict. c. 75, s. 1.

that a married woman, who is residing with her husband and has herself separate estate, orders necessaries for the household (*Morel* v. *Westmoreland*, [1903] 1 K. B. 78; [1904] A. C. 11; compare *Re Shaw, S.* v. *Jones*, 94 L. T. 93). In such a case there is a *prima facie* presumption of the husband's liability (*ibid.*), which, however, can be rebutted in various ways (*ibid.; Manby* v. *Scott*, 2 Sm. L. C.).

Where such a joint liability exists, judgment recovered against the husband bars a second action against the wife (*Hoare* v. *Niblett*, *supra*). The present rules of practice, however, provide that in certain cases a plaintiff who in one action is suing A and B as joint contractors may, after judgment against A, continue to prosecute the action against B (Ord. 14, r. 5; Ord. 13, r. 4). But if the action asserts a liability which is alternative, and not joint, judgment against A is conclusive evidence of an election not to proceed against B (*Morel* v. *Westmoreland*, *supra; French* v. *Howie*, [1906] 2 K. B. 674).

As regards contracts with her husband, the rule before the Act was that a married woman could during coverture contract with him so as to bind her separate estate (*Vansittart* v. *V.*, 4 K. & J. 70); and this has not been altered by the Act (*Butler* v. *B.*, 16 Q. B. D. 374). A *bona fide* purchase by the wife from the husband of goods which are paid for out of her separate estate, and remain in the conjugal domicil, will be good against the husband's creditors (*Ramsay* v. *Margrett*, [1894] 2 Q. B. 18). A husband and wife can contract as strangers as to the ownership of chattels in their joint possession (*Masson* v. *De Fries*, [1909] 2 K. B. 839), and such a contract may be inferred from their dealing (*Hunt* v. *H.*, 25 T. L. R. 132). An arrangement entered into by a wife with her husband, upon her assigning leaseholds to him was dealt with, *Re Marlborough, Davis* v. *Whitehead*, [1894] 2 Ch. 133. As to the effect of contracts by married women, see further the cases decided under sub-sects. 3 and 4 of this section (now repealed), *post*, p. 377; and M. W. P. Act, 1893, s. 1 (*post*, p. 393).

Married woman suing.

A married woman may present a petition under the Trustee Act (*Re Outwin*, 48 L. T. 410; 31 W. R. 374). Sect. 12 (*post*) gives her remedies for the protection of her separate property. Thus she may sue alone in respect of a trespass on a house which is her separate property (*Weldon* v. *De Bathe*, 14 Q. B. D. 339; *Symonds* v. *Hallett*, 24 Ch. D. 346; *Heimbs* v. *Newcastle Society*, 76 L. T. 109); or in respect of a tort committed before the present Act (*Weldon* v. *Winslow*, 13 Q. B. D. 784; *Lowe* v. *Fox*, 15 Q. B. D. 667; *James* v. *Barraud*, 31 W. R. 786; *Severance* v. *Civil Service Association*, 48 L. T. 485), or in respect of her separate interest in a partnership firm (*Eddowes* v. *Argentine*, 63 L. T. 364). As to suing to recover a separate legacy, see *Re Robinson, Pindar* v. *Robinson* (1885), W. N. 147, and as to resisting a claim to an easement, *Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 218. For the purpose of such an action she became discovert within the meaning of the Limitation Act, 1623, s. 7 (*ante*, p. 266), upon the commencement of the present Act (*Lowe* v. *Fox*, *supra; Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828).

As against her husband she can without a trustee sue him on his covenant in a separation deed (*Sweet* v. *S.*, [1895] 1 Q. B. 12), or for an account of her separate rents and profits (*Thornley* v. *T.*, [1893] 2 Ch. 229), or for detention of her goods (*Larner* v. *L.*, [1905] 2 K. B. 539, see *R.* v. *Murray*, [1906] 2 K. B. 385; *Healey* v. *H.*, [1915] 1 K. B. 938). And where a husband forcibly detained his wife's separate money, she could sue his executors for its return (*Wassell* v. *Leggatt*, [1895] 1 Ch. 554). She can acquire against

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him a title to land by possession (*Keelan* v. *Garvey*, [1924] 1 I. R. 107). Her power of suing her husband for a tort is limited by sect. 12 (*post*). And she cannot sue him for malicious prosecution (*Tinkley* v. *T.*, 24 T. L. R. 691), or for slander (*Young* v. *Y.*, 5 Fraser, 330). As to election by a wife whose husband has purported to deal with her property, see *Re Williams*, [1915] 1 Ch. 50; see also *Re Sullivan*, [1917] 1 I. R. 38.

Where an injunction is claimed her sole undertaking in damages must be accepted (*Pike* v. *Cave*, 62 L. J. Ch. 937; 68 L. T. 650; *Re Prynne*, 53 L. T. 465); and such an undertaking can be enforced by the husband (*Hunt* v. *H.*, 54 L. J. Ch. 289). She will not be ordered to give security for costs on the ground of poverty (*Re Thompson, Stevens* v. *T.*, 38 Ch. D. 317; as to costs of an appeal, see *Whittaker* v. *Kershaw*, 44 Ch. D. 296). She cannot, however, act as guardian *ad litem* or next friend (*Re Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465). Damages for personal injuries awarded to a wife are her separate property, notwithstanding that her husband was co-plaintiff (*Beasley* v. *Roney*, [1891] 1 Q. B. 509). A plaintiff who is a married woman should be so described (*Re Poinons, Sutton* v. *Martin*, [1891] W. N. 139).

Married woman being sued.

The effect of sub-sect. 2 is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, that her power to contract is limited, and the remedy is confined to her separate estate (*Whittaker* v. *Kershaw*, 45 Ch. D. 329); and the fact that she has no separate estate except subject to a restraint on anticipation does not prevent her being sued (*ibid.*; see *Braunstein* v. *Lewis*, 64 L. T. 265). She may be sued by an executor to refund a legacy (*ibid.*). She may be sued by her husband for money lent after marriage (*Butler* v. *B.*, 16 Q. B. D. 374), but not for money lent before marriage (*S. C.*, 14 Q. B. D. 831). Her husband's power of suing her in tort is limited by sect. 12 (*post*). She may be sued for torts committed by her during coverture; and her husband may be sued with her unless the tort is connected directly with a contract by her and is the means of enforcing it (*Edwards* v. *Porter*, [1925] A. C. 1, where *Seroka* v. *Kattenburg*, 17 Q. B. D. 177, and *Earle* v. *Kingscote*, [1900] 2 Ch. 585, were approved). See also *Cuenod* v. *Leslie*, [1909] 1 K. B. 880. Judgment may be ordered against her, under R. S. C. Ord. 14 (*Downe* v. *Fletcher*, 21 Q. B. D. 11; *Perks* v. *Mylrea* (1884), W. N. 64), or under R. S. C. Ord. 16, r. 52, as a third party, and in respect of a liability created before this Act (*Gloucestershire Co.* v. *Phillipps*, 12 Q. B. D. 533).

Judgments against married women.

For the law before this Act as to judgment in common law actions against married women, see *Scott* v. *Morley* (20 Q. B. D. 123, 124); and for the judgments in Chancery actions as regards her separate estate, see *McHenry* v. *Davies* (10 Eq. 92); *Picard* v. *Hine* (5 Ch. 278). The proper form of judgment against a married woman in ordinary cases, after the Act of 1882, was settled by the Court of Appeal in *Scott* v. *Morley* (20 Q. B. D. 120). It directs that the sum recovered be payable out of her separate property, and not otherwise; and that execution be limited to her separate property not subject to restriction against anticipation, unless by reason of sect. 19 the property is liable to execution notwithstanding such restriction (see *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Nicols* v. *Morgan*, 16 L. R. Ir. 409; *Brown* v. *Morgan*, 12 L. R. Ir. 122). There is no jurisdiction to make an order that she pay the amount recovered within a fixed time (*Hulbert* v. *Cathcart*, [1894] 1 Q. B. 244). The form of judgment in *Scott* v. *Morley* was held appropriate in an action brought against a widow on a contract made during coverture (*Softlaw* v. *Welch*, [1899] 2 Q. B. 419). The same form was also

Scott v. *Morley* form.

45 & 46 Vict. c. 75, s. 1.

held appropriate in an action to compel a married woman administratrix to make good a devastavit (*Re Turnbull, T.* v. *Nicholas*, [1900] 1 Ch. 180). It was said that a judgment against a married woman under this section was a judgment against her personally, but payable only out of her separate property (*Holtby* v. *Hodgson*, 24 Q. B. D. 103; *Pelton* v. *Harrison*, [1892] 1 Q. B. 118).

In common form.

Since the M. W. P. Act, 1882, it has been held that judgment in common form can be obtained against a married woman personally in respect of an ante-nuptial debt (*Robinson* v. *Lynes*, [1894] 2 Q. B. 577). But such judgment cannot be enforced against restrained property except where such restraint was contained in a settlement by a married woman of her own property (*Birmingham* v. *Lane*, [1904] 1 K. B. 35; see *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Maloney* v. *Harvey* [1895] 2 Ir. R. 169). Where judgment in common form was recovered against a married woman who had obtained a protection order, a receiver was refused of restrained property which had vested in her before the order (*Hill* v. *Cooper*, [1893] 2 Q. B. 85; see *Waite* v. *Morland*, 38 Ch. D. 135). An order directing a married woman administratrix to pay into court money belonging to the intestate and shown to be in her possession (there being no devastavit) should be in common form (*Re Turnbull, T.* v. *Nicholas*, [1900] 1 Ch. 180). Where a married woman is rated as owner of house property, she is liable (in proceedings against her to recover poor rate) to distress, and imprisonment in default of a sufficient distress (*Re Allen*, [1894] 2 Q. B. 924).

Enforcing judgments against married women.

A judgment in the *Scott* v. *Morley* form is not a final judgment against the married woman on which bankruptcy proceedings can be founded (*Ex p. Coulson*, 20 Q. B. D. 251; *Ex p. Lester, Re Lynes*, [1893] 2 Q. B. 113; *Re Elliott*, [1900] 2 Ir. 439), even after the death of her husband (*Re Hewett, Ex. p. Levene*, [1895] 1 Q. B. 328). She may be ordered to attend for examination as to her means (*Holtby* v. *Hodgson, supra*; *Aylesford* v. *G. W. Ry.*, 41 W. R. 42). But no other person can be examined (*Hood-Barrs* v. *Heriot, Ex p. Blyth*, [1896] 2 Q. B. 338). A married woman cannot be committed under sect. 5 of the Debtors Act, 1869, for default in payment (*Scott* v. *Morley, supra*; *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Re Turnbull, T.* v. *Nicholas, supra*; see *Johnson* v. *Brown*, 20 L. R. Ir. 443, where a married woman was committed). On a judgment in the *Scott* v. *Morley* form, a garnishee order may be obtained under R. S. C. Ord. 45, r. 1 (*Holtby* v. *Hodgson*, 24 Q. B. D. 103; *Barnett* v. *Howard*, [1900] 2 Q. B. 784, but see *Wood* v. *Lewis*, [1914] 3 K. B. 73), but it cannot, *semble*, be enforced against land over which she has an unexercised general power of appointment by deed or will (*Ex p. Gilchrist*, 17 Q. B. D. 521). So a judgment against a husband and wife, payable so far as she was concerned out of her separate estate, was not enforceable by elegit against land subject to a general power of appointment (not exercised) vested jointly in the husband and wife (*Goatley* v. *Jones*, [1909] 1 Ch. 557). A judgment against a married woman in the *Scott* v. *Morley* form may be enforced against arrears of restrained income accrued due at the date of the judgment whether paid over or not (*Hood-Barrs* v. *Heriot*, [1896] A. C. 174); but not against income which accrues due after that date (*Bolitho* v. *Gidley*, [1905] A. C. 98). A writ of sequestration in a divorce action is not limited in its terms, but will not affect property subject to a restraint until after decree absolute (*Hyde* v. *H.*, 13 P. D. 173). A woman cannot alienate either permanent alimony under the Divorce Act, 1857 (*Re Robinson*, 27 Ch. D. 160), or permanent maintenance under the Divorce Act, 1866 (*Watkins* v. *W.*, [1896] P. 222), or an allowance under 58 & 59 Vict. c. 39, sect. 5 (*Paquine* v. *Snary*,

[1909] 1 K. B. 688). As to enforcing judgments against restrained property, see further the note to sect. 1 of the M. W. P. Act, 1893 (*post*, p. 394). **45 & 46 Vict. c. 75, s. 1.**

Where a creditor delayed entering judgment until an instalment of income had just become due a receiver was refused (*Colyer* v. *Isaacs*, 77 L. T. 198). The Court refused to appoint a receiver of furniture settled on the husband and wife in *Whitaker* v. *Cohen* (69 L. T. 451). Orders have been enforced against separate property by an inquiry and a receiver (*Re Peace and Waller*, 24 Ch. D. 405; *Perks* v. *Mylrea* (1884), W. N. 64).

Where in an action on a married woman's covenant, the defendant paid money into court on being allowed to defend, the successful plaintiff was held in any event entitled to the money (*Bird* v. *Barstow*, [1892] 1 Q. B. 94).

As to costs of proceedings instituted by a married woman, see M. W. P. Act, 1893, *post*, p. 394. An appeal by a married woman will, if it fail, be dismissed with costs in the usual way (*Perrins* v. *Bellamy*, 68 L. J. Ch. 397). Costs ordered to be paid by a married woman can be recovered out of any unrestrained separate property to which she is entitled at the date of the order (*Cox* v. *Bennett*, [1891] 1 Ch. 617). As to arrears of restrained income, see cases quoted, *supra*, p. 376. Where an action by a married woman was dismissed with costs to be taxed and payable out of her separate property, a receiver of the only separate property she had was appointed before taxation (*Cummins* v. *Perkins*, [1899] 1 Ch. 16). As to actions before this Act, see *Re Glanvill, Ellis* v. *Johnson* (31 Ch. D. 532). A married woman need not give security for costs (*Threlfall* v. *Wilson*, 8 P. D. 18; *Severance* v. *Civil Service Association*, 48 L. T. 485), even if she has no separate estate (*Re Isaac, Jacob* v. *I.*, 30 Ch. D. 418; see *Re Robinson, Pindar* v. *R.* (1885), W. N. 147), except in the case of an appeal (*Whittaker* v. *Kershaw*, 44 Ch. D. 296; *Weldhen* v. *Scattergood* (1887), W. N. 69), but not on an appeal against an order of attachment (*Hood-Barrs* v. *Heriot*, [1896] 2 Q. B. 375). If she sues by a next friend, the next friend may be ordered to give security (*Re Thompson, Stevens* v. *T.*, 38 Ch. D. 317). In the case of a judgment against a married woman an order to set off costs may be made under Ord. 65, r. 27, sub-s. 21 (*Pelton* v. *Harrison*, [1892] 1 Q. B. 118). Costs.

(*g*) As to the power of a married woman, independently of this Act, to deal by way of contract with her non-separate land, and with her separate estate, real and personal, see *ante*, pp. 349, 355, 393. Sub-sects 3 and 4 were repealed by the M. W. P. Act, 1893, s. 4, and replaced by sect. 1 of that Act (*post*, p. 393). For the cases decided on the repealed sub-sections, see the 2nd ed. of this work, pp. 351-2. Contracts.

(*h*) A married woman with separate property, not trading separate from her husband, was not subject to the bankruptcy laws (*Ex p. Coulson*, 20 Q. B. D. 249). And a receiving order could not be made against her after marriage, even on a petition presented before marriage (*Re A Debtor*, [1898] 2 Q. B. 576). But see now sect. 125 of the Bankruptcy Act, 1914, *ante*, p. 372. Sub-sect. (5). Bankruptcy.

A trade belonging exclusively to a married woman, was a trade carried on by her separately from her husband, even where it was managed by him partially (*Re Worsley*, [1901] 1 K. B. 309) or wholly (*Re Simon*, [1909] 1 K. B. 201). Carrying on a farm is not "carrying on a trade" (*Re Long*, [1905] 2 I. R. 343). See, further, the note to sect. 1 of the M. W. P. Act, 1870, *ante*, p. 365.

As regards the initiation of bankruptcy proceedings, a bankruptcy notice could not be issued upon a judgment (in the *Scott* v. *Morley* form) recovered against a married woman in respect of trade debts (*Re Lynes*, [1893] 2 Q. B. 113; see *Re Hewett*, [1895] 1 Q. B. 328),

45 & 46 Vict. c. 75, s. 1.

nor upon a judgment in ordinary form against the firm under the name of which she is trading (*Re Handford*, [1899] 1 Q. B. 566). But a bankruptcy petition might be presented against her (*Re Dagnall*, [1896] 2 Q. B. 407), and on such a petition a receiving order can be made in respect of debts incurred while trading, even after the married woman has ceased to trade (*ibid.*; *Re Worsley*, [1901] 1 Q. B. 309). To give the Court jurisdiction to make a married woman a bankrupt it was not necessary to prove the existence of separate property at the time when the receiving order was made (*Re Simon*, [1909] 1 K. B. 205).

"Separate property" in sub-sect. 5 of sect. 1 of M. W. P. Act, 1882, did not include property over which a married woman had an unexercised general power of appointment (*Ex. p. Gilchrist*, 17 Q. B. D. 521; see *Goatley* v. *Jones*, [1909] 1 Ch. 557); and she could not be compelled to exercise such a power for the benefit of creditors (*ibid.*); but it did include a life estate under a settlement where there was no restraint on anticipation (*Ex p. Boyd*, 21 Q. B. D. 264). Where a married woman entitled to a restrained life interest and trading separately from her husband became bankrupt in 1891, and her husband subsequently died, it was held that under sub-sect. 5 and sect. 19 the whole life interest vested in the bankruptcy trustee subject only to the restraint on anticipation, and on such restraint ceasing by the husband's death the bankruptcy trustee was entitled (*Re Wheeler, Briggs* v. *Ryan*, [1899] 2 Ch. 722; compare the different rule established in the case of judgment creditors; *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422; *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; and see *Pike* v. *Fitzgibbon*, 17 Ch. D. 463).

As regards sect. 125 of the Bankruptcy Act, 1914, *supra*, its provisions applied to a debt incurred before they came into operation (*Re Clark; ex p. Pope*, [1914] 3 K. B. 1095). A woman who continues to trade after marriage can be made bankrupt on a debt incurred before marriage (*Re Reynolds, ex p. White*, [1915] 2 K. B. 186). A judgment against her in tort for a liability incurred in business is available for bankruptcy proceedings (*Re Allen, ex p. Shaw*, [1915] 1 K. B. 285).

Property of a woman married after the Act to be held by her as a *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

The effect of this section is to add the incident of separate use to the interest of the married woman in any property which belongs to her at the time of marriage (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622), or accrues afterwards (*Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361). This separate use is sufficient to support a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, [1896] 2 Ch. 696). It also rendered separate examination unnecessary (*Riddell* v. *Errington*, 26 Ch. D. 220; see *Re Batt*, [1897] 2 Ch. 65; see now sect. 167 of the L. P. Act, 1925, *post*). This section extends to the enlarging by a married woman after her marriage of

a base fee which had been disposed of by her to a purchaser before her marriage (*Re Drummond and Davie*, [1891] 1 Ch. 524). See further, the note to sect. 1, sub-sect. 1, *ante*, p. 372. And as to separate trading, see the notes to sect. 1 of the M. W. P. Act, 1870 (*ante*, p. 365), and to sect. 1, sub-sect. 5 of the M. W. P. Act, 1882, *ante*, p. 377. 45 & 46 Vict. c. 75, s. 2.

By Matrimonial Causes Act, 1857, s. 21, a wife deserted by her husband may apply to a police magistrate or justices in petty sessions for an order to protect any money or property she may acquire by her own lawful industry; and by virtue of the order such earnings and property will belong to her as if she were a *feme sole*.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

This section was repealed by the Bankruptcy Act, 1914, and the following provision substituted: Bankruptcy Act, 1914, s. 36 (2): "Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied."

"Other estate" included furniture (*Re Donaldson*, [1902] 2 I. R. 310). As regards money, the wife claiming to prove in her husband's bankruptcy must, generally speaking, show that money lent by her to the husband was not lent for the purpose of his trade (*Re Genese*, 16 Q. B. D. 700; see *Re Cronmire*, [1901] 1 Q. B. 480). She may prove in competition with creditors for money lent to a partnership of which her husband is a member (*Re Tuff*, 19 Q. B. D. 88); or for money lent to the husband for private purposes (*Re Tidswell*, 56 L. J. Q. B. 548; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Clark, Ex p. Schulze*, [1898] 2 Q. B. 330; see, however, *Alexander* v. *Barnhill*, 21 L. R. Ir. 511). Property mortgaged by a wife to secure a debt owing by her husband to a third party, and subsequently applied in discharge of it, is not lent or entrusted to him within this section (*Alexander* v. *Barnhill*, *supra*; see *Re Cronmire*, [1901] 1 Q. B. 480; *Mercier* v. *M.*, [1903] 2 Ch. 98). Where a husband, who had borrowed his wife's separate estate for his own business, died insolvent, having appointed his wife executrix, she could retain the debt (*Re May, Crawford* v. *M.*, 45 Ch. D. 499; *Re Simpson*, [1895] 1 Ir. R. 530; *Re Ambler, Woodhead* v. *A.*, [1905] 1 Ch. 697); but where she was not her husband's representative, and his estate was administered by the Court, she was postponed (*Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652; *contra, Moore* v. *Smith*, [1895] 1 Ir. R. 512; and see *Re Slade*, [1921] 1 Ch. 160).

As to how far the Act was retrospective, see *Re Home* (54 L. T. 301). As to the presumption arising from the receipt by the husband

45 & 46 Vict. c. 75, s. 3.

of the wife's separate income, see *Re Young*, 29 Times L. R. 391; and as to the rights of a husband lending money to a wife for her business, see *Butler* v. *B.* (14 Q. B. D. 831; 16 Q. B. D. 374).

Execution of general power:

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Recovery of a married woman's debts out of property appointed by her will.

The antenuptial debts of a married woman can be recovered out of property appointed by her under a general testamentary power (*Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510).

Antenuptial debts.

As to engagements entered into by her during coverture on the credit of her separate estate, it was said by Kay, J., that according to the law before the present Act, property appointed by will under a general power was not assets for payment thereof, whether the power of appointment was by deed or will, or by will only (*Re Roper, R.* v. *Doncaster*, 39 Ch. D. 488, 491; see *Ex p. Gilchrist, Re Armstrong*, 17 Q. B. D. 532); inasmuch as such property could not be said to have been her separate property at the time of the engagement (see *Pike* v. *FitzGibbon*, 17 Ch. D. 454, quoted *ante*, p. 355).

Postnuptial debts.

Rule before M. W. P. Act, 1882.

This *dictum* of Kay, J., however, is opposed to decisions holding that property appointed under a general power was assets for payment of these engagements where the power was either a power to appoint by deed or will (*London & Chartered Bank* v. *Lempriere*, 4 P. C. 572; *Mayd* v. *Field*, 3 Ch. D. 587); or by will only (*Re Harvey, Godfrey* v. *Harben*, 13 Ch. D. 216; *Hodges* v. *H.*, 20 Ch. D. 749). See the criticism on the last mentioned cases (39 Ch. D. 489, 490).

Rule under M. W. P. Act, 1882.

In cases within the M. W. P. Act, 1882, but not within the M. W. P. Act, 1893, *post*, the above section makes property appointed by will under a general power assets applicable for payment of the postnuptial debts of a married woman, where at the time she contracted the debt she had some separate property (see *Palliser* v. *Gurney*, 19 Q. B. D. 521). But not where she had no separate property at that time (*Re Fieldwick, Johnson* v. *Adamson*, [1909] 1 Ch. 1). See as to the order of application, *Re Williams, Green* v. *Burgess*, 59 L. T. 310.

Rule under M. W. P. Act, 1893.

In cases within the M. W. P. Act, 1893, the appointed property is assets for payment of her postnuptial debts whether at the time of the contract she had separate property or not (M. W. P. Act, 1893, s. 1, *post*, p. 393).

Cases under the present section.

The present section was held to apply:—where a sum was expressed to be appointed in satisfaction of a debt in fact owing from another person, which debt was paid by him after the death of the testatrix (*Re Hodgson, Darley* v. *H.*, [1899] 1 Ch. 666); where the married woman's debts had been incurred before the M. W. P. Act, 1882, under a protection order (*Re Hughes, Brandon* v. *H.*, [1898] 1 Ch. 529).

Before the M. W. P. Act, 1882, it was held that sect. 27 (as to general powers) of the Wills Act, 1837 (*post*), applied to the wills of married women (*Bernard* v. *Minshull*, Johns. 296). Sect. 24 now also applies to them (M. W. P. Act, 1893, s. 3, *post*, p. 395, where see note).

In the case of persons other than married women the execution of a general testamentary power makes the appointed property assets for payment of the appointor's debts (*Fleming* v. *Buchanan*, 3 D. M. G. 976; Land Transfer Act, 1897, s. 1 (2); Administration of Estates Act, 1925, s. 3 (2), *post*).

A married woman's funeral expenses were payable out of property appointed by her will (*Re M'Myn, Lightbown* v. *M'Myn*, 33 Ch. D. 575). 45 & 46 Vict. c. 75, s. 4.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

The words "her title" mean the title which first accrued to her, whether vested, contingent, in possession, in remainder, or in reversion (*Reid* v. *R.*, 31 Ch. D. 411; *Re Tucker, Emmanuel* v. *Parfitt*, 52 L. T. 923; 33 W. R. 932; *Re Adames*, 53 L. T. 198; 33 W. R. 834; *Re Hobson, Webster* v. *Rickards*, 55 L. J. Ch. 300; 34 W. R. 195; *Re Tench, Ex p. McCormack*, 15 L. R. Ir. 406). Where, accordingly, the title in reversion accrued before the Act, but the property fell into possession after the Act, the section did not apply (*Reid* v. *R.*, *supra*; compare the construction placed on a covenant to settled after acquired property, *Re Bland, B.* v. *Perkins*, [1905] 1 Ch. 4; *Re Brook, B.* v. *Hirst*, 111 L. T. 36). Nor was the section made applicable by reason of a conversion into money after the Act (*Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475).

A mere *spes successionis* claimed by A. as one of a possible class of next of kin, is not a contingent title within this section (*Re Parsons, Stockley* v. *P.*, 45 Ch. D. 51; *Re Simpson, S.* v. *S.*, [1904] 1 Ch. 1; *Re Butler, Joyce* v. *Brew*, [1918] 1 I. R. 394; *contra, Re Beaupré*, 21 L. R. Ir. 397). As to how far this section affects settlements, see sect. 19 (*post*, p. 390).

This section applies to money recovered by the verdict of a jury, even in an action in which the husband is co-plaintiff (*Beasley* v. *Roney*, [1891] 1 Q. B. 509).

As to the power of a woman married before this Act over separate property acquired before this Act, see *ante*, p. 355.

6. All deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum As to stock, &c., to which a married woman is entitled.

45 & 46 Vict. c. 75, s. 6.

forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to the probate of the will of a married woman having money standing in her name in the savings bank, see *Harding* v. *Sutton* (59 L. T. 839). As to investments held by a married woman as trustee, see sect. 18 (*post*, p. 389).

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the publis stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Where shares standing in a married woman's name represented savings from her separate estate, her husband was not liable as a contributory (*Belcher's Case* (1883), W. N. 94). But a deposit made by a wife in her own name out of remittances by her husband belonged to him (*Birkett* v. *B.*, 24 Times L. R. 284).

In the case of a woman married before the commencement of the present Act her husband may be a contributory in respect of shares acquired by her before that date (Companies Consolidation Act, 1908, s. 128; see *Ex p. Hatcher*, 12 Ch. D. 284; quoted *ante*, p. 370). Her name alone should not be placed on the list (*Lang's Case*, 4 App. Cas. 562; compare *Re London and Bombay Bank*, 18 Ch. D. 581). **45 & 46 Vict. c. 75, s. 7.**

Investments in joint names of married women and others.

8. All the provisions hereinbefore contained as to deposits in any post-office or other savings-bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England, or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, as far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock, &c., standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall

45 & 46 Vict. c. 75, s. 10.

have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and

13 & 14 Vict. c. 60.

extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

45 & 46 Vict. c. 75, s. 11.

See the note to sect. 10 of the M. W. P. Act, 1870 (*ante*, p. 367). The present section does not apply to policies effected under sect. 10 of the M. W. P. Act, 1870 (*Re Turnbull, T.* v. *T.*, [1897] 2 Ch. 415; *Re Kuyper*, [1899] 1 Ch. 38). Upon a motion to appoint a trustee there is no jurisdiction to decide the rights of the widow and children *inter se* (*Re Graham*, 29 L. R. Ir. 498).

A policy was effected by a husband and wife for benefit of the survivor, each contributing to the premium, and the wife died first; the insurance was valid as within the above words "a policy effected by any woman on her own life" (*Griffiths* v. *Fleming*, [1909] 1 K. B. 805). Where a policy was effected by a husband and expressed to be for the benefit of his wife and children in conformity with this Act, a second wife and her child participated with the children of the first marriage, all taking as joint tenants (*Re Browne*, [1903] 1 Ch. 188; see *Re Parker*, [1906] 1 Ch. 526). Compare the construction placed on powers to appoint income to a wife (*Re Hancock, Malcolm* v. *Burford Hancock*, [1896] 2 Ch. 173) and to jointure (*Marlborough* v. *M.*, [1901] 1 Ch. 165). An endowment policy taken out by a husband, the insurance moneys being payable on his death or on his living for twenty years, was held to be a policy on his own life within this section, and on his death within the twenty years a valid trust for his wife was created (*Re Ioakimidis' Policy*, [1925] Ch. 403). See also as to what is a policy "for the benefit of his wife," *Chrystal's Trustee* v. *Chrystal*, [1912] S. C. 1003, a case under sect. 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880. See also *Re Fleetwood's Policy*, [1926] Ch. 48.

Where a wife was convicted of murdering her husband, neither she nor anyone claiming under her could claim the amount of a policy effected by the husband for her benefit, but there was a resulting trust in favour of the husband's estate (*Cleaver* v. *Mutual Association*, [1892] 1 Q. B. 147).

A policy effected by a wife on her own life for the benefit of her husband belonged where the husband predeceased his wife to his executor (*Prescott* v. *P.*, [1906] 1 I. R. 155).

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section, it shall be sufficient to allege such property to be her property: and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding.

45 & 46 Vict. c. 75, s. 12.

Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

As to the civil proceedings which can be commenced by a married woman, see *ante*, p. 374. As regards criminal proceedings it has been held that in an indictment for stealing her separate goods they cannot be laid as the property of her husband (*R.* v. *Murray*, [1906] 2 K. B. 385). A married woman cannot criminally prosecute her husband for personal libel on herself (*R.* v. *London*, 16 Q. B. D. 772; see *Tinkley* v. *T.*, 24 Times L. R. 691). See also as to the proviso in the section, *Lemon* v. *Simmons* (36 W. R. 350; 57 L. J. Q. B. 260).

An action by her against him for rescission of a separation deed on the ground of fraudulent misrepresentation is not an action of "tort" within this section (*Hulton* v. *H.*, [1917] 1 K. B. 813). A husband cannot sue his wife to restrain her from wrongfully pledging his credit (*Webster* v. *W.*, [1916] 1 K. B. 714). See as to an agreement by which a wife forgoes the right to pledge it, *Balfour* v. *B.*, [1919] 2 K. B. 571. As to an action by a wife against her husband for a declaration that the house in which they lived was her separate property, see *Shipman* v. *S.*, 93 L. J. Ch. 382, where an interlocutory injunction was granted restraining the husband from entering the house.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not

have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed. 45 & 46 Vict. c. 75, s. 13.

The words "before her marriage" mean before the existing marriage, including the period of any previous marriage and the interval between the two marriages (*Jay* v. *Robinson*, 25 Q. B. D. 472); and the word "debt" includes both common law debts contracted by a woman whilst she is a *feme sole*, and debts contracted under the Act in respect of her separate property (*ibid.*, p. 474). A husband cannot under this section sue his wife in respect of loans made by him to her before marriage (*Butler* v. *B.*, 14 Q. B. D. 836). Judgment can be recovered against a married woman personally for an antenuptial debt (*Robinson* v. *Lynes*, [1894] 2 Q. B. 577). In the case of women married since 1882, where a restraint exists, this section must be read in conjunction with sect. 19, which may prevent the property being made available to satisfy an antenuptial debt (*Birmingham* v. *Lane*, [1904] 1 K. B. 38).

Husband to be liable for his wife's debts contracted marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property: Provided always that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

The husband is still liable for the wrongs committed by his wife after marriage, unless they are directly connected with contracts by her (*Edwards* v. *Porter*, [1925] A. C. 1). Judgment recovered against a wife, who has no separate property, in respect of an antenuptial debt, is no defence to an action against the husband for the same debt (*Beck* v. *Pierce*, 23 Q. B. D. 316). A husband married since 1882 may be sued alone for his wife's antenuptial debts, whether she be alive or dead (*ibid.*, p. 321). If the wife is sued alone she cannot require her husband to be joined, and if he is sued alone he cannot require her to be joined (*ibid.*). Under the Stat. Lim. time runs in favour of the husband in respect of an antenuptial debt of the wife from the cause of action, not the marriage, and no acknowledgment or part payment by the wife after marriage will alter this (*ibid.*, p. 322).

45 & 46 Vict. c. 75, s. 15.

Suits for antenuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

As to this joint judgment, see *Beck* v. *Pierce* (23 Q. B. D. 321).

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

The stealing by a wife of her husband's property is made a criminal offence by this Act (*R.* v. *Payne*, [1906] 1 K. B. 97; see *R.* v. *James*, [1902] 1 K. B. 540).

Doubts having arisen on the subject of evidence (see *R.* v. *Brittledon*, 12 Q. B. D. 266), it was enacted that in any criminal proceeding against a husband or wife authorised by the present Act, the husband and wife respectively should be competent and admissible witnesses, and (except when defendant) compellable to give evidence (M. W. P. Act, 1884). See also sect. 4 of the Criminal Evidence Act, 1898.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the

division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be) by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

45 & 46 Vict. c. 75, s. 17.

Applications under this section have been made by originating summons as regards a public-house (*Gaynor* v. *G.*, [1901] 1 I. R. 217), also by motion in divorce actions, as regards furniture (*Phillips* v. *P.*, 13 P. D. 220), and as regards paraphernalia (*Tasker* v. *T.* (1895), P. 1). In such an action the registrar cannot under this section make an order to hand over property (*Wood* v. *W.*, 14 P. D. 157). Where there is no action the application should be by originating summons (see the form Dan. Ch. F. p. 1180, 6th ed., and Table of Titles in the Annual Practice). See as to varying the report of a registrar to whom a question has been referred, *Wilder* v. *W.*, 56 S. J. 571.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may

Married woman as an executrix or trustee.

45 & 46 Vict. c. 75, s. 18.

sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

A married woman who is an executrix or trustee may under the earlier part of this section sue or be sued in respect of the trust property, whatever its nature may be (*Re Harkness and Allsopp*, [1896] 2 Ch. 363). She can also dispose without her husband of real or personal property held by her as trustee or personal representative (L. P. Act, s. 170 (2), *post*, re-enacting M. W. P. Act, 1907, s. 1); see as to the law before the Act of 1907, *Re Harkness and Allsopp*, *supra*). Similarly she could convey land as a "bare trustee" within sect. 16 of the (repealed) Trustee Act, 1893, without any acknowledgment or the concurrence of her husband (*Re Docwra, D.* v. *Faith*, 29 Ch. D. 693). So where she is a paid-off mortgagee (*Re Howgate and Osborn*, [1902] 1 Ch. 451). As to the form of order directing payment to a married woman trustee, see *Re Hawksworth* ((1887), W. N. 113); and as to orders directing payment by her, see note to sect. 24, *post*.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman (*i*), or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument (*k*); but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors (*l*).

(*i*) The earlier part of this section applies to all settlements, whether made before or after marriage, not only to what are popularly called marriage settlements (*Re Armstrong, Ex p. Boyd*, 21 Q. B. D. 271).

The words "interfere with or affect" mean "invalidate or render inoperative" (*Re Armstrong, Ex p. Boyd*, 21 Q. B. D. 270, 273). The effect of the settlement is to be determined as it would have been under the old law. And no one who under that law could have taken any interest is to be deprived of such interest (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 625). Sect. 19 prevents the Act from interfering with any settlement which would have bound the property if the Act had not been passed (*Hancock* v. *H.*, 38

Ch. D. 90). So, in the case of settlements before 1908, a husband's covenant in a settlement made in 1870, to settle property coming to him in right of his wife, was held notwithstanding sect. 5 (*ante*) to bind property bequeathed to her in 1883 (*ibid.*). Again, a covenant by the husband and wife, in a settlement prior to 1882, to settle property not limited to the wife's separate use, bound property acquired by her after 1882 (*Re Stonor*, 24 Ch. D. 195; *Re Whitaker, Christian* v. *W.*, 34 Ch. D. 227). And a settlement since 1882 by the intended husband and wife (the latter being an infant) of funds coming to the latter on her marriage was held binding though the wife on attaining twenty-one repudiated the settlement (*Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307; *Buckland* v. *B.*, [1900] 2 Ch. 534). See now, as to settlements by the husband after 1907, sect. 2 of the M. W. P. Act, 1907, *post*, p. 396. 45 & 46 Vict. c. 75, s. 19.

On the other hand, where a married woman was entitled to separate property under a settlement made before the Act, the incidents annexed by the Act to separate property (*e.g.*, the liability to alienation on bankruptcy) attached to it (*Re Armstrong, Ex p. Boyd*, 21 Q. B. D. 264). Again, where a woman entitled under a settlement made in 1878 to a life interest, with remainder (in default of her testamentary appointment) to herself absolutely, re-married since 1882, she held all her interest as *feme sole* (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622). And where since 1882 property is settled on a married woman subject to a restraint on anticipation, but without the words "for her separate use," the separate use arising under sects. 1 and 2 of the present Act will support the restraint (*Re Lumley, Ex p. Hood-Barrs*, [1896] 2 Ch. 690).

(*k*) As to the creation and effect of a restraint against anticipation, see *ante*, p. 356. And as to enforcing against restrained income judgments recovered against a married woman since the Act, see the cases quoted *ante*, p. 376.

Where the restraint was contained not in a settlement made by a married woman of her own property but in a separation deed, the latter part of the section did not apply, and the earlier words prevented the restrained income from being made available to satisfy her antenuptial debt (*Birmingham* v. *Lane*, [1904] 1 K. B. 35).

(*l*) The latter part of the section has no operation on settlements made before the Act (*Beckett* v. *Tasker*, 19 Q. B. D. 12; *Smith* v. *Whitlock*, 34 W. R. 414; 55 L. J. Q. B. 286). The words "before marriage" mean before her existing marriage, and include the period of a previous marriage and the interval between the two marriages (*Jay* v. *Robinson*, 25 Q. B. D. 472). The word "debts" includes both common law debts contracted by a woman whilst a *feme sole*, and debts contracted under the Act in respect of her separate property (*ibid.* 474). As to the effect of the marriage of a debtor before judgment, see *Rothschild* v. *Fisher*, [1920] 2 K. B. 243).

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes

Married woman to be liable to the parish for the maintenance of her husband.

31 & 32 Vict. c. 122.

45 & 46 Vict. c. 75, s. 20.

chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

See *Peters* v. *Cowie* (2 Q. B. D. 131); *Coleman* v. *Birmingham* (6 Q. B. D. 615).

Maintenance of parents.

As regards her parents, a married woman was not liable for their maintenance before 1909 (*Pontypool* v. *Buck*, [1906] 2 K. B. 896). But since 1908 where she has separate property she is subject to all such liability for the maintenance of her parent or parents as a *feme sole* is subject to (M. W. P. Act, 1908).

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

22. *The Married Women's Property Act*, 1870, *and the Married Women's Property Act*, 1870, *Amendment Act*, 1874, *are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.*

This section prevented sect. 11 of this Act from applying to policies effected under the M. W. P. Act, 1870, *ante* (*Re Turnbull, T.* v. *T.*, [1897] 2 Ch. 415). The section was repealed by S. L. R. Act, 1898, as also the preamble to the present Act, which being of a formal character has been omitted.

Legal representative of married woman.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

A husband who takes separate property *jure mariti* is a "legal personal representative" within this section, and liable thereunder to the extent of the property so taken (*Surman* v. *Wharton*, [1891] 1 Q. B. 491).

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix, or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

45 & 46 Vict. c. 75, s. 24.

Interpretation of terms.

Before this Act, the separate estate of a married woman was not in general liable for breaches of trust or torts committed by her (*Wainford* v. *Heyl*, L. R. 20 Eq. 321). Since the Act, she may be ordered to make good a loss occasioned by her devastavit, for which purpose the order should be in the *Scott* v. *Morley* (20 Q. B. D. 120) form (*Re Turnbull, T.* v. *Nicholas*, [1900] 1 Ch. 180). Where there is no devastavit, an order directing her to pay money into court should be in the common form (*ibid*). Where letters of administration are granted to a married woman, it is not now necessary that her husband should join in the administration bond (*Re Ayres*, 8 P. D. 168).

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Commencement of Act.

26. This Act shall not extend to Scotland.

Extent of Act.

27. This Act may be cited as the Married Women's Property Act, 1882.

Short title.

The Married Women's Property Act, 1893.

56 & 57 Vict. c. 63.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

56 & 57 Vict. c. 63, s. 1.

Effect of contracts by married women.

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising

56 & 57 Vict. c. 63, s. 1.

out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

This Act repeals sub-sections 3 and 4 of sect. 1 of the M. W. P. Act, 1882, *ante*. The object was to correct or reverse *Stogdon* v. *Lee*, [1891] 1 Q. B. 661, and to repeal the provision of the M. W. P. Act, 1882, which threw on a married woman the burden of showing that her contract did not bind her separate estate (*Paquin* v. *Beauclerk*, [1906] A. C. 163).

For the present section to apply, there must be a contract entered into for the first time after the passing of the Act. An acknowledgment of a pre-existing debt is not sufficient (*Re Wheeler; Hankinson* v. *Haytor*, [1904] 2 Ch. 66). And the contract must have been entered into by the married woman "otherwise than as agent." Where a husband had authorised his wife to contract, so that in fact she did not contract "otherwise than as agent," the section did not apply, even where the contractee did not know of the husband's authority (*Paquin* v. *Beauclerk*, [1906] A. C. 148).

Under the M. W. P. Act, 1882, it was held that where an action on a contract made during coverture was brought against a woman after her husband's death, the form of judgment in *Scott* v. *Morley* (*ante*, p. 375) was appropriate (*Softlaw* v. *Welch*, [1899] 2 Q. B. 419). The husband's death rendered her property no longer separate, but this did not free it from liability. It also removed any restraint, but this did not subject it to liability (*Pelton* v. *Harrison*, [1891] 2 Q. B. 422, 426; see, however, as to this last point, *Re Wheeler; Briggs* v. *Ryan*, [1899] 2 Ch. 722, *ante*, p. 378). Under the present Act the proviso in sect. 1 preserves unaltered the law as to restrained property (*Brown* v. *Dimbleby*, [1904] 1 K. B. 32), and a contract can be enforced only against such of the married woman's separate property as has not been subject to a restraint against anticipation (*Wood* v. *Lewis*, [1914] 3 K. B. 73). And where a married woman entitled to restrained income had during coverture entered into a contract, and after the termination of the coverture judgment was recovered against her in an action on the contract, instalments of the income accruing after such termination could not be rendered available to satisfy the judgment. So held where coverture terminated by the husband's death (*Brown* v. *Dimbleby*, [1904] 1 K. B. 28; where a receiver was asked of instalments not due), or by divorce (*Barnett* v. *Howard*, [1900] 2 Q B. 784; where the instalments had accrued due before judgment. Qu. whether in the latter case the instalments were not available, according to *Hood-Barrs* v. *Heriot*, [1896] A. C. 174; see also as to restrained income accruing due after a divorce, *Hyde* v. *H.*, 13 P. D. 173.

The question of the liability of the wife's estate after her death on a contract made during coverture was raised where she had purported to release her husband's covenant to pay restrained income and also not to sue for the same. After her death, the release being admittedly void, her executors sued for arrears of the income, and the husband having claimed damages for breach of the covenant not to sue, these arrears were held to be assets for payment of the damages by reason of a direction in her will for payment of her debts (*Sprange* v. *Lee*, [1908] 1 Ch. 424).

Costs may be ordered to be paid out of property subject

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to

time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

56 & 57 Vict. c. 63, s. 2.

to restraint on anticipation.

The "proceeding" must be one which initiates litigation; and so the section does not apply in the case of an appeal by a married woman defendant (*Hood-Barrs* v. *Cathcart*, [1894] 3 Ch. 376; *Hood-Barrs* v. *Heriot*, [1897] A. C. 177); nor to a petition in an action presented by a married woman defendant (*Hollington* v. *Dear*, [1895], W. N. 35; nor to a wife's summons in a divorce action relating to the custody of children (*Gordon* v. *G.* [1904] P. 163); nor to a probate action brought by an executor in consequence of a caveat entered by a married woman (*Moran* v. *Place*, [1896] P. 214). But the section does apply to a counterclaim by a married woman defendant (*Hood-Barrs* v. *Cathcart*, [1895] 1 Q. B. 873); to an application by a married woman plaintiff for a new trial (*Dresel* v. *Ellis*, [1905] 1 K. B. 594); to a written claim made by her to goods taken in execution and served on the sheriff (*Nunn* v. *Tyson*, [1901] 2 K. B. 487); and to an application by her to intervene in a probate action (*Crickitt* v. *C.*, [1902] P. 177). It applies even where the husband is co-plaintiff (*Huntley* v. *Gaskell*, [1905] 2 Ch. 656). The onus lies on the married woman to show that the restraint should be sustained to the prejudice of the person claiming costs (*Pawley* v. *P.*, [1905] 1 Ch. 596).

An order under this section may be made subsequently to the order directing payment of costs (*Hood-Barrs* v. *Cathcart*, [1895] 1 Q. B. 873). An order was made in *Paget* v. *P.* ([1898] 1 Ch. 470). As to the form of order, see *Davies* v. *Treharris Brewery Co.* ([1894], W. N. 198; 13 R. 219).

See also the power to charge the costs of a married woman on a fund preserved (Solicitors Act, 1860, s. 28).

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

Will of married woman.

As to the law before this Act, see *Willock* v. *Noble*, L. R. 7 H. L. 580, and *Re Price, Stafford* v. *S.*, 28 Ch. D. 709, quoted *ante*, p. 373.

In the case of every married woman who dies after 5th December, 1893, this section applies to her will whether made before or after that date (*Re Wylie, W.* v. *Moffat*, [1895] 2 Ch. 116). It makes her will executed during coverture operate upon all that she has at her death (*Re James, Hole* v. *Bethune*, [1910] 1 Ch. 157). A will "in exercise of all powers" was held to exercise the statutory power given by this section (*ibid.*).

Before the M. W. P. Act, 1882, it was held that sect. 27 of the Wills Act, 1837, applied to the wills of married women (*Bernard* v. *Minshull*, Johns. 296). As to the joint effect of sects. 24 and 27, see the cases quoted under sect. 27 of the Wills Act, 1837 (*post*).

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Repeal.

56 & 57 Vict. c. 63, s. 5.

5. This Act may be cited as the Married Women's Property Act, 1893.

Short title.

Extent.

6. This Act shall not apply to Scotland.

The Married Women's Property Act, 1907.

7 Edw. VII. c. 18.

7 Edw. 7, c. 18, s. 1.

An Act to amend the Married Women's Property Act, 1882.

[21st August, 1907.]

Be it enacted as follows:—

[Sect. 1, enabling a married woman to dispose without her husband of real or personal property held by her as trustee or personal representative, was repealed by L. P. Act, 1925, and replaced by s. 170 (2) and (4) of that Act, which see *post*, p. 762.]

Under the M. W. P. Act, 1882, it had been held that a married woman who was trustee for sale of land, could not convey it to a purchaser except with the concurrence of her husband and by deed acknowledged (*Re Harkness and Allsopp*, [1896] 2 Ch. 358; see M. W. P. Act, 1882, s. 18; *ante*, p. 390).

Settlements of a married woman's separate property.

45 & 46 Vict. c. 75.

2.—(1.) Notwithstanding section nineteen of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age.

(2.) But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed.

(3.) Nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infants Settlements Act, 1855.

18 & 19 Vict. c. 43.

See notes to M. W. P. Act, 1882, s. 19 (*ante*, p. 390).

Married woman entitled to prior estate to be protector of settlement alone.

3.—(1.) Where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is by virtue of the Married Women's Property Act, 1882, made her separate property, then she alone shall, in respect of that estate, be the protector of the settlement.

(2.) This section applies to disentailing assurances and surrenders made after the thirty-first day of December one

thousand eight hundred and eighty-two, and as well before as after the commencement of this Act. **7 Edw. 7, c. 18, s. 3.**

See sect. 24 of the Fines and Recoveries Act, 1833, *ante*, p. 323.

4.—(1.) This Act may be cited as the Married Women's Property Act, 1907. Short title;

(2.) This Act shall come into operation on the first day of January one thousand nine hundred and eight. commencement.

(3.) This Act shall not extend to Scotland.

(4.) This Act shall be construed with the Married Women's Property Acts, 1882, 1884, and 1893, and those Acts and this Act may be cited together as the Married Women's Property Acts, 1882 to 1907. Construction. 45 & 46 Vict. c. 75. 47 Vict. c. 14. 56 & 57 Vict. c. 63.

VI.—Dower and Curtesy.

The Dower Act, 1833.

3 & 4 William IV. c. 105.

§ 1. *Interpretation*...397.
§ 2. *Equitable Estates liable to Dower*...401.
§ 3. *Seisin of Husband not necessary*...402.
§§ 4—10. *How Husband may bar or restrict Dower*...402—404.
§ 11. *Agreement not to bar Dower enforceable*...404.
§ 12. *Priority of Legacies in lieu of Dower*...404.
§ 13. *Certain Forms of Dower abolished*...405.
§ 14. *Saving and Restraining Clause*...405.
Note on Curtesy...405.

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing. **3 & 4 Will. 4, c. 105, s. 1.** Meaning of the words in the Act. "Land." Number.

The Administration of Estates Act, 1925, *post*, abolishes (sect. 45) dower, freebench, tenancy by the curtesy, and all other estates and interests of husbands and wives in real estate as to which the other dies intestate, whether arising under the general law or by custom or otherwise, in the cases of all persons dying after 1925; and the same Act repeals the present Act as to all deaths after that date (s. 56 and sched. 2). In view of the changes in the law effected Law of dower before this Act.

3 & 4 Will. 4, c. 105, s. 1.

by the legislation of 1925 the notes to the present Act in the earlier editions of this work (2nd ed. pp. 369—79) have been abbreviated.

For a statement of the law of dower before this Act see the first Report of the R. P. Commrs. 16—19; Co. Litt. 32 a; *Lyster* v. *Mahony*, 1 Dru. & War. 236.

Out of what property a woman was entitled to dower.

The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower (*Moody* v. *King*, 2 Bing. 447; *Smith* v. *Spencer*, 4 W. R. 729). She was not entitled to dower out of an estate *pur autre vie* (*Low* v. *Burron*, 3 P. W. 262; *Re Michell, Moore* v. *M.*, [1892] 2 Ch. 99). Where, however, land was limited to the husband *pur autre vie*, with certain contingent estates in remainder over, with ultimate remainder to him in fee, the land was held liable to dower (*Lemon* v. *Mark*, [1899] 1 I. R. 416; see *Re Michell, supra*).

Mines.

Dower was due of mines wrought during coverture, but not of mines or strata unopened. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit (*Stoughton* v. *Leigh*, 1 Taunt. 401; *Dickin* v. *Hamer*, 1 Dr. & Sm. 284). And a dowress may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease (*Dickin* v. *Hamer, supra*),

Timber.

or of proceeds of timber cut after her husband's decease (*Bishop* v. *B.*, 5 Jur. 931; *Dickin* v. *Hamer, supra*). Where land subject to dower was taken by a railway company, the dowress had the value of her dower paid to her out of the purchase-money (*Re Hall*, 9 Eq. 179). In another case one-third of the purchase-money was carried over to a separate account, the dividends being payable to the dowress for life (*Harrop* v. *Wilson*, 34 Beav. 166); but see *Re Wilson, W.* v. *Clark*, [1916] 1 Ch. 220. See, further, as to the property out of which a woman was entitled to dower, and the requisites to dower, the note to sect. 2, *post*; Tudor's L. C. Conv. 112 *et seq.* 4th ed.

Barring dower.

In consequence of two maxims of the common law—first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage (*Vernon's Case*, 4 Rep. 1; Co. Litt. 36 b).

Legal jointures.

Dower, however, might be barred by a legal jointure.

According to Lord Coke (Co. Litt. 36 b), there are six requisites to a strict legal jointure, viz., 1st. The provision for the wife must by original limitation take effect in possession or profit immediately after the husband's death (*Wood* v. *Shirley*, Cro. Jac. 488; see *Re De Hoghton, De H.* v. *De H.*, [1896] 2 Ch. 385; *Greenwood* v. *Lutman*, [1915] 1 I. R. 266). 2nd. It must be for the term of her own life or greater estate (Dyer, 97 b). 3rd. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the *whole*, and not of part, of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower (see 9 Mod. 152; 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391). And 6th. It may be made either before or after marriage (4 Rep. 3).

Jointure before marriage was a peremptory bar of dower; jointure after marriage she had an option to renounce (1 Swanst. 429, n); but a *feme covert* was held not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law (*Frank* v. *F.*, 3 M. & C. 171). A jointure settled on a wife by articles, to which she was not a party, did not deprive her of dower (*Buckingham* v. *Drury*, 3 Br. P. C. 497; *Daly* v. *Lynch*, *ibid.* 48); but an infant having before her marriage a jointure made to her in bar of dower was thereby bound and barred by the Statute

of Uses (27 Hen. 8, c. 10) (*ibid.*) That statute was repealed by L. P. Act, 1925, *post.* 3 & 4 Will. 4, c. 105, s. 1.

Equitable jointures.

In equity, a trust estate, an agreement to settle lands as a jointure (see *Warde* v. *W.*, 16 Beav. 103; *Wellesley* v. *W.*, 4 M. & Cr. 554), or a covenant from the husband for payment of an annuity to his wife, for life, in case she survived him, in full for her jointure and in bar of dower, in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage accepts in lieu of dower, is a good jointure (*Buckingham* v. *Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; Wilmot's Notes, 177; *Charles* v. *Andrews*, 9 Mod. 152; *Williams* v. *Chitty*, 3 Ves. jun. 545; *Tinney* v. *T.*, 3 Atk. 8; *Carruthers* v. *C.*, 4 Br. C. C. 500; *Estcourt* v. *Estcourt*, 1 Cox, 20; *Simpson* v. *Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a, n. by Thomas; Harg. Co. Litt. 36 b, n (5); Sugd. V. & P. 543, 544, 11th ed.; *Dyke* v. *Rendall*, 2 D. M. & G. 209). A future contingent provision, accepted by an adult female upon her marriage in lieu of dower, was in equity a valid bar to dower (*Re Herons*, 1 Flan. & K. 330; see *Power* v. *Sheil*, 1 Moll. 312; *Williams* v. *Chitty*, 3 Ves. 545; *Corbet* v. *C.*, 5 Russ. 254). So where the husband and his father, "for providing a competent jointure" for the wife, settled moneys for the benefit of the husband, his wife, and issue (*Dyke* v. *Rendall*, 2 D. M. & G. 209). And where a tenant in tail in remainder agreed to execute a legal postnuptial settlement, to secure a jointure (*Pennefather* v. *Pennefather*, I. R. 6 Eq. 171). And where the intended husband covenanted that in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of his property at death (*Hamilton* v. *Jackson*, 2 J. & Lat. 295). In order, however, to exclude the right to dower, there had to be either an express declaration or a plain intention (*Hamilton* v. *Jackson*, 2 J. & Lat. 299; *O'Rorke* v. *O'Rorke*, 17 L. R. Ir. 153). A grant of an annuity to the wife surviving did not bar dower, even out of the lands charged with the annuity (*Cody* v. *Cody*, 5 L. R. Ir. 620; see *Lemon* v. *Mark*, [1899] 1 I. R. 416).

Where widow barred of distributive share in husband's personalty.

A stipulation in a marriage settlement, that the provision thereby made for the wife was to be "in lieu of dower or thirds," was held, on the husband dying intestate, to bar the claim of his widow to a distributive share in his personal estate (*Thompson* v. *Watts*, 2 J. & H. 291; see *Sambourne* v. *Barry*, I. R. 6 Eq. 28; *Gurly* v. *G.*, 8 Cl. & Fin. 743; *Re Burgess*, 11 Ir. Ch. R. (N.S.) 164; *Colleton* v. *Garth*, 6 Sim. 19; *Coyne* v. *Duigan*, [1894] 1 I. R. 138; *Re Hogan, H.* v. *H.*, [1901] 1 Ir. R. 168).

As to the law of jointures, see 1 Rop. on Husband and Wife, by Bright, c. 10; Cruise's Dig. tit. 7; Bac. Abr. Dower and Jointure (G.); Gilb. on Uses, by Sugd. p. 321, &c.

Attendant terms.

As to how far attendant terms could have been used to bar a right to dower, see *Mole* v. *Smith*, Jac. R. 496; *Radnor* v. *Vandebendy*, Show. P. C. 69; Pr. Ch. 65; *Swannock* v. *Lifford*, 2 Atk. 208; Ambl. 6; Co. Litt. 208 a, n.; *Willoughby* v. *W.*, 1 T. R. 763; *Maundrell* v. *M.*, 10 Ves. 246; *Wynn* v. *Williams*, 5 Ves. 130; Butl. Co. Litt. 290 b, n. l. s. 13; *Re Sleeman*, 4 Ir. Ch. 563; 8 & 9 Vict. c. 112, *post*; *Corry* v. *Cremorne*, 12 Ir. Ch. 136; *Anderson* v. *Pignet*, 8 Ch. 180, *post*; and as to when a court of equity would relieve against them, see *Dudley* v. *D.*, Prec. Ch. 241; *Radnor* v. *Rotherham*, *ibid.* 65; *Williams* v. *Lambe*, 3 B. C. C. 264; *Wilkins* v. *Lynch*, 1 Hayes, Ir. R. 98.

Uses to bar dower.

The form of limitation to uses to bar dower formerly used is discussed, Gilb. on Uses, by Sugd. 321—325, n.; Fearne, 347, n. by Butl. 7th ed.; 2 Dav. Conv. 210; 3 Dav. Conv. 249, n. (*o*); *Collard* v *Roe* (4 De G. & J. 525). A limitation to the old uses to bar

3 & 4 Will. 4, c. 105, s. 1.

dower did not deprive of her dower a woman married since the passing of the Act (*Fry* v. *Noble*, 7 D. M. & G. 687; *Re Michell*, *Moore* v. *M.*, [1892] 2 Ch. 99).

Purchase without notice.

The defence of purchase for value without notice failed as against a claim for dower (*Williams* v. *Lambe*, 3 Brown, C. C. 264; see *Collins* v. *Archer*, 1 R. & M. 292; *Phillips* v. *P.*, 4 D. F. & J. 217; *Ind, Coope* v. *Emmerson*, 12 App. Cas. 300).

Forfeiture of dower by adultery.

Under 13 Edw. 1, c. 34 (repealed by Administration of Estates Act, 1925, *post*), a woman forfeited her dower by adultery, even though brought about by her husband's cruelty (*Hetherington* v. *Graham*, 6 Bing. 139; *Woodward* v. *Dowse*, 10 C. B. (N.S.) 722; *Bostock* v. *Smith*, 34 Beav. 57). Under the old law a divorce *à vinculo matrimonii* was a bar to dower (*Frampton* v. *Stephens*, 21 Ch. D. 164), and so has been a decree for dissolution of marriage (*ibid.*). As to the effect of a divorce *a mensa et thoro*, see Rolfe v. *Perry*, 11 W. R. 357; *Shute* v. *S.*, Prec. Ch. 111.

Bar by acknowledged deed.

Dower was extinguished by a deed duly acknowledged by the wife, even where her name was not inserted as a co-grantor (*Dent* v. *Clayton*, 12 W. R. 903).

Remedies for the recovery of dower.

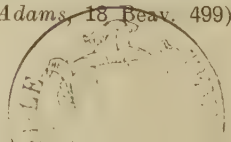
The remedies for the recovery of dower before 1860 were by writs of dower. Since that year the usual remedy has been by action in Chancery. For instances of such actions, see *Sheaf* v. *Cave* (24 Beav. 259); *Bamford* v. *Bamford* (5 Hare 203); *Marshall* v. *Smith* (5 Giff. 37); *Dawson* v. *Whitehaven* (6 Ch. D. 218); *Meek* v. *Chamberlain* (8 Q. B. D. 31); see also the forms of orders, Seton, 6th ed. 955, 1546; *Kernaghan* v. *M'Nally* (11 Ir. Ch. Rep. (N.S.) 52). As to costs, see *Harris* v. *H.* (11 W. R. 62); *Stormont* v. *Wickens* (14 W. R. 192).

Limitation.

An action for the assignment of dower is not within the R. P. Lim. Acts, 1833 and 1874 (*Williams* v. *Thomas*, [1909] 1 Ch. 713, overruling *Marshall* v. *Smith*, 5 Giff. 37). As to the arrears of dower which may be recovered, see *ante*, p. 228.

Freebench in case of copyholds.

The Dower Act did not apply to freebench (*Smith* v. *Adams*, 5 D. M. & G. 712). Freebench (abolished by sect. 45 of the Administration of Estates Act, 1925, as to all deaths after 31st December, 1925, from which date also Copyhold Tenure is abolished by Part V. of L. P. Act, 1922), in the absence of any custom to the contrary, did not attach even in right until the husband's death (*Benson* v. *Scott*, 12 Mod. 49; 2 Ves. sen. 633; *Godwin* v. *Winsmore*, 2 Atk. 526; *R.* v. *Lopen*, 2 T. R. 580; *Brown* v. *Raindle*, 3 Ves. jun. 256). And therefore any alienation by him *alone*, even by contract (*Hinton* v. *H.*, 2 Ves. sen. 631), to take effect in his lifetime, defeated the widow's claim (*Benson* v. *Scott*, 3 Lev. 385; *Goodwin* v. *Windmore*, 2 Atk. 526; *Farley's Case*, Cro. Jac. 36; Moor, 758; *Dagworth* v. *Radford*, Sir W. Jones, 462; 1 Freem. 516; Gilb. Ten. 321; see 2 Watk. on Cop. 73—79; Shelford on Copyholds, pp. 68—72). And if a man surrendered copyholds to the use of his will, and then devised them, the widow did not take freebench (*Lacy* v. *Hill*, 19 Eq. 350). Under sect. 3 of the Wills Act a devise without a surrender had the same effect (*ibid.*; see *Powdrell* v. *Jones*, 2 Sm. & G. 407, where a devise did not bar freebench, the special custom being that the title of the wife could only be destroyed by voluntary surrender; *Riddell* v. *Jenner*, 10 Bing. 29; *Doe* v. *Gwinnell*, 1 Q. B. 682). Where a purchaser of a copyhold took a surrender, but died before admittance, his widow was not entitled to freebench (*Smith* v. *Adams*, 5 D. M. & G. 712). *Secus*, where the heir of the purchaser had been admitted (*Vaughan* v. *Atkins*, 5 Burr. 2764). A widow was not entitled to freebench out of a moiety of copyholds to which her husband was entitled in remainder after a life estate (*Smith* v. *Adams*, 18 Beav. 499). Nor out of trust estates (*Forde*



v. *Wade*, 4 Bro. C. C. 520). The widow of a tenant in tail was entitled to freebench, though the custom was confined to widows of tenants in fee (*Doe* v. *Sanders*, 3 Dougl. 303). Freebench was not barred by a settlement (*Willis* v. *W.*, 34 Beav. 340). See further Scriven, 69, Elton, 157. **3 & 4 Will. 4, c. 105, s. 1.**

The Dower Act extended to lands of gavelkind tenure (*Farley* v. *Bonham*, 2 J. & H. 177). By the custom of gavelkind (abolished by sect. 45 of the Administration of Estates Act, 1925, *post*, in the case of all deaths after 1925), the wife, after the death of her husband, had for her dower a moiety of all lands of her husband so long as she continued chaste (Robinson, Gav., 205—236; see *Re Maskell and Goldfinch*, [1895] 2 Ch. 525). But she was not entitled as of right to have an apportioned part of the proceeds of sale of lands assigned to her, but only to a proportionate share of the income of the purchase money (*Re Wilson, W.* v. *Clark*, [1916] 1 Ch. 220). Gavelkind.

2. When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable (*m*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) (*n*), then his widow shall be entitled in equity to dower out of the same land. Widows to be entitled to dower out of equitable estates.

(*m*) For example of interests partly legal and partly equitable equal to an estate of inheritance in possession, see *Re Michell, Moore* v. *M.*, ([1892] 2 Ch. 99). In that case, where the husband was at his death entitled to an equitable estate *pur autre vie*, and also a legal remainder expectant on the death of the *c. q. vie* without a second son, the widow took no dower.

Before this Act there was no dower out of equitable estates (*Dawson* v. *Whitehaven*, 6 Ch. D. 221; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388; *Re Michell, Moore* v. *M.*, [1892] 2 Ch. 93). Old law.

A woman was not entitled to dower out of a legal estate in remainder (*Lloyd* v. *L.*, 4 Dru. & W. 370), or out of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture (*D'Arcy* v. *Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a; Co. Litt. 203 a, Harg. note; Perk. 333, 348; *Forder* v. *Wade*, 4 Br. C. C. 520). On the surrender in deed or in law of the life estate to the husband the right of dower attached (1 Roll. Abr. 676, pl. 40). But if a rent were reserved on a lease for years, made before marriage, the wife was entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cesset executio* during the term (Prec. Ch. 250). And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, was dowable after payment of them (Co. Litt. 41 a; 8 Rep. 96 a; 2 Vern. 404). Where a husband was seised in fee subject to a trust term to secure life annuities and to pay himself half the surplus rents, his widow was entitled to have her dower set out (*Sheaf* v. *Cave*, 24 Beav. 259). Where a husband was entitled to an equitable estate in fee simple determinable in the event, which took place, of his dying without leaving issue living at his decease, his widow was, notwithstanding the operation of the executory devise over, entitled to dower (*Smith* v. *Spencer*, 4 W. R. 729). Reversions and remainders.

3 & 4 Will. 4, c. 105, s. 2.

Joint tenants.

(*n*) The widow of a joint tenant in fee or in tail was not entitled to dower, because, upon the death of one of the joint tenants, the estate went to the survivor, who was then in from the first grantor, and might plead the deed creating the estate as originally made to him, without naming his companion (Litt. s. 45; Co. Litt. 37 b, 30 a, 183 a). And if a joint tenant aliened his share, his wife was not endowed (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615). A widow of a tenant in common was in the circumstances held entitled to dower (*Reynard* v. *Spence*, 4 Beav. 103).

Seisin shall not be necessary to give title to dower.

3. When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof: provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

Right of entry.

A right of entry is where a man, who has the possession of lands, is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover possession (see Rosc. on Real Actions, 79, &c.; 1 Real Prop. Rep. 493). The time within which a right of entry must be prosecuted is now prescribed by R. P. Lim. Acts, 1833 and 1874 (see *ante*, p. 147 *et seq.*). As to the relation back of an actual entry, see *Ocean* v. *Ilford*, [1905] 2 K. B. 493. See now as to rights of entry sects. 1 (2) (e), 3 (3) and 4 (2) (b) of L. P. Act, 1925, *post*.

As to seisin, mentioned in the marginal note to this section, see the 2nd ed. of this work, p. 374, and authorities there cited. By sect. 51 of L. P. Act, 1925, *post*, all lands and interests therein lie in grant and are incapable of being conveyed by livery or livery and seisin.

No dower out of estate disposed of.

4. No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

A devise of "all my real estate" to trustees on trust for sale barred dower under sect. 4 (*Lacey* v. *Hill*, 19 Eq. 346; see *Rowland* v. *Cuthbertson*, 8 Eq. 466).

Priority to partial estates, charges, and specialty debts.

5. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Effect of sections.

By the above sections all dispositions by the husband were made effectual as against the right of his widow to dower. Thus a mortgage by a husband was a bar *pro tanto* of dower (*Jones* v. *J.*, 4 K. & J. 361).

Notwithstanding the Admon. of Estates Act, 1833 (repealed by Admon. of Estates Act, 1925, *post*, see now sect. 32 of that Act), and the 5th section of this Act, the widow's right to dower or free-bench had still priority over mere creditors of a deceased husband

(*Spyer* v. *Hyatt*, 20 Beav. 621; *Jones* v. *J.*, *supra*; *Northern Bank* v. *M'Machin*, [1909] 1 I. R. 374; but see Williams, R. P. 19th ed. 318, n.). 3 & 4 Will. 4, c. 105, s. 5.

6. A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land. Dower may be barred by a declaration in a deed;

A declaration was sufficient under this section, although the deed was not executed by the husband (*Fairley* v. *Tuck*, 27 L. J. Ch. 28; 6 W. R. 9). A declaration in a conveyance, prior to this Act, did not deprive a wife, married after this Act, of her dower (*Fry* v. *Noble*, 20 Beav. 598; 7 D. M. & G. 687; *Clarke* v. *Franklin*, 4 K. & J. 266). A recital might operate as a declaration (*Re Gibbon*, *Moore* v. *G.*, [1909] 1 Ch. 367).

7. A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land. or by a declaration in the husband's will.

8. A right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid. Dower shall be subject to restrictions.

9. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will. Devise of real estate to the widow shall bar her dower.

This Act gave the husband complete power to defeat the right of dower, either by deed or will (sects. 4 and 5); and where any interest in the land otherwise liable to dower was given to the wife, in order to preserve the right of dower, an intention to that effect had to be declared (sect. 9), although no gift to the wife out of personal estate was to defeat the right of dower, unless an intention to do so be declared by the will (sect. 10). Defeating the right to dower.

Where a testator devised his real and personal estate to trustees upon trust for sale and conversion and payment of an annuity out of the income of the proceeds to his widow, she was deprived of her right to dower by sect. 9 (*Rowland* v. *Cuthbertson*, 8 Eq. 466; *Lacey* v. *Hill*, 19 Eq. 346; *Re Thomas*, *T.* v. *Howell*, 34 Ch. D. 166). A devise by a husband to his wife of his fee simple land deprived her of dower out of land of which he was tenant in tail (*Cooper* v. *C.*, 6 Ir. Ch. R. 221).

Under the Intestates Act, 1890 (repealed as to deaths after 1925 by Admon. of Estates Act, 1925), the estate of an intestate leaving no issue, which did not exceed £500, belonged to his widow. (See *Re Green*, 17 Times L. R. 242.) If the estate exceeded £500 she had a charge for £500. This right of the widow was in addition to Intestates' Estates Act, 1890.

3 & 4 Will. 4, c. 105, s. 9.

her interest in the rest of the intestate's realty and personalty, *e.g.* her dower (see sect. 4 of the Act); but the amount of the dower was subject to abatement in respect thereof (*Re Charriere, Duret* v. *C.*, [1896] 1 Ch. 912; *Rea* v. *R.*, [1902] 1 I. R. 451). The right might be barred by a provision in a settlement (*Re Hogan, H.* v. *H.*, [1901] 1 I. R. 168). The Act did not apply to a partial intestacy (*Re Twigg, T.* v. *Black*, [1892] 1 Ch. 579), but applied where the executor and all the beneficiaries named in a will predeceased a testator (*Re Cuffe, Fooks* v. *C.*, [1908] 2 Ch. 500). The value of the estate had to be taken as at the death; and if it did not then exceed £500 the whole belonged to the widow, notwithstanding that by the falling in of a contingent reversionary interest it became of greater value (*Re Heath, H.* v. *Widgeon*, [1907] 2 Ch. 270). See now as to all deaths after 1925 sects. 46 *et seq.* of the Admon. of Estates Act, 1925, *post*.

Bequest of personal estate to the widow shall not bar her dower.

10. No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared (*Ayres* v. *Willis*, 1 Ves. sen. 230).

Agreement not to bar dower may be enforced.

11. Provided always, and be it further enacted, that nothing in this Act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

In purchasing an estate free from dower by force of this Act, it was advisable to ascertain that the vendor had not bound himself by agreement not to bar his wife's dower (Sugd. V. & P. 548, pl. 24, 11th ed.).

Legacies in bar of dower still entitled to preference.

12. Nothing in this Act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Preference of legacies in lieu of dower.

When a legacy was given to a wife in satisfaction of dower, she did not, in case assets proved deficient, abate in proportion to other legatees (*Burridge* v. *Bradyl*, 1 P. Wms. 127; *Blower* v. *Morrett*, 2 Ves. sen. 420; *Davenhill* v. *Fletcher*, Ambl. 244).

But this rule did not apply where the testator at his death was not entitled to any real estate (*Acey* v. *Simpson*, 5 Beav. 35); or where his only real estate was conveyed to him with a declaration against dower (*Roper* v. *R.*, 3 Ch. D. 714), or where he disposed by will of all his real estate (*Re Greenwood, G.* v. *G.*, [1892] 2 Ch. 295). Kekewich, J., refused to extend the rule to a legacy given in satisfaction of an ascertained debt (*Re Wedmore, W.* v. *W.*, [1907] 2 Ch. 377; but see *Davies* v. *Bush*, Younge, 343; *Re Whitehead, W.* v. *Street*, [1913] 2 Ch. 56).

A legacy to a wife in satisfaction of dower carried interest only for one year from the death (*Re Bignold, B.* v. *B.*, 45 Ch. D. 496).

13. No widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris. **3 & 4 Will. 4, c. 105, s. 13.**

Certain dowers abolished.

An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34a; 2 Bl. Comm. 132, 133.

14. This Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

Act not to take effect before January 1, 1834.

See *Fry* v. *Noble* (20 Beav. 598; 7 D. M. & G. 687); and *Clarke* v. *Franklin* (4 K. & J. 266).

TENANT BY THE CURTESY.

Tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise, is abolished by sect. 45, sub-s. 1 (b) of the Admon. of Estates Act, 1925, *post*, as to all deaths after Dec. 31, 1925, (but see as to entailed interests sect. 130, sub-s. 4 of L. P. Act, 1925, *post*). For the new provisions made for husbands and wives on intestacy see sect. 46 of the Admon. of Estates Act. The following statement of the law of tenancy by the curtesy is abbreviated from that in the 2nd ed. of this work, pp. 378-9.

Tenant by the curtesy of England was where a man married a woman solely seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and had by her issue, born alive, and capable of inheriting her estate. In this case the husband, on the death of his wife, held the lands for his life, as tenant by the curtesy of England (Litt. ss. 35, 52; 2 Bl. Comm. 126). And it seems that a husband might have curtesy of an estate which his wife had inherited (Williams, Real Prop., App. E. 572, 14th ed.); and of money which was to be considered as land (*Cunningham* v. *Moody*, 1 Ves. sen. 174). A husband was still entitled to curtesy in real estate as to which his wife, married since 1882, had died intestate (*Hope* v. *H.*, [1892] 2 Ch. 336).

Requisites of a tenancy by the curtesy.

Four circumstances were requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage were *voidable* only, the husband was tenant by the curtesy, unless the marriage were actually avoided during the lives of *both* parties (*Hicks* v. *Harris*, Carth. 271; 2 Salk. 548; 4 Mod. 182; see 2 Ves. sen. 245; 7 Rep. 43 b).

2nd. The wife had to have a seisin in deed of *corporeal* hereditaments (Co. Litt. 29 a), either before or after issue born (*ibid.* 30 a).

In some cases where it was impossible to obtain seisin in deed, seisin in law was sufficient to give rise to curtesy. Thus, "where a wife who hath issue inherits an advowson or rent in fee and dieth before the rent becomes due or the church becomes void, she has but a seisin in law, yet the husband shall be tenant by the curtesy because he could by no industry attain to any other seisin (Co. Litt.

3 & 4 Will. 4, c. 105, s. 14.

29 a)." On the same principle, where a father devised land to a married daughter who predeceased him, her husband took an estate by the curtesy by virtue of sect. 33 of the Wills Act, 1837 (*Eager* v. *Furnivall*, 17 Ch. D. 115).

Where there was a devise in fee simple, with an executory devise over, the husband's right to curtesy attached on the first estate, and was not defeated by its determination (see *Buckworth* v. *Thirkel*, 10 Moore, 235, n.; 2 Bing. 447; 3 Bos. & P. 652, n.; 4 Doug. 323; see 2 Sim. 251; 2 Rop. on Husband and Wife, Jac. ed. Addenda, No. 2; Butl. Co. Litt. 241 a, n. (4); *Boothby* v. *Vernon*, 9 Mod. 147). But see *Barker* v. *B.*, 2 Sim. 249.

Curtesy arose out of an estate of inheritance; it could not arise out of an estate *pur autre vie* (*Stead* v. *Platt*, 18 Beav. 54). And the wife must have been solely seised of an estate in fee simple or fee tail. There was no curtesy in respect of an estate held in joint tenancy; but it existed in respect of an estate held under a tenancy in common (*Palmer* v. *Rich.*, [1897] 1 Ch. 141) and in respect of the estate of a coparcener (Co. Litt. 174 b, 183 a).

As to the effect of the wife's election on the husband's curtesy, see *Griggs* v. *Gibson* (1 Eq. 685).

3rd. The wife had to have issue born alive, and capable of inheriting the estate (Co. Litt. 29 b; 8 Rep. 34 b; Dyer, 25 b; see *Jones* v. *Ricketts*, 31 L. J. Ch. 753).

4th. The last circumstance required to consummate the right of the husband was the death of the wife (Co. Litt. 20 a).

Copyholds.

Copyholds were not subject to curtesy, except by custom (4 Rep. 22 a, 30 b; *Paulter* v. *Cornhill*, Cro. Eliz. 361), to which resort had to be had for determining what portion of the lands of a feme copyholder a husband took. See Co. Litt. 30 a, 111 a; 2 Sid. 153; Robinson on Gav., pp. 177—204; Scriven on Cop. 74, 7th ed.; Shelford on Copyholds, pp. 72—74.

Equitable estates.

Equity followed the law in the quality of estates, and therefore a husband became tenant by the curtesy of an equitable estate of inheritance of the wife, and this notwithstanding a direction to pay the rents to her separate use (*Morgan* v. *M.*, 5 Madd. 408; *Hearle* v. *Greenbank*, 3 Atk. 715; *Pitt* v. *Jackson*, 2 Br. C. C. 51; *Follett* v. *Tyrer*, 14 Sim. 125). So where there was a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use (*Appleton* v. *Rowley*, 8 Eq. 139; *contra*, *Moore* v. *Webster*, 3 Eq. 267). But a disposition by a wife of her separate property, either by deed or will prevented an estate by the curtesy (*Cooper* v. *Macdonald*, 7 Ch. D. 288).

Adverse possession, commenced before the equitable estate of the wife began, by a party claiming by a title paramount to the trust, who retained possession until after the death of the wife, prevented any title by the curtesy (*Parker* v. *Carter*, 4 Hare, 400).

The husband might be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance should descend to the heir of the wife, and that the husband should not be a tenant by the curtesy (*Bennett* v. *Davis*, 2 P. Wms. 316); although a *partial* exclusion from the enjoyment of the property had not that effect (5 Madd. 412).

Powers of tenant by the curtesy.

By the Fines and Recoveries Act, 1833, s. 22 (*ante*, p. 321), an estate by the curtesy qualifies a person to be protector of a settlement. And by sect. 20, sub-s. 1 (vii) of the S. L. Act, 1925, *post* (replacing the S. L. Act, 1882, sect. 58 (1) (viii), a tenant by the curtesy has the powers of a tenant for life.

THE INHERITANCE ACT, 1833.

3 & 4 Will. IV. c. 106.

An Act for the Amendment of the Law of Inheritance.
[29th August, 1833.]

§ 1. *Interpretation*...407.
§ 2. *Root of Descent*...408.
§ 3. *Effect of Devise to Heir, or Limitation to Grantor*...410.
§ 4. *Effect of Limitation to Heirs as Purchasers*...411.
§ 5. *Brothers and Sisters*...412.
§ 6. *Lineal Ancestors*...412.
§§ 7. *and* 8. *Male Line Preferred*...412.
§ 9. *Half Blood*...413.
§ 10. *Attainted Blood*...414.
§ 11. *Commencement of Act*...414.
§ 12....414.

The Admon. of Estates Act, 1925, *post*, abolishes (sect. 45) with regard to the real estate of every person dying after Dec. 31, 1925, all existing modes, rules and canons of descent, whether operating by the general law or by local custom. For the present devolution of property on intestacy see sects. 46 *et seq.* of that Act. But by sect. 51 the foregoing provisions of the Act do not apply to any beneficial interest in real estate of a lunatic or defective living and of full age on 1st January, 1926, who is unable to make a will and thereafter dies intestate without having recovered testamentary capacity; and such beneficial interest is to devolve in accordance with the general law in force before 1926. The present Act therefore governs such cases; and gifts to the heir or heirs, or any particular heir or class of heirs, or the heir, either general or special, also confer interests on the persons who would have answered the description under the law in force before 1926 (L. P. Act, 1925, sects. 131 and 132, *post*).

See also sect. 51, sub-s. 1 of the Admon. of Estates Act, 1925, *post*, and as to entailed interests sub-s. 4 of that section and sect. 130, sub-s. 4 of L. P. Act, 1925, *post*. The notes to the present Act in the former editions of this work (pp. 380—391 in the 2nd ed.) have been curtailed by the omission or shortening of passages relating to the law before the passing of the Act and other matters, the Act itself being retained in this edition in view of its having governed descents down to the end of 1925, as well as of its continued application in the cases above referred to.

3 & 4 Will. 4, c. 106, s. 1.

Meaning of words in the Act.

"Land."

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows (that is to say), the word "land" shall extend to

3 & 4 Will. 4, c. 106, s. 1.

manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"The purchaser."

"Descent."

"Descendants."

"Persons last entitled."

"Assurance."

Number and gender.

For information on the subject of the law of descents before the passing of this Act the reader is referred to 2 Bl. Comm. 200, 240; Bl. on the Law of Descents; Watkins and H. Chitty on Descents; Bac. Abr. and Com. Dig. Descents; Hale's Hist. C. L. 206—248, and to the Report of the Real Property Commissioners, extracts from which, explaining the general object of the alterations made by the Act, will be found on pp. 381—2 of the 2nd ed. of this work.

Equitable estates.

Equitable estates are subject to the same rules of descent as *legal* (2 P. Wms. 668; 1 Rep. 121 b; 4 Rep. 22; 2 Eden 258; 1 Sand. Uses, 217, 3rd ed.; *Trash* v. *Wood*, 4 M. & C. 324; *Re Hudson, Cassels* v. *H.*, [1908] 1 Ch. 655).

Descent shall always be

2. In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never

be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purpose of this Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

3 & 4 Will. 4, c. 106, s. 2.

traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof (Law of Property Amendment Act, 1859, s. 19).

22 & 23 Vict. c. 35, s. 19.

The last preceding section shall be read as part of the 3 & 4 Will. 4, c. 106 (*ibid.*, s. 20).

Effect of this section in the case of purchase from an heir.

A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption contained in this section until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase (*Dorling* v. *Claydon*, 1 H. & M. 402). Where an action to try the validity of a will was compromised on the terms that the rights of the female plaintiff to certain lands should be the same as if there had been an intestacy, she took that land by descent, not by purchase (*Blake* v. *Hynes*, 11 L. R. Ir. 284).

Estates in remainder or reversion, or by executory devise.

The descent under the present Act of an estate in remainder or reversion, or by executory devise, is analogous to the descent of an estate taken by descent from a purchasing ancestor (*Ingilby* v. *Amcotts*, 21 Beav. 585).

For the purpose of estoppel against a tenant the heir of the landlord may be his privy in blood though the heirship is ascertained under this section by tracing descent from an ancestor of the landlord (*Weeks* v. *Birch*, 69 L. T. 759).

Whole share of coparcener dying intestate, leaving a son. descends on the son.

Where a coparcener died intestate leaving a son, the whole of her share descended on her son (*Cooper* v. *France*, 19 L. J. Ch. 315); and the same principle applied in the case of her leaving more remote descendants (*Paterson* v. *Mills*, 19 L. J. Ch. 310; *Re Matson, James* v. *Dickinson*, [1897] 2 Ch. 509). Where land was limited to the "right heirs" of A., who were females, they took as joint tenants and not coparceners, and there was no right of representation (*Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 350; *Re Baker, Pursey* v. *Holloway*, 79 L. T. 343). See *Owens* v. *Gibbons*, [1902] 1 Ch. 636. See the previous discussions of descent among coparceners in 5 Jur. 641, 763; 23 Law Mag. 279; 1 Hayes's Convey. 314, 5th ed.; 1 Jarm. & Blyth. Convey. by Sweet, 139, 140; 10 Jur. 71—75, 112, 132, 160, 173.

3 & 4 Will. 4, c. 106, s. 2.

Customary descents.

The rule as to tracing the descent from the purchaser applied where there was a customary descent (sect. 1, *ante*). If the custom was found applicable by reason of the parties being within the requisite degree of consanguinity, the customary mode of descent was to be applied, and the descent traced according to the directions of the Act. If the parties were not within the requisite degree, the directions of the Act were to be followed, the descent being traced according to common law (*per* Crompton, J.; *Muggleton* v. *Barnett*, 2 H. & N. 653; *Re Smart, S.* v. *S.*, 18 Ch. D. 165; see Williams, Real. Prop. App. A.). An equitable interest in copyholds descended to the customary heirs (*Re Hudson, Cassels* v. *H.*, [1908] 1 Ch. 655). When the custom was that copyholds for the first descent after a surrender descend to the eldest son, and if no surrender to the youngest, the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy" (*Bickley* v. *B.*, 4 Eq. 216). See Scriven, p. 167 *et seq.*, 7th ed. Copyhold and customary tenure were abolished by Part V. of L. P. Act, 1922, as from 1st January, 1926.

Lands of gavelkind tenure, chiefly found in Kent, descended to all sons in equal shares, and in default of sons to all daughters (Robinson on Gavelkind, 5th ed. p. 44). This custom (which in Kent was the common law, *Re Chenoweth, Ward* v. *Dwelley*, [1902] 2 Ch. 488) extended to collaterals (*Re Chenoweth, Ward* v. *Dwelley, supra*; see *Crump* v. *Norwood*, 7 Taunt. 362). Lands of borough English tenure descended to the youngest son (Robins. Gavelkind, 236). In the case of the descent of lands of gavelkind or borough English tenure, the *jus representationis* attached to the custom (*Hook* v. *H.*, 1 H. & M. 43; *Clements* v. *Scudamore*, 1 P. Wms. 65). In the case of other customary descents, however, where the express terms of the custom were silent, the descent was in accordance with the common law (*Rider* v. *Wood*, 1 K. & J. 644; *Re Smart, S.* v. *S.*, 18 Ch. D. 165; see *Locke* v. *Colman*, 1 My. & Cr. 423). Descent by the custom of gavelkind or borough English or any other custom was abolished with regard to the real estate and personal inheritance of every person dying after 31st December, 1925, by sect. 45 of Admon. of Estates Act, 1925, *post*.

Right of posthumous heir.

Although lands had actually descended in the first instance to the person who was heir of the party last seised at the time of his decease, yet, if a nearer heir was afterwards born, property shifted to the nearest heir who subsequently came into being (see *Rider* v. *Wood*, 1 K. & J. 644; Cru. Dig. Descent, Ch. III. s. 14). A posthumous heir was entitled to the rents of a descended estate only from the date of his birth, and the qualified heir was entitled to the rents which accrued before the birth of the posthumous heir, whether actually received before that time or not (*Richards* v. *R.*, Johns, 754; *Re Mowlen*, 18 Eq. 9; *Re Wilmer, Moore* v. *Wingfield*, [1903] 1 Ch. 885, 888; see, however, *Goodale* v. *Gawthorne*, 2 Sm. & Giff. 375).

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

3. That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person

who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

3 & 4 Will. 4, c. 106, s. 3.

This section of the Act is in direct contravention of two old-established rules of law—(a) that a man could not make his right heir take by purchase, and (b) that a grantor could not enable his heir general to take a remainder as purchaser under a limitation to his heirs. See the 2nd ed. of this work, pp. 385—7, and authorities there cited; and as to limitations to heirs since 1st January, 1926, see sects. 131 and 132 of L. P. Act, 1925, *post* (the former of which abolishes as from that date the Rule in *Shelley's Case* (1 Rep. 93)), and sect. 51, sub-sect. 1 of Admon. of Estates Act, 1925, *post*.

It does not seem certain whether this section applied to the case of a devise of copyholds to an heir who disclaimed all interest under the will, and entered as heir of the testator (*Bickley* v. *B.* 4 Eq. 216).

Devise to "right heirs."

It applies to a devise to "right heirs" (*Owen* v. *Gibbons*, [1902] 1 Ch. 636). So where a testator devised lands to his own right heirs who were females, they took as joint tenants and not as coparceners (*Re Baker, Pursey* v. *Holloway*, 79 L. T. 343; see *Swaine* v. *Burton*, 15 Ves. 371; *Berens* v. *Fellowes*, 56 L. T. 391; *Owen* v. *Gibbons*, *supra*).

Construction of devises to "heir."

Under a devise of customary lands to the testator's heir, his heir-at-law took, and not his customary heir (*Thorp* v. *Owen*, 2 Sm. & G. 90; *Polley* v. *P.*, 31 Beav. 363; *Garland* v. *Beverley*, 9 Ch. D. 213; see *Sladen* v. *S.*, 2 J. & H. 369). Copyhold and customary tenure were abolished from 1st January, 1926, by L. P. Act, 1922, Part V.

A devise of the whole fee simple in the testator's residuary real estate to trustees, in trust to convey to such person as should answer the description of the testator's heir-at-law, broke the descent of real estate which had descended to the testator *ex parte materna*, and the trustees were bound to convey to the common law heir (*Davis* v. *Kirk*, 2 K. & J. 391; compare the grant in *Heywood* v. *H.*, 34 Beav. 317). As to a devise to "my nearest male heir" see *Lightfoot* v. *Maybery*, [1914] A. C. 782.

Where a settlor entitled *ex parte materna* limited lands (by an ultimate limitation in a settlement), to the right heirs of her mother, whose heir-at-law she then was, the estate descended on her intestacy to her own heir *ex parte materna* (*Moore* v. *Simpkin*, 31 Ch. D. 95).

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

4. When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

3 & 4 Will. 4, c. 106, s. 4.

The above section lays down a rule of descent applicable as well to limitations to heirs general as to limitations to heirs special.

A gift to the heirs of a person to whom no estate is given is a gift to them as *personæ designatæ*, and they take as joint tenants (*Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 350).

Brothers, &c. shall trace descent through their parent.

5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Before this Act the descent between brothers and sisters was considered as *immediate*; and in making out their title *to each other*, the common father need not have been named, though living, but the descent between them was exactly the same as if he had been dead (Watk. Desc. 111, n.; H. Chitty on Desc. 64, 354; *Collingwood* v. *Pace*, 1 Ventr. 413; Bridg. by Bann. 410).

Lineal ancestor may be heir in preference to collateral persons claiming through him.

6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

Old rule excluding the ascending line.

It was an old maxim of law that an inheritance might lineally descend but not ascend (3 Rep. 40a). The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated (*Cowper* v. *C.*, 2 P. Wms. 666).

By the present section lineal ancestors are admitted.

Where a son, legitimate in Scotland by the subsequent marriage of his parents, died intestate as to lands in England of which he was seised in fee and without issue, the father did not inherit under this section (*Re Don*, 4 Drew. 194). Compare the rule laid down in *Doe* v. *Vardill*, 7 Cl. & F. 895, that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in England. And see *Re Grey, G.* v. *Stanford*, [1892] 3 Ch. 88; and *Shaw* v. *Gould*, L. R. 3 H. L. 55.

The male line to be preferred.

7. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

Where, after due and sufficient investigation, there is no reasonable possibility of ascertaining that there are descendants from the paternal ancestors, then under the above section the descendants of the maternal ancestors must be sought for (*Greaves* v. *Greenwood*, 2 Ex. D. 297). As to what is sufficient evidence of the extinction of superior lines of descent, see *ibid.*; *Lyell* v. *Kennedy* (18 Q. B. D. 811); *Rawlinson* v. *Miller* (1 Ch. D. 52); *Jeakes* v. *White* (6 Exch. 880); and the note, *ante*, p. 182.

3 & 4 Will. 4, c. 106, s. 7.

8. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

This statute has declared the law to be in accordance with the position laid down by Blackstone (2 Comm. 238; *Davies* v. *Lowndes*, 5 Bing. N. C. 169). It was decided, that where a person seised of an estate *ex parte materna* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte materna* (*Hawkins* v. *Shewen*, 1 Sim. & Stu. 257; see Hale's Hist C. L. by Runn. 2nd vol. 120). As to what is sufficient evidence of the extinction of a superior line of descent, see *Jeakes* v. *White* (6 Exch. 880), and the cases quoted under sect. 7.

9. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be the next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

The law before this Act excluded the half blood from taking by descent, subject to some exceptions and qualifications stated on p. 390 of the 2nd. ed. of this work, including the cases of estates tail and titles of honour.

Exceptions to the rule excluding the half blood.

A brother or sister of the half blood was entitled under the Statute of Distribution (1 Jac. 2, c. 17, s. 7) to share the personal estate of an intestate equally with one of the whole blood, inasmuch as they were both equally near of kin to the intestate; *Jessop* v. *Watson*, 1 M. & K. 665; *Burnett* v. *Mann*, 1 Ves. sen. 156). But see now sect. 46, sub-sect. 1 (v) of Admon. of Estates Act, 1925, *post*.

3 & 4 Will. 4, c. 106, s. 10.

After the death of a person attainted, his descendants may inherit.

10. That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four.

The effect of attainder.

Persons attainted of high treason or felony were incapable of inheriting lands or of transmitting them by descent to their posterity (Co. Litt. 8 a; Cro. Car. 566). Another consequence of such an attainder was the corruption and extinction of all hereditary blood in the person attainted, by which he was rendered not only incapable of himself inheriting or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor (11 Rep. 1 b; Co. Litt. 391 b; see Yorke's Law of Forfeiture, 72, 4th ed.; 2 Blac. Com. 251; 4 *ibid.* 388; Bl. Considerations on the Law of Forfeiture for High Treason; Bac. Abr. Forfeiture; Burn's J. Forfeiture). But as between two sons of an attainted father, there was nothing to hinder one brother from inheriting to the other (1 Ventr. 413; Yorke's Law of Forfeiture, 83, 4th ed.; *Kynnaird* v. *Leslie*, L. R. 1 C. P. 389).

Statutes as to attainder.

33 & 34 Vict. c. 23.

By the Forfeiture Act, 1870, s. 1, it is enacted that, from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat. As to the rights of the Crown under the law before the Act see *Talbot* v. *Jevers*, [1917] 2 Ch. 363. But nothing in the Act is to affect the law of forfeiture consequent upon outlawry (see also 54 Geo. 3, c. 145; Hansard, Parl. Debates, vol. 27, pp. 527—538; Trustee Act, 1925, s. 65, *post*). As to a tenant in tail convicted of felony, see *Re Gaskell and Walter*, [1906] 2 Ch. 1; quoted, *ante*, p. 312.

Act not to extend to any descent before January, 1834.

11. This Act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

Limitations made before January 1, 1834, to the heirs of a person then living, shall take effect as if this Act had not been made.

12. Where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

ADMINISTRATION OF ESTATES OF DECEASED PERSONS.

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I.—The Land Transfer Act, 1897, ss. 1—5, 24—26.

60 & 61 Vict. c. 65.

An Act to establish a Real Representative and to Amend the Land Transfer Act, 1875. [6th August, 1897.]

Part I.

Establishment of a Real Representative.

60 & 61 Vict. c. 65, s. 1.

Devolution of legal interest in real estate on death.

1.—(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2.) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4.) The expression "real estate," in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5.) This section applies only in cases of death after the commencement of this Act.

Part I. of this Act applied in the case of all deaths occurring between 1st January, 1898, and 31st December, 1925. It was repealed by L. P. Act, 1922, as respects deaths occurring after 31st December, 1925 (see L. P. (Amendment) Act, 1924, s. 1 and sched. 1, and as to the date 15 Geo. 5, c. 4). The remainder of the Act was repealed by the Land Registration Act, 1925, *post*. For the similar provisions, in respect of deaths after 1925, of the Admon. of Estates Act, 1925, see that Act, *post*.

Law as to persons dying before 1898.

Sect. 25 of the Act (*post*, p. 425), fixed January 1, 1898, as the date on which the Act was to come into operation. In the case of a person dying before that date and who had by his will charged his

60 & 61 Vict. c. 65, s. 1.

debts on his real estate, the Law of Property Amendment Act, 1859, contained provisions for raising the money, either by trustees to whom the real estate had been devised for the testator's whole interest (sect. 14), or by the executors (sect. 16). As to a devisee in fee or tail raising the money in such a case, see sect. 18. Where such a person's will did not contain a charge, or where he died intestate, the real estate could be made available for payment of debts under the Administration of Estates Act, 1833, the proceedings used for the purpose being a creditor's administration action in the Chancery Division, to which the devisee or heir, as well as the executor, was a necessary party (and see the forms of indorsement on a creditor's writ, App. A., R. S. C. 1883, Pt. III., s. 1). Such an action might be commenced by originating summons (see R. S. C., Ord. LV., rr. 3, 4, 10, and 10a). See further, Admon. of Estates Act, 1925, s. 32, and notes, *post*.

Persons dying after 1897.

Under the present Act, the real estate of a person dying after 1897 was made available in all cases for the payment of his debts without the necessity for any proceedings. Sect. 1, sub-sect. 1, vested such real estate (including real estate appointed by will under a general power—sub-sect. 2; but not including copyholds—sub-sect. 4) in the personal representatives. And this real estate was to be administered in the same manner for the payment of debts, &c., as if it were personal estate (sect. 2, sub-sect. 3). For the purpose of such administration the powers, rights, duties and liabilities of the personal representatives in respect of the personal estate were to apply to the real estate as if the same were a chattel real (see sect. 2, sub-sect. 2). And, subject to such powers, rights, duties, and liabilities, the representatives held the real estate as trustees for the beneficiaries (sect. 2, sub-sect. 1). To these beneficiaries a transfer might be made by the representatives, either by means of an assent to a devise or by a conveyance, and either subject to a charge or not sect. 3, sub-sect. 1); and might be ordered after the expiration of one year from the death (sect. 3, sub-sect. 2). The Act further contains provisions as to probate and letters of administration (sect. 1, sub-sect. 3, and sect. 2, sub-sect. 4), and also a special power for the representatives to appropriate parts of the residuary estate (sect. 4).

Parties to administration actions.

If it becomes necessary to administer in an action the freehold estate of a person dying since 1897, it seems that (contrary to the rule before this Act) the devisee is not a necessary party (see *Re Harrowby and Paine*, [1902] W. N. 137) and that between 1897 and 1926 the heir was not a necessary party (*ibid.*). See as to the devolution of property on intestacy after 1925, Admon. of Estates Act, 1925, s. 45, *post*. And since 1898, a creditor need not sue on behalf of himself and all other creditors (*Re James, J.* v. *Jones*, [1911] 2 Ch. 348).

Where the owner of real estate in England dying since 1897 held shares in a company which is being wound up, his personal representatives and also his heirs (see now Admon. of Estates Act, 1925, s. 45, *post*), and devisees were liable to contribute (Comp. Consol. Act, 1908, s. 126 (1)). The representatives should be placed on the list of contributories, but not it seems the devisees (or before 1926 the heirs) (sect. 126, sub-sect. 2; see sect. 168, sub-sect. 2).

Contributories.

Real estate made legal assets.

The real estate referred to in sect. 1 appears to be thereby made "legal assets"—*i.e.*, *assets* which the representative could *virtute officii* recover in a Court of law or equity (*Cook* v. *Gregson*, 3 Drew. 549, *post*, p. 440).

What real estate vests under the section.

The trust and mortgage estates vested in a deceased person at the time of his death were dealt with by sect. 30, sub-sect. 1, of the Conv. Act, 1881, under which they devolved on the personal representative in the same manner as a chattel real, notwithstanding any testa-

mentary disposition (see now sect. 3, sub-sect. 1 (ii) of Admon. of Estates Act, 1925, *post*). As regards his beneficial interests the words of the present sub-section include every interest of the deceased (whether legal or equitable) in real estate (*Re Somerville and Turner*, [1903] 2 Ch. 587). Such real estate is to vest in the personal representatives as if it were a "chattel real"; as to the meaning of which, see *ante*, p. 136. As to the devolution on the executor of all interests of the deceased (whether legal or equitable) in chattels real at the commencement of this Act see *Re Culverhouse*, [1896] 2 Ch. 253. **60 & 61 Vict. c. 65, s. 1.**

According to sect. 26 of the L. T. Act, 1897 (*post*, p. 425), the Act is to be construed as one with the L. T. Act, 1875. Sect. 2 of the last-mentioned Act provides that such Act shall not apply to Scotland or Ireland. It seems, accordingly, that the provisions as to a real representative did not apply to real estate situate in Scotland or Ireland (see now sect. 58, sub-sect. 3 of Admon. of Estates Act, 1925, *post*). Scotland and Ireland.

The real estate made available for debts by the Admon. of Estates Act, 1833 (which only applied where there was no testamentary charge of debts), included, in the words of that Act, every estate or interest in real estate of or to which a person died seised or entitled. In the case of a man who died intestate leaving a widow, it was said that what was claimed by or came to the widow as dower was no part of what the intestate was seised of at his death, and that accordingly the dower had priority over the creditors (*Spyer* v. *Hyatt*, 20 Beav. 623; *Northern Bank* v. *M'Machin*, [1909] 1 I. R. 374). Under the present Act the widow's dower seems to have the same priority. (Dower is abolished in the case of deaths after 1925 by Admon. of Estates Act, 1925, s. 45 (1), *post*.) Dower.

As regards real estate appointed by the will of the deceased under a general power, this, under sect. 1, sub-sect. 2, of this Act, vests in the representative (see now Admon. of Estates Act, 1925, s. 3 (2), *post*). Previously such property had been held to fall within the words of the Admon. of Estates Act, 1833, above referred to, and to be applicable in payment of debts under that Act (*Fleming* v. *Buchanan*, 3 D. M. & G. 980). Under the joint operation of sects. 24 and 27 of the Wills Act, 1837, all general powers vested in a testator immediately before his death are (in the absence of a contrary intention) executed by a general devise (see *post*, p. 528). In the case of a married woman such appointed property was made liable for her debts by M. W. P. Act, 1882, s. 4, *ante*, p. 380. Sect. 27 always applied to the will of a married woman (*Bernard* v. *Minshull*, John. 276); and in the case of a married woman dying since December 5, 1893, s. 24 has been rendered applicable by sect. 3 of the M. W. P. Act, 1893, *ante*, p. 395. The case of a testator who has exercised a general testamentary power becoming bankrupt and dying undischarged is dealt with in *Re Guedalla*, *Lee* v. *G.*, [1905] 2 Ch. 331, quoted, *ante*, p. 354. Real estate appointed.

Copyholds where the interest was legal and an admission was necessary were not included in the real estate which vests in the representative (sect. 1, sub-sect. 4); and to these the old law still applied. But an equitable interest in copyholds passed to the representative (*Re Somerville and Turner*, [1903] 2 Ch. 583). (Copyhold and customary tenure were abolished as from January 1, 1926, by L. P. Act, 1922, Part V.) Copyholds.

The expression "personal representative" in sub-sect. 1 means an executor or administrator (sect. 24, sub-sect. 2, *post*, p. 425). It has been held that this section vested a testator's real estate in all the executors appointed by his will, whether they had or had not proved; unless those who had not proved had, by renunciation or Representative.

60 & 61 Vict. c. 65, s. 1.

otherwise, made it impossible for them to obtain probate; in which last case (*semble*) the real estate might vest exclusively in the executors who had proved (*Re Pawley and London Bank*, [1900] 1 Ch. 64; see *Re Boucherett, Barne* v. *Erskine*, [1908] 1 Ch. 180; *quære* as to the effect of a retractation of renunciation, see *Re Stiles*, [1898] P. 12; *Re Morant*, 3 P. & M. 151); but see sect. 6 of the Admon. of Estates Act, 1925, *post*, p. 430. It was said by North, J., that, until some executor proved, the legal estate remained in the heir (*John* v. *J.*, [1898] 2 Ch. 576). See now Admon. of Estates Act, 1925, ss. 2 (2) and 8, *post*, the former of which re-enacts sect. 12 of the Conv. Act, 1911. But upon probate or grant of administration there is a relation back to the death of the title of the representative (*Re Pryse*, [1904] P. 301; see *ante*, p. 166). As to the vesting of personal estate between the death and grant of administration, see Court of Probate Act, 1858, s. 19, re-enacted by sect. 9 of Admon. of Estates Act, 1925, *post*.

Where a testator appointed general executors, and also special executors for his property in Australia, the general executors could under this section make a good title to property in England without the concurrence of the special executors (*Re Cohen's Executors*, [1902] 1 Ch. 187; compare *Re Clark, M'Kecknie* v. *Clark*, [1904] 1 Ch. 294).

Married woman representative.

Where a married woman holds real or personal property solely or jointly with any other person as personal representative she can, without her husband, dispose of the same as if she were a *feme sole* (L. P. Act, 1925, s. 170 (2), replacing M. W. P. Act, 1907, s. 1).

Estate duty.

As regards the incidence of estate duty, it has been held that, notwithstanding this section, real estate does not "pass to the executor as such" within the meaning of sect. 9, sub-sect. 1, of the Finance Act, 1894, and must bear a rateable part of the duty (*Re Palmer, P.* v. *Rose-Innes*, [1900] W. N. 9; *Re Sharman, Wright* v. *S.*, [1901] 2 Ch. 280).

Escheat.

As regards escheated land (as to which see *ante*, p. 142), this Act did not bind the Crown, which is not named therein (see cases quoted *ante*, p. 143); and accordingly did not affect the legal estate in such land (*Re Hartley*, [1899] P. 40; *Re Ball*, [1902] W. N. 226). Escheat was abolished in the case of deaths after 1925 by the Admon. of Estates Act, 1925, s. 45 (1) (d), *post*.

Probate, &c.

As to probate and letters of administration in the case of real estate, see note to sect. 2, sub-sect. 4, *post*.

In the case of applications under Part I. of this Act, the Senior Judge of the Chancery Division has no exclusive jurisdiction (*Re Walbeck*, [1904] W. N. 204).

Provisions as to administration.

2.—(1.) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

In the case of personal estate it was held before this Act that an executor was not, strictly speaking, a trustee for legatees (see *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491; *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 124; see *Re Lacy, Royal Association* v. *Kydd*, [1899] 2 Ch. 149; *Re Hyatt, Bowles* v. *H.*, 38 Ch. D. 617); but an executor might become a trustee by his conduct (see cases quoted

60 & 61 Vict. c. 65, s. 2.

ante, p. 222). Under this section the representative (subject as therein mentioned) is made a trustee of the real estate for the beneficiaries (see *Re Peel, Woodcock* v. *Holdroyd* (1899), W. N. 208). But as regards costs, where a conflict arose on the construction of a devise between devisees and the heir, and the executors brought them both before the Court, the unsuccessful party was ordered to pay costs (*ibid.*). Where land descended to an infant, and the representative disclaimed the trusteeship arising under this section, the Court appointed trustees under sect. 42 of the Conv. Act, 1881 (*Re Cowley*, [1901] 1 Ch. 38; see now S. L. Act, 1925, s. 102, *post*). Under sects. 1 & 2 of the Land Transfer Act, 1897, the legal personal representative is an express trustee of real estate, and the R. P. Lim. Act, 1874, does not run in his favour (*Toates* v. *T.*, [1926] 2 K. B. 30).

As regards personal estate, it was held before this Act that, subject to paramount claims of creditors, the next-of-kin of an intestate had a right to require the specific property forming his personal estate to be transferred to them by the administrator (*Cooper* v. *C.*, L. R. 7 H. L. 65, 72). See now pp. 471 *et seq.*, *post*.

(2.) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

As to the rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, see the note to the R. P. Lim. Act, 1833, s. 6, *ante*, p. 166.

As regards the costs of administration, the rule of law which obtained at the passing of this Act is stated in the note to sub-sect. 3 of present section; see the words of the proviso in that sub-section.

Powers, rights and duties of representatives.

The "powers and rights" of representatives in dealing with the chattels real of a deceased person include power for executors (for the purpose of administration and before assenting to a bequest thereof) to sell the chattels real (*Simpson* v. *Gutteridge*, 1 Madd. 609; *Cole* v. *Miles*, 10 Hare, 179), and to mortgage them (*Thorne* v. *T.*, [1893] 3 Ch. 196; *Re Morgan, Pillgrem* v. *P.*, 18 Ch. D. 98; *Re Scott and Alverez*, [1895] 1 Ch. 596; and see sect. 39 of Admon. of Estates Act, 1925, *post*). And unless the contrary be shown, executors dealing with purchasers or mortgagees, even more than twenty years after the testator's death, are to be presumed to be acting in discharge of their duties as such (*Re Venn and Furze*, [1894] 2 Ch. 114; *Corser* v. *Cartwright*, L. R. 7 H. L. 736; *Re Henson, Chester* v. *H.*, [1908] 2 Ch. 356; see *Re Verrell*, [1903] 1 Ch. 65, where the rule did not apply). It would seem that in dealings with freeholds under the powers of the present Act this rule would apply rather than the rule in *Re Tanqueray Willaume* (20 Ch. D. 480, *post*, p. 440; see now Admon. of Estates Act, 1925, s. 36 (8), *post*, p. 459). Executors cannot give an option of purchase at a future time of lease-

60 & 61 Vict. c. 65, s. 2.

holds (*Oceanic Co.* v. *Sutherberry*, 16 Ch. D. 236); but, if necessary for the due administration of the property, can grant an underlease (*ibid.*; see *Re Judd and Poland*, [1906] 1 Ch. 684). Administrators after a grant have equal power with executors (Wms. Exors., 11th ed. 688). The rights and liabilities, under sub-sect. 2, of the administratrix of an equitable mortgagor of freeholds were said to include the right to redeem, and the liability to be sued in a foreclosure action; to which action the mortgagor's heir was held not to be a necessary party (*Re Harrowby & Paine*, [1902] W. N. 137).

One of several representatives.

One only of several executors could sell chattels real (*Simpson* v. *Gutteridge*, *Cole* v. *Miles*, *supra*). And it seems that one administrator stands on the same ground with one executor (*Jacomb* v. *Harwood*, 2 Ves. sen. 267). This power of a single representative was expressly made applicable in the case of trust and mortgage estates by sect. 30 of the Conv. Act, 1881 (see now Admon. of Estates Act, 1925, s. 3 (1) (ii), *post*). But the proviso in this subsection prevents it from applying in the case of real estate vesting in representatives under the present Act.

Estate duty.

As regards estate duty, the power and duty of the personal representatives is to discharge out of the general personal estate the estate duty payable in respect of the chattels real of the deceased, even where they are specifically bequeathed (*Re Culverhouse*, *Cook* v. *Culverhouse*, [1896] 2 Ch. 251; see Finance Act, 1894, s. 6, sub-s. 2; *Re Webber*, *Gribble* v. *W.*, [1896] 1 Ch. 914). Having regard, however, to sect. 9, sub-sect. 1, of the Finance Act, 1894, the estate duty payable in respect of the freeholds of the deceased is charged on such freeholds (*Re Palmer*, *P.* v. *Rose-Innes*, [1900] W. N. 9; see *Re Sharman*, *Wright* v. *S.*, [1901] 2 Ch. 280).

Liabilities of representatives.

As to the liability of personal representatives in respect of the chattels real of the deceased, see the note to sect. 26 of the Trustee Act, 1925, *post*. Their liability in respect of the acts of the deceased generally is dealt with in Wms. Exors., 11th ed., 1332 *et seq.* The representatives may also be liable in respect of their own acts, *e.g.* devastavit. The rule of limitation applicable in such a case is stated *ante*, pp. 258, 295. See also, in connection with the representative's acts, sects. 30 and 68 of the Trustee Act, 1925, *post*. The last-mentioned liability is dealt with generally in Wms. Exors., 11th ed., 1457 *et seq.*

(3.) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

Persons dying before 1898, liability of their personalty to pay—debts, costs and expenses.

In the case of a person dying before the commencement of this Act, his general personal estate was the primary fund for payment of his debts other than debts being at the time of the death charged on land (see *post*, p. 484); which last-mentioned debts were by the Real Estates Charges Acts (see now sect. 35 of the Admon. of Estates Act, 1925, *post*), payable primarily out of the land charged. Similarly costs and expenses, including the costs of an administration action, were payable primarily out of general personalty (*Trethewy* v. *Helyar*, 4 Ch. D. 53). But where real estate was included in the

action, any additional costs were borne by the real estate (*Patching* v. *Barnett*, [1907] 2 Ch. 154; *Re Middleton, Thompson* v. *Harris*, 19 Ch. D. 552). Where real and personal estate were given on trust for conversion, the proceeds formed one fund for this purpose (*Re Price, Williams* v. *Jenkins*, 31 Ch. D. 493). The rule in *Patching* v. *Barnett* has not been altered by the present Act (*Re Jones, Elgood* v. *Kinderley*, [1902] 1 Ch. 92); even where the will contains a direction to pay "testamentary expenses" out of personalty (*Re Betts, Doughty* v. *Walker*, [1907] 2 Ch. 149). Before this Act the costs of probate litigation were not payable out of real estate (*Re Shaw, Bridges* v. *S.*, [1894] 3 Ch. 615). But this Act has altered the rule (*Re Prince, Godwin* v. *P.*, [1898] 2 Ch. 228; see *Briscoe* v. *Baillie Hamilton*, [1902] P. 238; *Re Vickerstaff, V.* v. *Chadwick*, [1906] W. N. 67). 60 & 61 Vict. c. 65, s. 2.

The order in which, at the date of the passing of this Act, real and personal assets were applicable in payment of debts is stated *post*, p. 484. The words "testamentary expenses" in wills have been held to include the costs of an administration action (*Penny* v. *P.*, 11 Ch. D. 440; *Sharp* v. *Lush*, 10 Ch. D. 468; see *Re Betts, supra*; as to administration under an intestacy, see *Re Cledmow, Yeo* v. *C.*, [1900] 2 Ch. 182). They have also been held to include estate duty payable in respect of a bequest of personalty (*Re Trenchard, T.* v. *T.*, [1905] 1 Ch. 82); but not personalty appointed under a general power (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, overruling *Re Hadley, Johnson* v. *H.*, [1909] 1 Ch. 24, 20); nor settlement estate duty on personalty (*Re King, Travers* v. *Kelly*, [1904] 1 Ch. 363; see as to this *Re Pimm, Sharpe* v. *Hodgson*, [1904] 2 Ch. 345; *Re Cayley, Awdry* v. *C.*, *ibid.*, 781; *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726); nor estate duty payable in respect of specifically devised real estate (*Re Sharman, Wright* v. *S.*, [1901] 2 Ch. 280; *Re Jolley*, 17 T. L. R. 244). As regards the incidence of estate duty payable in respect of real estate, it has been held that, under sect. 9, sub-sect. 1 of the Finance Act, 1894, such duty is charged on and payable out of the real estate itself (*Re Palmer, P.* v. *Rose-Innes*, [1900] W. N. 9; see also sect. 5, *post*). The cases relating to the liability of real estate to be charged with legacies are collected, p. 439. The order of application of assets in payment of testamentary expenses is the same as in the case of debts (*Re Pullen, Parker* v. *Pullen*, [1910] 1 Ch. 564). Proviso.

The proviso has preserved the doctrine of marshalling (*post*, p. 427), under which, where the general personalty has been exhausted by a creditor, a pecuniary legatee is entitled to be repaid out of land charged with debts (*Re Kempster, K.* v. *K.*, [1906] 1 Ch. 446; see *Re Balls, Trewby* v. *B.*, [1909] 1 Ch. 795). The words of the proviso were held to prevent an administratrix from successfully claiming a right to retain out of real assets a debt due to her from the intestate (*Re Williams, Holder* v. *W.*, [1904] 1 Ch. 52). But see now as to retainer, Admon. of Estates Act, 1925, s. 34, and notes, *post*.

(4.) Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provisions shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

60 & 61 Vict. c. 65, s. 2.

Old rules as to probate of will of realty;

Before this Act a will disposing of realty only, but not appointing an executor, could not be proved (*Re Drummond*, 2 Sw. & Tr. 8). Where it appointed an executor, it could (*Re Hornbuckle*, 15 P. D. 151; *Re Jordan*, L. R. 1 P. & M. 555). But the last rule did not apply to the will of a married woman appointing under a power (*Re Tomlinson*, 6 P. D. 209; *Re Barden*, L. R. 1 P. & M. 325), except where by equitable conversion the real estate was personalty (*Re Gunn*, 9 P. D. 242).

of realty and personalty.

In the case of a will dealing with realty and personalty, the Court could, under the Court of Probate Act, 1857, grant probate without citing the heir (sect. 63). He was not bound unless cited (*ibid.*); but he was bound if cited even as one of the next-of-kin (*Beardsley* v. *B.*, [1899] 1 Q. B. 746). Probate was conclusive evidence of a will proved in solemn form (Court of Probate Act, 1857, s. 62). Where not so proved, see sect. 64.

Rule under Act as to probate and letters of administration in case of real estate.

Under the present Act, probate and letters of administration might be granted in respect of real estate only (sect. 1, sub-sect. 3); even, it seems, in the case of the will of a married woman exercising a power (sub-sect. 2).

Sect. 2, sub-sect. 4, deals with letters of administration in the case of real estate. The position of the heir under the Act has been said to be practically that of the next-of-kin (*Twist* v. *Tye*, [1902] P. 98). By an additional rule and order of the Probate Division dated November 20, 1897, all rules, orders and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897 (L. R. Current Index, 1897, p. lxxxii.). Under this rule grants *ad colligendum* may be made applicable to real estate (*Re Roberts*, [1898] P. 152). Where an heir with a clear title applies for administration and there is no personalty, a grant may be made without notice to the next-of-kin; otherwise they should have notice (*Re Barnett*, [1898] P. 145). Administration was granted to one of the next-of-kin without citing the heir, who was abroad (*Re Blenkinsop*, 49 W. R. 336). Sub-sect. 4 does not expressly refer to a husband, whose right to administration of his wife's estate is well established; under special circumstances this right was disregarded, and administration was granted to the guardian *ad litem* of the wife's heir (*Re Ardern* [1898] P. 147; see *Re Roberts*, *supra*). The universal devisee and legatee in a will which names no executor is entitled to administration with the will annexed (*Re Pryse*, [1904] P. 301). As to the form of grant where land had escheated, see *Re Ball*, [1902] W. N. 226.

Provision for transfer to heir or devisee.

3.—(1.) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

(2.) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives. 60 & 61 Vict. c. 65, s. 3.

(3.) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4.) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

Cases under the section.

Where executors conveyed freeholds to devisees in trust, "subject to a charge of any money which the personal representatives were liable to pay," and on a subsequent sale by such devisees the purchaser insisted on an indemnity in respect of any claims against the testator's estate of which at the date of the conveyance the executors had no notice; it was held that, having regard to sect. 2, sub-sect. 3, of this Act, and sect. 29 of the Law of Prop. Amt. Act, 1859 (see now sect. 27 of the Trustee Act, 1925, *post*), the purchaser was not entitled to the indemnity (*Re Cary and Lott*, [1901] 2 Ch. 463).

The personal representative is entitled to assent to the devise in preference to executing a conveyance (*Re Pix, Plomley* v. *Stileman*, [1901] W. N. 165; where see as to form of assent. See also the instrument of assent, Form 51, Rule 185, Land Transfer Rules, 1903). A written assent, not under seal, is not liable to stamp duty as a conveyance (*Kemp* v. *Commrs. of Revenue*, [1905] 1 K. B. 581). See further as to assent, Admon. of Estates Act, 1925, s. 36, and notes, *post*.

Appropriation of land in satisfaction of legacy or share in estate.

4.—(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and

60 & 61 Vict. c. 65, s. 4.

such valuation and appropriation shall be conclusive save as otherwise directed by the court.

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land.

Operation of section.

As to appropriation apart from statute, and under sect. 41 of the Admon. of Estates Act, 1925, see that section and notes, *post*, p. 464. As regards appropriations since the passing of the L. T. Act, 1897, it has been decided that where there was a trust for conversion the Act did not take away the old general power (*Re Beverly, Watson* v. *W.*, [1901] 1 Ch. 687). Where there was no such trust, however, the case may be doubtful having regard to the doubt which exists as to the effect of the Act on any appropriations made after it came into operation, but not effected in accordance with its provisions (*Re Beverly, supra*).

Under the section, it will be observed, valuations by the representative of appropriated estates were to be made "in accordance with the prescribed provisions"; and beneficiaries (to whom notice of an intended appropriation is required to be given) were to be at liberty to apply to the Court "within the prescribed time." Sect. 22, sub-sect. 6 (i) of the Land Transfer Act, 1897, provided for the making of general rules for regulating any such matters as are authorised by the Act to be prescribed. To the Land Transfer Rules, 1903, was attached (among other forms) a form of appropriation of land under this section (see Form 52, Rule 185). But no rules were made dealing either with the question of the valuation of assets, or the time for an application to the Court and the powers of the section therefore remained in abeyance (see now sect. 41 of Admon. of Estates Act, 1925, *post*, which applies in the case of deaths before 1926).

The marginal note to the section (which forms no part of the statute itself, *Att.-Gen.* v. *G. E. Ry.*, 11 Ch. D. 461) refers only to appropriation of "land," and the words of sub-sects. 2 and 3 are similarly restricted. It has been held, however, that sub-sect. 1 is not confined to real estate (*Re Beverly, Watson* v. *W.*, [1901] 1 Ch. 687; and see as to leaseholds, *Re Cooke's Settlement, Tarry* v. *C.*, [1913] 2 Ch. 661; and as to shares in companies, *Re Craven, Watson* v. *C.*, [1914] 1 Ch. 358). An appropriation under the section of land by the representative could only be made in the case of a death after 1897. But as regards an appropriation of property other than land, the words of sub-sect. 1 appear to apply to a death before as well as since the Act.

The expression "personal representative" is defined by sect. 24, sub-sect. 2, as meaning "executor or administrator." But if the section is to be applied to the case of intestacy, the words "residuary estate" must refer to the surplus of the intestate's assets after payment of his debts.

The section does not deal with an appropriation by trustees, or an appropriation to a settled share where unborn persons are or may be interested. 60 & 61 Vict. c. 65, s. 4.

5. Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof. Liability for duty.

See *Re Palmer, P.* v. *Rose-Innes,* [1900] W. N. 9, quoted *ante,* p. 421.

Part IV.

Miscellaneous.

24.—(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such. Interpretation.

(2.) In this Act the expression "personal representative" means an executor or administrator.

25. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-eight. Commencement of Act.

26. This Act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal Act, and that Act and this Act may be cited together as the Land Transfer Acts, 1875 and 1897. Short title and construction.

II.—The Administration of Estates Act, 1925.

15 Geo. V. c. 23.

An Act to consolidate Enactments relating to the Administration of the Estates of Deceased Persons.

[9th April, 1925.]

Part I.

Devolution of Real Estate.

1.—(1.) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal repre- Devolution of real estate on personal representative.

15 Geo. 5, c. 23, s. 1.

sentative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person.

(2.) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.

(3.) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate.

The provisions of Part I. of this Act are similar to those of Part I. of the Land Transfer Act, 1897, *ante*, repealed as respects deaths occurring after December 31, 1925, by L. P. Act, 1922 (see L. P. (Amdt.) Act, 1924, s. 1, and Sched. I, and as to the date, 15 Geo. 5, c. 4). See as to the effect of these enactments with regard to the availability of real estate for the payment of debts, sect. 1 of the L. T. Act, 1897, and notes, *ante*, and sect. 32 of the present Act, and notes, *post*. For definition of "real estate" see sect. 3, sub-sect. 1, *post*; and as to interests "ceasing on death," sub-sects. 3 to 5 of that section. The Act commenced January 1, 1926 (sect. 58, sub-sect. 2, *post*).

Application to real estate of law affecting chattels real.

2.—(1.) Subject to the provisions of this Act, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration, or to dealings before probate in the case of chattels real, and with respect to costs and other matters in the administration of personal estate, in force before the commencement of this Act, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of this Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him, and in particular all such powers of disposition and dealing as were before the commencement of this Act exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal representative, or by all the personal representatives together, shall be exercisable by the personal representatives or representative of the deceased with respect to his real estate.

Cf. sect. 2, sub-sect. 2, of L. T. Act, 1897, *ante*, p. 419.

(2.) Where as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act shall not, save as otherwise provided as respects trust estates including settled land, be made without the concurrence therein of all such repre-

sentatives or an order of the court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the court, and shall be as effectual as if all the persons named as executors had concurred therein. 15 Geo. 5, c. 23, s. 2.

For the provisions as to settled land, see sects. 22—24, *post*. The latter part of the present sub-section re-enacts sect. 12 of the Conv. Act, 1911, but extends it to the case of power not being reserved. See also sect. 8, *post*, and as to the law before the Act of 1911, sect. 2, sub-s. 2 of L. T. Act, 1897, *ante*, and *Re Pawley and London, &c. Bank*, [1900] 1 Ch. 64; *Re Boucherett, Barne* v. *Erskine*, [1908] 1 Ch. 180.

(3.) Without prejudice to the rights and powers of a personal representative, the appointment of a personal representative in regard to real estate shall not, save as hereinafter provided, affect—

(a) any rule as to marshalling or as to administration of assets;

(b) the beneficial interest in real estate under any testamentary disposition;

(c) any mode of dealing with any beneficial interest in real estate, or the proceeds of sale thereof;

(d) the right of any person claiming to be interested in the real estate to take proceedings for the protection or recovery thereof against any person other than the personal representative.

Compare sect. 2 of L. T. Act, 1897, *ante*, in view of which, and of s. 29 of the L. P. (Amdt.) Act, 1859 (see now Trustee Act, 1925, s. 27, *post*), it was held that a purchaser from devisees in trust to whom freeholds had been conveyed by executors "subject to a charge of any money which the personal representatives were liable to pay" was not entitled to an indemnity against claims of which the executors had no notice (*Re Cary and Lott*, [1901] 2 Ch. 463).

The order in which assets are applicable under the present Act is set out in Sched. I., *post*, p. 484, in the notes to which the order previously obtaining is also stated.

Marshalling assets between legatees.

If the order has been disturbed by any creditor, equity will marshal the assets so as to set right the disturbance. Thus, if the general personal estate out of which pecuniary legacies are to be paid has been exhausted by creditors the legatee will be repaid out of lands devised for payment of debts, and out of lands descended (*Rickard* v. *Barrett*, 3 K. & J. 289; *Foster* v. *Cook*, 3 Br. C. C. 347); and out of lands charged with debts (*Re Roberts, R.* v. *R.*, [1902] 2 Ch. 834; *Re Kempster, K.* v. *K.*, [1906] 1 Ch. 446). But (inasmuch as a residuary devise remains specific notwithstanding the Wills Act (*Hensman* v. *Fryer*, 3 Ch. 420)) a pecuniary legatee cannot call upon a residuary devisee to contribute to the payment of debts (*Collins* v. *Lewis*, 8 Eq. 708; *Dugdale* v. *D.*, 14 Eq. 234); unless the legacy is charged on the residuary real estate (*Re Bawden*, [1894] 1 Ch. 693). Where a debt is charged by way of mortgage on

15 Geo. 5. c. 23. s. 2.

specifically devised real estate and the testator excludes the Real Estate Charges Acts (see now sect. 35, *post*), and the mortgagee obtains payment out of the personal estate, a pecuniary legatee can stand in the shoes of the mortgagee as against the real estate and has priority over the devisee (*Re Smith, S. v. S.*, [1899] 1 Ch. 371). When a testator agreed to purchase land and devised it, and after his death the purchase-money was paid out of his general personal estate, a pecuniary legatee stood in the place of the vendor against the land (*Lilford* v. *Powys Keck*, 1 Eq. 347). Generally speaking, if specific or residuary devisees or specific legatees are called on to pay debts, they have a right to throw the debts on the other property which is primarily liable. And on failure of other assets, any one of such devisees or legatees who may have paid the whole of the debts, will have a right to contribution from the others (Wms. Real Assets, 113; *Hensman* v. *Fryer*, 3 Ch. 430; followed on the question of the specific character of a residuary devise in *Lancefield* v. *Iggulden*, 10 Ch. 136; but not followed on the question of the right of pecuniary legatees to contribution. *Dugdale* v. *D.*, 14 Eq. 234; *Farquharson* v. *Floyer*, 3 Ch. D. 109).

Marshalling assets between creditors

The principle of marshalling was, that a person who had two funds to which he might resort for the payment of a debt, should not by his choice disappoint another who had only one, but the latter should stand in the place of the former (*Trimmer* v. *Bayne*, 9 Ves. 209; see *Aldrich* v. *Cooper*, 8 Ves. 391). Thus where, before the Admin. of Estates Act, 1833, creditors holding specialties binding the heir exhausted the personal estate, equity allowed simple contract creditors to stand in their place against the real estate (*Cradock* v. *Piper*, 15 Sim. 302; see *Kidney* v. *Coussmaker*, 12 Ves. 154, and the notes to *Aldrich* v. *Cooper*, 1 L. C. Eq.). There does not appear to be any authority for holding that the right to marshal assets will be exercised in favour of a simple contract creditor, whose immediate right against the real estate is barred by the Stat. Lim. (*Fordham* v. *Wallis*, 10 Hare, 230; see *Busby* v. *Seymour*, 1 J. & Lat. 527).

Interpretation of Part I

3.—(1.) In this Part of this Act "real estate" includes—

(i) Chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and

(ii) Real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land.

Appointments under general power.

(2.) A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which operates as an appointment under a general power to appoint by will, or operates under the testamentary power conferred by statute to dispose of an entailed interest.

Entailed interests.

(3.) An entailed interest of a deceased person shall (unless disposed of under the testamentary power conferred by statute) be deemed an interest ceasing on his death, but any further or other interest of the deceased in the same property in remainder or reversion which is capable of being

disposed of by his will shall not be deemed to be an interest so ceasing. 15 Geo. 5, c. 23, s. 3.

(4.) The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death. Joint tenants.

(5.) On the death of a corporator sole his interest in the corporation's real and personal estate shall be deemed to be an interest ceasing on his death and shall devolve to his successor. Corporators sole.

This subsection applies on the demise of the Crown as respects all property, real and personal, vested in the Crown as a corporation sole.

The definition of "real estate" in sect. 1, sub-sect. 4 of L. T. Act, 1897, *ante*, does not specify the interests included in it, but merely excludes copyholds. Sub-sect. 2 of the present section repeats the effect of sect. 1, sub-sect. 2 of L. T. Act, and sub-sect. 1 (ii) that of sect. 30 of Conv. Act, 1881. As to entailed interests, see sects. 130 and 176 of L. P. Act, 1925, *post*, and *cf.* sect. 55, sub-sect. 3, *post*, as to them and as to the exercise of a general power. On sub-sect. 5, *cf.* L. P. Act, 1925, s. 180, *post*, p. 770.

Part II.

Executors and Administrators.

General Provisions.

[Sect. 4, repealed and re-enacted by Jud. Act, 1925, s. 159, empowered the Court to summon an executor to prove or renounce.]

5. Where a person appointed executor by a will— Cesser of right of executor to prove.

(i) survives the testator but dies without having taken out probate of the will; or

(ii) is cited to take out probate of the will and does not appear to the citation; or

(iii) renounces probate of the will;

his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor.

This section is in effect a re-enactment, as to clause (iii), of sect. 79 of the Court of Probate Act, 1857, and as to clauses (i) and (ii), of sect. 16 of the Court of Probate Act, 1858. If executors do not appear to a citation, or renounce probate, the will must be read and administration granted as if no executors had been appointed; but no intestacy as to any part of the property results, even if the executors renounce (*O'Dwyer* v. *Geare*, 1 Sw. & Tr. 465; 29 L. J. P. 47). A renunciation may be retracted before it is filed and recorded in the registry (*Re Morant*, 3 P. & M. 151); but not afterwards, unless the executor can show that it is for the benefit of the estate or the parties interested (*Re Gill*, 3 P. & M. 113; *Re Stiles*, [1898] P. 12). See also sect. 6, *post*.

15 Geo. 5, c. 23, s. 6.

Withdrawal of renunciation.

6.—(1.) Where an executor who has renounced probate has been permitted, whether before or after the commencement of this Act, to withdraw the renunciation and prove the will, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be endorsed on the original probate or letters of administration.

(2.) This section applies whether the testator died before or after the commencement of this Act.

The Act commences January 1, 1926 (sect. 58, *post*). The provisions of this section are new.

Executor of executor represents original testator.

7.—(1.) An executor of a sole or last surviving executor of a testator is the executor of that testator.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

(2.) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3.) The chain of such representation is broken by—

(a) an intestacy; or

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of a will;

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4.) Every person in the chain of representation to a testator—

(a) has the same rights in respect of the real and personal estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate whether real or personal of that testator has come to his hands, answerable as if he were an original executor.

This section re-enacts the effect of 25 Edw. 3, stat. 5, c. 5, and sect. 16 of Court of Probate Act, 1858, repealed by this Act as to deaths after 1925.

Right of proving executors to exercise powers.

8.—(1.) Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative

may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein. 15 Geo. 5, c. 23, s. 8.

(2.) This section applies whether the testator died before or after the commencement of this Act.

Cf. sect. 2, sub-sect. 2 and note, *ante*. The section is new.

9. Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the Probate Judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary. Vesting of estate of intestate between death and grant of administration.

By 13 Edw. 1, c. 19, the personal estate of intestates vested in the Ordinary, and by sect. 19 of Court of Probate Act, 1858, in the Judge of that Court. The present section extends to real estate. The Probate Judge is the President of the Probate Division (sect. 55, sub-sect. 1 (xv), *post*).

[Sects. 10—14 were repealed by Jud. Act, 1925, and replaced by provisions of that Act. By sect. 162 of that Act the Court, in granting letters of administration, is to have regard to the rights of all persons interested in the real and personal estate or the proceeds of sale thereof, and in particular administration with the will annexed may be granted to a devisee or legatee, and as regards land settled before the death, and not by the will, to the trustees, and administration may be limited as the Court thinks fit. The section also directs the grant, in cases of total intestacy, to be made to some party or parties interested in the residuary estate, unless by reason of insolvency of the estate or other special circumstance the Court thinks it expedient to grant it to some other person (*cf.* as to deaths before 1926, sect. 73 of Court of Probate Act, 1857); and in regard to settled land the grant is to be made to the trustees if willing to act. Sect. 11 of the present Act (Jud. Act, s. 167) related to administration bonds. By sect. 160 of Jud. Act (replacing sect. 12) representation is not to be granted to more than four persons, and if a beneficiary is an infant or a life interest arises under the will or intestacy, administration is to be granted to a trust corporation (see note to L. P. Act, 1925, s. 205, p. 794, *post*) or not less than two individuals; and where in those cases the only personal representative is an individual, one or more additional representatives may be appointed. Sect. 14 of the present Act (Jud. Act, s. 161) regulated the grant of administration to trust corporations (*supra*).] As to appointing a creditor sole administrator of an insolvent estate, see *Re Herbert's Estate*, [1926] P. 109.

15. Where administration has been granted in respect of any real or personal estate of a deceased person, no person shall have power to bring any action or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked. Executor not to act while administration is in force.

This section re-enacts sect. 75 of the Court of Probate Act, 1857, extending it to real estate.

[Sect. 16, repealed and re-enacted by Jud. Act, 1925, s. 163, provided for the grant of administration *pendente lite*.]

15 Geo. 5, c. 23, s. 17.

Continuance of legal proceedings after revocation of temporary administration.

17. If, while any legal proceeding is pending in any court by or against an administrator to whom a temporary administration has been granted, that administration is revoked, that court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against him, but subject to such conditions and variations, if any, as that court directs.

This section replaces sect. 76 of Court of Probate Act, 1857.

[Sects. 18—20, repealed and replaced by sects 164—166 of Jud. Act, 1925, provided for the grant of special administration where a personal representative is abroad, and for the grant of administration *cum testamento annexo* and *durante minore ætate*.]

Rights and liabilities of administrator.

21. Every person to whom administration of the real and personal estate of a deceased person is granted, shall, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.

Special Provisions as to Settled Land.

Special executors as respects settled land.

22.—(1.) A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land.

In this subsection "settled land" means land vested in the testator which was settled previously to his death and not by his will.

(2.) A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets.

See in connection with this and the two following sections the provisions of the S. L. Act, 1925, *post*, under which the legal estate the subject of the settlement is vested in the tenant for life or statutory owner (see for definition S. L. Act, s. 117 (1) (xxvi), *post*, p. 980). Sects. 7 and 8 of S. L. Act (*post*, p. 863) provide for the conveyance to the tenant for life or statutory owner by the personal representatives of a deceased one.

Provisions where, as respects settled land, representation is not granted to the trustees

23.—(1.) Where settled land becomes vested in a personal representative, not being a trustee of the settlement, upon trust to convey the land to or assent to the vesting thereof in the tenant for life or statutory owner in order to give effect to a settlement created before the death of the deceased and not by his will, or would, on the grant of

representation to him, have become so vested, such representative may— 15 Geo. 5, c. 23, s. 23.

(a) before representation has been granted, renounce his office in regard only to such settled land without renouncing it in regard to other property; of the settlement.

(b) after representation has been granted, apply to the court for revocation of the grant in regard to the settled land without applying in regard to other property.

(2) Whether such renunciation or revocation is made or not, the trustees of the settlement, or any person beneficially interested thereunder, may apply to the High Court for an order appointing a special or additional personal representative in respect of the settled land, and a special or additional personal representative, if and when appointed under the order, shall be in the same position as if representation had originally been granted to him alone in place of the original personal representative, if any, or to him jointly with the original personal representative, as the case may be, limited to the settled land, but without prejudice to the previous acts and dealings, if any, of the personal representative originally constituted or the effect of notices given to such personal representative.

(3) The court may make such order as aforesaid subject to such security, if any, being given by or on behalf of the special or additional personal representative, as the court may direct, and shall, unless the court considers that special considerations apply, appoint such persons as may be necessary to secure that the persons to act as representatives in respect of the settled land shall, if willing to act, be the same persons as are the trustees of the settlement, and an office copy of the order when made shall be furnished to the Principal Probate Registry for entry, and a memorandum of the order shall be endorsed on the probate or administration.

(4.) The person applying for the appointment of a special or additional personal representative shall give notice of the application to the Principal Probate Registry in the manner prescribed.

(5.) Rules of court may be made for prescribing for all matters required for giving effect to the provisions of this section, and in particular—

(a) for notice of any application being given to the proper officer;

(b) for production of orders, probates, and administration to the registry;

(c) for the endorsement on a probate or administration of a memorandum of an order, subject or not to any exceptions;

15 Geo. 5, c. 23, s. 23.

(d) for the manner in which the costs are to be borne;

(e) for protecting purchasers and trustees and other persons in a fiduciary position, dealing in good faith with or giving notices to a personal representative before notice of any order has been endorsed on the probate or administration or a pending action has been registered in respect of the proceedings.

Power for special personal representatives to dispose of settled land.

24.—(1.) The special personal representatives may dispose of the settled land without the concurrence of the general personal representatives, who may likewise dispose of the other property and assets of the deceased without the concurrence of the special personal representatives.

(2.) In this section the expression "special personal representatives" means the representatives appointed to act for the purposes of settled land and includes any original personal representative who is to act with an additional personal representative for those purposes.

Duties, Rights, and Obligations.

Duty of personal representative as to inventory.

25. The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the court, a true and perfect inventory and account of the real and personal estate of the deceased, and the court shall have power as heretofore to require personal representatives to bring in inventories.

Sect. 25 re-enacts a provision of 21 Hen. 8, c. 5.

Sect. 26, relating to actions by and against personal representatives, will be found *ante*, p. 243.

Protection of persons acting on probate or administration.

27.—(1.) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2.) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom the representation is afterwards granted might have properly made.

This section is a re-enactment of sects. 77 and 78 of the Court of Probate Act, 1857.

15 Geo. 5, c. 23, s. 28.

Liability of person fraudulently obtaining or retaining estate of deceased.

28. If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any real or personal estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the real and personal estate received or coming to his hands, or the debt or liability released, after deducting—

(a) any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and

(b) any payment made by him which might properly be made by a personal representative.

Replaces 43 Eliz. c. 8. See *Vernon* v. *Curtis*, 2 H. Bl. 18, 26 n; *Vaughan* v. *Browne*, 2 Stra. 1106; *Stratford-upon-Avon* v. *Parker*, [1914] 2 K. B. 562; Wms. Exors., 11th ed., pp. 177 *et seq.*

Liability of estate of personal representative.

29. Where a person as personal representative of a deceased person (including an executor in his own wrong) wastes or converts to his own use any part of the real or personal estate of the deceased, and dies, his personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

30 Car. 2, st. 1, c. 7, made the representatives of executors *de son tort* liable, and 4 Will. & M. c. 24, s. 12, extended the liability to the representatives of rightful executors and administrators. These enactments are replaced as to deaths after 1925 by this section. See as to devastavit p. 295, *ante*, and as to actions against representatives for torts of the deceased sect. 26, sub-s. 5, of the present Act, *ante*, p. 244.

Provisions applicable where administration granted to nominee of the Crown.

30.—(1.) Where the administration of the real and personal estate of any deceased person is granted to a nominee of the Crown (whether the Treasury Solicitor, or a person nominated by the Treasury Solicitor, or any other person), any legal proceeding by or against that nominee for the recovery of the real or personal estate, or any part or share thereof, shall be of the same character, and be instituted and carried on in the same manner, and be subject to the same rules of law and equity (including, except as otherwise provided by this Act, the rules of limitation under the statutes of limitation or otherwise), in all respects as if the administration had been granted to such nominee as one of the persons interested under this Act in the estate of the deceased.

(2) An information or other proceeding on the part of His Majesty shall not be filed or instituted, and a petition of right shall not be presented, in respect of the real or

15 Geo. 5, c. 23, s. 30.

personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity within and subject to which a proceeding for the like purposes might be instituted by or against a subject.

(3) The Treasury Solicitor shall not be required, when applying for or obtaining administration of the estate of a deceased person for the use or benefit of His Majesty, to deliver, nor shall the Probate, Divorce and Admiralty Division of the High Court or the Commissioners of Inland Revenue be entitled to receive in connexion with any such application or grant of administration, any affidavit, statutory declaration, account, certificate, or other statement verified on oath; but the Treasury Solicitor shall deliver and the said Division and Commissioners respectively shall accept, in lieu thereof, an account or particulars of the estate of the deceased signed by or on behalf of the Treasury Solicitor.

39 & 40 Vict. c. 18. 10 & 11 Geo. 5, c. 51.

(4) References in sections two, four, six and seven of the Treasury Solicitor Act, 1876, and in subsection (3) of section three of the Duchy of Lancaster Act, 1920, to "personal estate" shall include real estate.

Sub-sects. 1 and 2 of this section re-enact, with application to realty also, sects. 2 and 3 of the Intestates Estates Act, 1884. See also as to claims by the Crown, sect. 57, p. 482, *post*, and as to the persons interested under this Act in the estate of the deceased, sect. 46, p. 471, *post*.

Power to make rules.

31. Provision may be made by rules of court for giving effect to the provisions of this Part of this Act so far as relates to real estate and in particular for adapting the procedure and practice on the grant of letters of administration to the case of real estate.

Part III.

Administration of Assets.

Real and personal estate of deceased are assets for payment of debts.

32.—(1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the Court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This subsection takes effect without prejudice to the rights of incumbrancers. 15 Geo. 5, c. 23, s. 32.

(2) If any person to whom any such beneficial interest devolves or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process.

For the power to dispose by will of entailed interests see L. P. Act, 1925, s. 176, p. 768, *post*. "Will" includes a codicil (sect. 55, sub-s. 1 (xxviii), *post*).

Summary of former law.

At the time of the passing of Admon. of Estates Act, 1833 (3 & 4 Will. 4, c. 104), lands devised or charged for payment of debts were equitable assets, but lands not so charged were not available at all for payment of debts, except that freehold lands were liable to debts by specialty where the heirs were bound, and were also liable to debts of all descriptions owing from traders (Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), s. 9; see *Re Illidge, Davidson* v. *I.*, 27 Ch. D. 480, 483). The Administration of Estates Act, 1833, extended to the freeholds of all persons the provisions of the Debts Recovery Act, 1830, as to the freeholds of traders, and also subjected copyholds to a similar liability. (For order under that Act see *Worthington* v. *Abbott*, [1910] 1 Ch. 588). To enforce this statutory liability it was necessary to apply to a court of equity (*Ball* v. *Harris*, 4 M. & C. 268). It should also be remembered that specialties executed after 1881 bound heirs, though not so expressed (see L. P. Act, 1925, s. 80 (1), *post*); and seem accordingly to have brought the holders within the words of the Debts Recov. Act, 1830, s. 3, the right of action under which section was not taken away by the Admon. of Estates Act, 1833 (*Re Illidge*, 27 Ch. D. 482). The liability of the heir and devisees was at law joint (*Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 347); but the liability extended only to the value of the land taken by descent or devise (*Re Moon, Holmes* v. *H.*, [1907] 2 Ch. 310). As to the effect on payments under the Stat. Lim. see *ante*, pp. 252, 282.

The substance of the Administration of Estates Act, 1833, was that the land itself was made assets (*Re Hyatt, Bowles* v. *H.*, 38 Ch. D. 619); and the remedies given against the heir and devisee did not control the larger effect of the previous words, which made the land assets generally (*Downes* v. *Morris*, 3 Hare, 399). Accordingly, where a person died without heirs, it was held that as against the lord claiming by escheat the lands of the deceased were assets for payment of his debts (*Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Hare, 749). Under this Act freehold estates over which a testator had a general power of appointment, and which he appointed by will, were assets for payment of his debts (*Fleming* v. *Buchanan*, 3 D. M. & G. 976). So all rents arising from the real estate of a deceased person after his death were assets by accretion, whether received by his heir (*Re Illidge, Davidson* v. *I.*, 27 Ch. D. 478; see *Re Moon, Holmes* v. *H.*, [1907] 2 Ch. 311), or by a person appointed a trustee of his will after his death (*Re Hyatt, Bowles* v. *H.*, 38 Ch. D. 621), the creditor being entitled to an account (*ibid.*; see Seton, 1429, 6th ed.). So an equity of redemption of freeholds was assets (*Foster* v. *Handley*, 1 Sim. (N.S.) 200; *Beale* v. *Symonds*, 16 Beav. 406), or copyholds (*Burrell* v. *Smith*, 9 Eq. 443), and consequently a mortgagee might tack his simple contract debt as against the heir or devisee (*Rolfe* v. *Chester*, 20 Beav. 610; *Thomas* v. *T.*, 22

Rents.

Equity of redemption.

15 Geo. 5, c. 23, s. 32.

Beav. 341). The Act applied where the testator had not charged his land with, or devised it subject to, the payment of his debts. Where he had created such a charge, and had not made any express provision for raising the money, sects. 14—18 of the L. P. Amdt. Act, 1859 (22 and 23 Vict., c. 35) empowered the devisees in trust or executors to raise it by sale or mortgage. For the above-named Acts and sections and full notes upon them see the 2nd ed. of this work, pp. 392—421. They are repealed by the present Act as to all deaths occurring after December 31, 1925, ; and having regard to the L. T. Act, 1897 (*ante*) it has not been necessary in the case of persons dying after 1897 to have recourse to them, except as regards copyholds (see L. T. Act, 1897, s. 1 (4), *ante*, p. 415, and *Sissons* v. *Chichester-Constable*, [1916] 2 Ch. 75). (Copyhold tenure was abolished as from January 1, 1926, by L. P. Act, 1922, Part V.)

(1) *What amounts to a Charge of Debts or Legacies on Real Estate*...438.
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(6) *Debts of a Deceased Person*...441.
(7) *Order of Payment of Debts*...443.

(1) Charge of debts on real estate.

On the question, what amounted to a charge of debts upon real estate, a mere authority to trustees to pay claims on the estate was not such a charge (*Re Head's Trustees*, 45 Ch. D. 310). A general direction, however, in a will to pay debts, charged them ordinarily on all the testator's real estate (*Graves* v. *G.*, 8 Sim. 55; *Cook* v. *Dawson*, 29 B. 126; *Corser* v. *Cartwright*, L. R. 7 H. L. 735; *Re Adams and Perry*, [1899] 1 Ch. 554); unless a contrary intention appeared in the will (*Thomas* v. *Britnell*, 2 Ves. Sen. 313; see *Re Butler, Le Bas* v. *Herbert*, [1894] 3 Ch. 258; *Re Major, Taylor* v. *M.*, [1914] 1 Ch. 278). Such contrary intention might appear (1) by reason of there being a specific charge of debts on part of the real estate (*Palmer* v. *Graves*, 1 Keen, 545; *Corser* v. *Cartwright, supra*), in which case the words must be clear (*Taylor* v. *T.*, 6 Sim. 246; *Jones* v. *Williams*, 1 Coll. 156; see *Wrigley* v. *Sykes*, 21 Beav. 337; *Marshall* v. *Gingell*, 21 Ch. D. 790); or (2) by reason of the direction being a direction to executors to pay, in which case the presumed intention was that the debts were to be paid only out of the property which passes to the executors as such (*Wasse* v. *Heslington*, 3 M. & K. 495; *Re Bailey, B.* v. *B.*, 12 Ch. D. 272). Where, however, in addition to the direction to the executors to pay debts the will contained a devise of real estate to them, such real estate might be charged, whether under the devise they took beneficially for life or otherwise (*Henvell* v. *Whitaker*, 3 Russ. 343; *Finch* v. *Hattersley*, *ibid.* 345), or merely on trust (*Hartland* v. *Murrell*, 27 Beav. 204; *Re Tanqueray-Willaume*, 20 Ch. D. 465; *Re Brooke, B.* v. *B.*, [1894] 1 Ch. 43; *Re Stokes, Parsons* v. *Miller*, 67 L. T. 223; see *De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568; the will of a married woman in exercise of a power). But it was a question of intention (*Re Bailey, B.* v. *B.*, 12 Ch. D. 272; *Wasse* v. *Heslington*, 3 M. & K. 495). And such real estate was not charged, either where the executors took unequal benefits (*Harris* v. *Watkins*, Kay, 438; see *Re Tanqueray-Willaume*, 20 Ch. D. 465), or where the devise was to one executor only (*Warren* v. *Davis*, 2 M. & K. 49; see *Marshall* v. *Gingell*, 21 Ch. D. 790). Real estates made assets by means of such

a charge were equitable assets (*Silke* v. *Prime*, 1 Br. C. C. 138; *Shiphard* v. *Lutwidge*, 8 Ves. 26). **15 Geo. 5, c. 23, s. 32.**

With regard to legacies, where there is only a general gift of them, they are not charged on the testator's real estate (*Kightley* v. *K.*, 2 Ves. Jun. 328). To charge them a clear intention must be shown (*Bench* v. *Biles*, 4 Mad. 188); clearer, it would seem, than in the case of debts (*Kightley* v. *K.*, *supra*). Where there is a direction that the real estate be sold, the proceeds to form part of the personal estate, the realty is charged (*Bright* v. *Larcher*, 3 De. G. & J. 148; *Field* v. *Peckett*, 29 B. 568). A direction to the executor to pay legacies would seem to charge real estate devised to him (*Alcock* v. *Sparhawk*, 2 Vern. 228; *Elliot* v. *Handcock*, *ibid.* 143; *Cross* v. *Kennington*, 9 Beav. 150); but a direction to executors to realise for the payment of legacies such part of the testator's estate as they thought right, did not charge the real estate (*Re Cameron*, *Nixon* v. *Cameron*, 26 Ch. D. 19). A general charge of legacies on the real estate did not charge specifically devised realty (*Spong* v. *S.*, 3 Bli. (N.S.) 84; *Conron* v. *C.*, 7 H. L. C. 168); except where the legacies were coupled with debts (*Maskell* v. *Farrington*, 3 D. J. & S. 338; see *Mannox* v. *Greener*, 14 Eq. 456); or where the specific devises comprised the whole of the testator's real estate (*Bank of Ireland* v. *McCarthy*, [1898] A. C. 181). Where legacies are charged on the real estate if the personal estate be deficient, see as to the time when the deficiency is to be ascertained, *Richardson* v. *Horton*, 13 Eq. 121, and cases there referred to; *McCarthy* v. *McCartie*, [1897] 1 I. R. 86; [1898] A. C. 181. Charge of legacies on real estate.

Where a will gives legacies generally, and also gives the residue of the real and personal estate in one mass, the result is to charge the legacies upon the residuary real estate (*Greville* v. *Browne*, 7 H. L. C. 689; *Re Bellis*, 5 Ch. D. 504; *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Adams and Perry*, [1899] 1 Ch. 554). The rule applies where the gift is of all real and personal estate "not otherwise disposed of" (*Re Bawden*, *National Bank* v. *Cresswell*, [1894] 1 Ch. 693; see *Re Smith*, *S.* v. *S.*, [1899] 1 Ch. 369); and whether the legacies are given before or after the gift of residue (*Elliott* v. *Dearsley*, 16 Ch. D. 327; *Re Balls*, *Trewby* v. *B.*, [1909] 1 Ch. 791); and is not affected by a direction that debts and legacies are to be paid by the executors (*Re Brooke*, *B.* v. *Rooke*, 3 Ch. D. 630). As to its application in the case of property subject to a special power of appointment, see *Gainsford* v. *Dunn* (17 Eq. 405). The rule applies even where the will contains a specific devise of real estate by means of which the word "residue" might have been explained (*Francis* v. *Clemow*, Kay, 435); but in such case the specifically devised estate is not charged (see *Bray* v. *Stephens*, 12 Ch. D. 169). Where, after bequeathing legacies, a testator devised his real estate in B and the residue of his real and personal estate, the legacies were charged on the real estate in B as well as the testator's other real estate (*Bray* v. *Stephens*, 12 Ch. D. 162). But where, after bequeathing legacies, a testator devised all his real estate and bequeathed the residue of his personal estate, the rule in *Greville* v. *Browne* did not apply (*Wells* v. *Rowe*, 48 L. J. Ch. 476). When the rule applies the legacies are payable primarily out of the personalty, unless the testator directs payment out of a mixed fund arising from the conversion of the real and personal estates; in which case they are payable rateably out of the realty and personalty (*Re Boards*, *Knight* v. *K.*, [1895] 1 Ch. 499; *Re Spencer Cooper*, *Poe* v. *Spencer Cooper*, [1908] 1 Ch. 130). The rule was not applied to legacies expressly directed to be paid out of personal estate (*Gyett* v. *Williams*, 2 J. & H. 429).

Notwithstanding a charge of legacies on real estate, the general

15 Geo. 5, c. 23, s. 32.

personal estate remains the primary fund for their payment (*Davies* v. *Ashford*, 15 Sim. 46; *Paget* v. *Huish*, 1 H. & M. 668); unless the words of the charge exonerate the personal estate (*Re Needham, Robinson* v. *N.*, 54 L. J. Ch. 78; *Ion* v. *Ashton*, 28 Beav. 379).

(2) Legal and equitable assets.

Mention may here be made of the distinction between legal and equitable assets. After the Admon. of Estates Act, 1833, all the debts of the deceased were payable out of all his assets, whether legal or equitable. Legal assets were described as the assets with which a Court of law would charge an executor in an action brought against him by a creditor; and included all assets which, *virtute officii*, he could recover, whether in a Court of law or of equity (*Cook* v. *Gregson*, 3 Drew. 549; *Att.-Gen.* v. *Brunning*, 8 H. L. C. 258). Equitable assets were described as the assets which could only be made available for payment of debts through a Court of equity (*Cook* v. *Gregson, supra*). Independently of the L. T. Act, 1897, equitable assets included (1) land charged or devised for payment of debts (*Silke* v. *Prime*, 1 Bro. C. C. 138), including the proceeds of sale thereof (*Bain* v. *Sadler*, 12 Eq. 570; see *Newton* v. *Bennet*, 1 Bro. C. C. 135); (2) land which could only be reached by the Admon. of Estates Act, 1833 (*Re Illidge, Davidson* v. *I.*, 27 Ch. D. 484; *Walters* v. *W.*, 18 Ch. D. 182); and (3) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 18 Ves. 258), and also earnings which, by that Act, were made separate estate (*Re Poole, Thompson* v. *Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, the separate estate of a married woman, including property appointed by her will under a general power (sect. 4), appears to have been made legal assets (see sect. 1, sub-s. 2, and sect. 23, *ante*, pp. 371, 392). Personal estate appointed by the will of a *feme sole* under a general power has been held by the C. A. to be legal assets (*Re Hadley, Johnson* v. *H.*, [1909] 1 Ch. 30; see *contra* the words of Lord Lindley, *Commrs. of Stamps* v. *Stephen*, [1904] A. C. 140; of Lord Romilly, *Pardo* v. *Bingham*, 6 Eq. 487; of Eady, J., *Re Peacock, Kelcey* v. *Harrison*, [1902] 1 Ch. 555; and of Warrington, J., *Re Guedalla, Lee* v. *G.*, [1905] 2 Ch. 339; and see now *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231). Under the L. T. Act, 1897, the real estate of a person dying after 1897 (including real estate appointed under a general testamentary power, but not including copyholds) vested in his personal representative (L. T. Act, 1897, s. 1, *ante*, p. 415), and seems also to have been legal assets. The provisions of sects 1, sub-s. 1, and 3, sub-s. 2, of the present Act (*ante*, pp. 425, 428) are similar. The principal distinctions between these two classes of assets were: (1) out of legal assets an executor had a right of retainer for his own debt (see *post*, p. 447), but not out of equitable assets; (2) debts were payable in the order of priority given *post*, p. 443, out of legal assets, but *pari passu* out of equitable assets (Seton, 7th ed. 1362).

(3) Effect of lapse of time upon executor's power of sale.

The power implied under a charge of debts in wills before the L. P. Amdt. Act, 1859, has been held to exist notwithstanding the lapse of a considerable time. Thus, in *Greetham* v. *Colton* (34 Beav. 615), thirteen years; in *Forbes* v. *Peacock* (Phill. 717), twenty-five years; in *Sabin* v. *Heape* (27 Beav. 353), twenty-seven years; and in *Wrigley* v. *Sykes* (21 Beav. 337), thirty-three years, had elapsed between the testator's death and the sale. In a case before the L. T. Act, 1897, the rule was laid down that after twenty years there was a presumption that the debts had been paid, and that in such case a purchaser of freeholds from the executor was bound to inquire as to this; but that within that period the purchaser was not entitled to make any inquiry (*Re Tanqueray-Willaume*, 20 Ch. D. 480). Before the L. T. Act, 1897, the last-mentioned rule

15 Geo. 5, c. 23, s. 32.

did not apply to an executor selling leaseholds (*Re Venn and Furze*, [1894] 2 Ch. 101; *Re Whistler*, 35 Ch. D. 561; see *Re Molyneux and White*, 15 L. R. Ir. 383; *Re Verrell*, [1903] 1 Ch. 65); as to an administrator see *Re Norwood and Blake*, [1917] 1 I. R. 472. Since the L. T. Act, 1897 (*ante*, p. 415), it may be a question whether as regards freeholds affected by that Act the rule continued to apply. And as to all conveyances of legal estates since 1925 see sect. 36, sub-s. 8 of the present Act, *post*. Compare the rule that after ten years from the death money will not be paid out of Court to an executor without notice to beneficiaries (Practice Note, [1904] W. N. 135).

(4) Power to mortgage.

A power of sale out and out does not authorise a mortgage (*Stroughill* v. *Anstey*, 1 D. M. & G. 645; *Page* v. *Cooper*, 16 Beav. 400); but a power of sale for raising a particular charge does (*ibid.*; see *Walker* v. *Southall*, 56 L. T. 882): so a power of sale to pay debts implies power to mortgage (*Ball* v. *Harris*, 4 M. & C. 267; see *Colyer* v. *Finch*, 5 H. L. C. 905; *Corser* v. *Cartwright*, L. R. 7 H. L. 731). A trust for sale was held not to authorise a mortgage, even where some of the trusts required the raising of money (*Walker* v. *Southall*, 56 L. T. 882; see *Haldenby* v. *Spofforth*, 1 Beav. 390). But the trustees could mortgage where they had power to employ capital in carrying on a business (*Re Dimmock, D.* v. *D.*, 52 L. T. 494); or power to make any outlay out of the income or capital of the testator's real and personal estate (*Re Bellinger, Durell* v. *B.*, [1898] 2 Ch. 534). A power to mortgage does not give a power to sell (*Cook* v. *Dawson*, 29 Beav. 128); but a power to mortgage authorises a mortgage with a power of sale (*Bridges* v. *Longman*, 24 Beav. 29; *Cook* v. *Dawson*, 29 Beav. 128; *Re Chawner's Will*, 8 Eq. 569; *contra*, *Clarke* v. *Royal Panopticon*, 4 Drew. 26). As to sales by the Court see sect. 38, sub-s. 2, *post*.

(5) Administration of assets in one country where owner domiciled in another.

As regards the application in payment of the debts of a person domiciled in one country of assets belonging to him situate in another, it has been laid down that the proper order and priority of distribution of assets is always a matter for the *lex fori*; and the country where the distribution takes place always claims to itself the right to regulate the course of distribution (*Thurburn* v. *Steward*, L. R. 3 P. C. 513; see *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch. 836). Personal assets for the purpose of administration as distinguished from distribution among successors are governed by the law, not of their owner's domicile, but of their locality (*Blackwood* v. *Reg.*, 8 App. Cas. 93; *Commrs. of Stamps* v. *Hope*, [1891] A. C. 476; *Henty* v. *Reg.*, [1896] App. Cas. 567, overruling on this point *Wilson* v. *Dunsany*, 18 Beav. 293). Compare in the case of real assets *Harrison* v. *H.*, 8 Ch. 342; *Re Hewit, Lawson* v. *Duncan*, [1891] 3 Ch. 568. Mortgages on land are immovables (*Re Hoyles, Row* v. *Jagg*, [1911] 1 Ch. 179). In the case of a debt contracted abroad by a domiciled Englishman, the *lex loci contractus* does not entitle the creditor to prior payment out of equitable assets administered here (*Pardo* v. *Bingham*, 6 Eq. 485). An executor who has taken out probate in one country must not remit assets situate there to another country, in order to give a priority which would not exist in the first country (*Cook* v. *Gregson*, 2 Drew. 286; see *Re Kloebe, Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 179). In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors (*Re Kloebe, Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175).

(6) Debts of a deceased person.

In view of the distinction (as regards payment out of real estate) between specialty and simple contract debts before the Admon. of Estates Act, 1833, that Act expressly referred to each of these classes

15 Geo. 5, c. 23, s. 32.

of debts. Debts by simple contract are, where the contract is neither ascertained by matter of record, nor yet by deed, but by oral evidence, or by notes unsealed (2 Bl. Comm. 465). A foreign judgment constitutes but a simple contract debt (*Wilson* v. *Dunsany*, 18 Beav. 293). So the right to indemnity of a surety for a specialty debt, who has not paid (*Ferguson* v. *Gibson*, 14 Eq. 379; *Re Illidge, Davidson* v. *I.*, 27 Ch. D. 482). So damages awarded in an arbitration for breach of an agreement to lease a mine (*Talbot* v. *Shrewsbury*, 16 Eq. 26).

Simple contract debts.

Payments on behalf of lunatics.

In the case of necessaries supplied to a lunatic, the law implies an obligation on the part of the lunatic under which the amount of such necessaries may become payable as a simple contract debt out of his real or personal assets (*Re Rhodes, R.* v. *R.*, 44 Ch. D. 94; *Wentworth* v. *Tubb*, 1 Y. & Coll. C. C. 171; see the cases quoted, *ante*, p. 258, and see *Re Beavan, Davies* v. *B.*, [1912] 1 Ch. 196, as to the rights of a lender of money to provide necessaries; see also Pope on Lunacy, 257, 2nd ed.). And a trustee will be allowed such payments in account (*Nelson* v. *Duncombe*, 9 Beav. 211). Necessaries include costs of proceedings in lunacy (*Stedman* v. *Hart*, Kay, 607; *Jones* v. *Noyes*, 7 W. R. 21; *Williams* v. *Wentworth*, 5 Beav. 325).

Debts in connection with trusts.

A trustee, who has committed a breach of trust by misapplying the trust fund, is considered only as a simple contract debtor to his *cestui que trust* (*Vernon* v. *Vawdry*, 2 Atk. 119; *Cox* v. *Bateman*, 2 Ves. sen. 19; see *Perry* v. *Phelips*, 4 Ves. 116). But an acknowledgment by a trustee under his hand and seal, that he alone had received the whole trust money for the purposes of the trust (*Gifford* v. *Manley*, Cas. temp. Talbot, 109; see Kay, 725), or any general words amounting to a covenant on his part, will make him a debtor by specialty (*Montford* v. *Cadogan*, 19 Ves. 638; *Wood* v. *Hardisty*, 2 Coll. 542). And the words "covenant or agree," are not necessary in a trust deed to constitute a specialty contract: a declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient (*Richardson* v. *Jenkins*, 1 Drew. 477). A trustee, however, under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it (*Richardson* v. *Jenkins*, 1 Drew. 477). And even where the trustee has executed the deed, the Court will not raise a covenant without necessity (*Adey* v. *Arnold*, 2 D. M. & G. 437). In every case the question is: Was it intended that the trustee should give a covenant for payment of the money? (*Isaacson* v. *Harwood*, 3 Ch. 228). The mere assignment of the trust property will not create a specialty debt (*Adey* v. *Arnold*, 2 D. M. & G. 432; *Wynch* v. *Grant*, 2 Drew. 312); nor a recital of an agreement to become trustee (*Wynch* v. *Grant, ubi supra*); nor a declaration by the trustee that he accepts the office (*Holland* v. *H.*, 4 Ch. 449).

Specialty debts.

As to specialty debts, see generally the note to sect. 3 of the Civil Proc. Act, 1833, *ante*, p. 246. To make a debt a specialty it must be enforceable at law. There is no specialty in equity (*Holland* v. *H.*, 4 Ch. 455). Specialty debts have been held to have been created by a covenant in a marriage settlement to settle money (*Eyre* v. *Monro*, 3 K. & J. 305); by a covenant to execute a lease (*Kidd* v. *Boone*, 12 Eq. 89); and by a covenant for further assurance (*Re Dickson, ibid.* 154). In general, an acknowledgment of a debt by an instrument under seal will amount to a covenant to pay and creates a specialty (*Saunders* v. *Milsome*, 2 Eq. 573), but not where the acknowledgment is made for a collateral purpose (*Jackson* v. *N. E. Ry.*, 7 Ch. D. 573, 583; *Isaacson* v. *Harwood*, 3 Ch. 225; *Marryat* v. *M.*, 28 Beav. 224). All moneys payable in pursuance of the regulations of a company formed under Companies Act, 1862,

by a member to the company were specialty debts (Cos. Act, 1862, s. 16); and where a company was being wound up, the liability of a contributory to pay calls was a specialty (sect. 75; *Buck* v. *Robson*, 10 Eq. 629), even where the company was not registered under that Act (*Re Muggeridge, M.* v. *Sharp*, 10 Eq. 443). See now Comp. Consol. Act, 1908, ss. 14 and 125. Calls on shares in a company incorporated by a Colonial Act only give rise to a simple contract debt (*Welland Co.* v. *Blake*, 6 H. & N. 415; 30 L. J. Ex. 161). **15 Geo. 5, c. 23, s. 32.**

Calls enforced against real estate.

The Admon. of Estates Act, 1833, charged the real estate not only with debts actually due, but also with all liabilities resulting out of obligations entered into during life (*Hamers' Devisees' Case*, 2 D. M. & G. 366). Calls in respect of shares made after the death of a shareholder were enforced against his real estate in the hands of his devisees (*ibid.*; *Turquand* v. *Kirby*, 4 Eq. 123). It is now provided that on the death of a contributory his personal representatives and also his heirs and devisees shall be liable to contribute (Comp. Consol. Act, 1908, s. 126 (1)). As to settling on the list, see sect 126, sub-s. 2, sect. 168, sub-s. 2.

Costs.

The costs of probate litigation could not, before the L. T. Act, 1897 (*ante*, p. 415), be paid out of real estate (*Charter* v. *C.*, 3 Ch. D. 218; *Re Price, Williams* v. *Jenkins*, 31 Ch. D. 485; *Re Shaw, Bridges* v. *S.*, [1894] 3 Ch. 615). But the L. T. Act, 1897, altered the rule (*Re Prince, Godwin* v. *P.*, [1898] 2 Ch. 228; see *Brisco* v. *Baillie Hamilton*, [1902] P. 238; *Re Vickerstaff, V.* v. *Chadwick*, [1906] W. N. 67). The costs of a creditor's administration action were, according to the old rule, paid out of the same funds and in the same order as debts (see *Wilson* v. *Heaton*, 11 Beav. 492). According, however, to the modern rule (laid down by the C. A. in a legatee's administration action), the general costs of an action to administer real and personal estate are borne by the personal estate; but the costs exclusively occasioned by the administration of the real estate are thrown upon the real estate (*Patching* v. *Barnett*, [1907] 2 Ch. 154; *Re Middleton, Thompson* v. *Harris*, 19 Ch. D. 552). This was not altered by the L. T. Act, 1897 (*Re Jones, Elgood* v. *Kinderley*, [1902] 1 Ch. 92; *Re Betts, Doughty* v. *Walker*, [1907] 2 Ch. 149).

(7) Order of payment of debts.

In the administration of equitable assets all creditors are paid *pari passu* without regard to legal priority (Wm. Exors., 11th ed. 1290; see *Pardo* v. *Bingham*, 6 Eq. 485; *Re Poole, Thompson* v. *Bennett*, 6 Ch. D. 739).

In the administration of legal assets the debts of persons dying since 1869 have been paid in the following order:—

(1.) Debts due to the Crown on record or specialty. See as to the priority of the Crown in winding up proceedings, *Re Henley* (9 Ch. D. 469); *Re Oriental Bank* (28 Ch. D. 643); *Fox* v. *Newfoundland*, [1898] A. C. 667; *New South Wales* v. *Palmer*, [1907] A. C. 179. But see now *Re Wood & Co.*, [1922] 2 Ch. 369. A surety to the Crown who had paid the debt was entitled to the Crown's priority (*Re Churchill, Manisty* v. *C.*, 39 Ch. D. 174). As to who are Crown debtors, see p. 559, *post*.

(2.) Debts to which particular statutes give priority, such as debts for poor rates due from overseers (Poor Relief Act, 1743, s. 3; *Fisher* v. *Shirley* (1879), W. N. p. 108); debts due from their officers to an unincorporated building society (*Moors* v. *Marriott*, 7 Ch. D. 543), or to a friendly society (Friendly Societies Act, 1896, s. 35; see *Ex parte Edmonds*, 46 L. T. 240); or to a savings-bank (Trustee Savings Banks Act, 1863, s. 14; *Jones* v. *Williams*, 36 Ch. D. 573); certain debts from officers or soldiers dying while subject

15 Geo. 5, c. 23, s. 32.

to military law (Regimental Debts Act, 1893, s. 2). When an insolvent estate is being administered in the Chancery Division, the priority as to rates and wages given by the Preferential Payments in Bankruptcy Act, 1888, applied (*Re Heywood, Parkington* v. *H.*, [1897] 2 Ch. 593). See now as to insolvent estates, sect. 34 and Sched. I., *post*.

(3.) Judgments in Courts of record, and decrees in Courts of equity against the deceased *pari passu* (*M'Causland* v. *O'Callaghan*, [1904] 1 I. R. 376). After the Law of Property Amendment Act, 1860, it was held that to enjoy this priority the judgment must be registered (*Re Turner, T.* v. *Waller*, 12 W. R. 337; 33 L. J. Ch. 232; *Kemp* v. *Waddingham*, L. R. 1 Q. B. 355; *Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189). See now as to registration of writs and orders the Land Charges Act, 1925, s. 6, *post*. A foreign judgment is only a simple contract debt (*Wilson* v. *Dunsany*, 18 Beav. 293). As to a surety for the deceased who has paid off a judgment recovered during his life for the debt, see *Re M'Myn, Lightbown* v. *M.* (33 Ch. D. 575).

(4.) Judgments against legal personal representatives for debts of deceased whether specialty or simple contract (*Williams* v. *W.*, 15 Eq. 270; see however as to judgments for simple contract debt, *Re Bentinck, B.* v. *B.*, [1897] 1 Ch. 673), and whether the judgment be registered or not. The rule before Administration of Estates Act, 1869, that registration was unnecessary (*Jennings* v. *Rigby*, 33 Beav. 198), was not altered by that Act (*Williams* v. *W.*, 15 Eq. 270). A balance order for payment of a call is not such a judgment (*Re Hubback, International Co.* v. *Hawes*, 29 Ch. D. 934). Where a general decree for administration was made on the same day as the judgment, the judgment creditor had no priority (*Parker* v. *Ringham*, 33 Beav. 535). So where a like decree was made after order *nisi* to sign judgment, but before judgment actually signed (*Hanson* v. *Stubbs*, 8 Ch. D. 154). Judgments against representatives are payable according to their dates (*Dolland* v. *Johnson*, 2 Sm. & G. 301; see *M'Causland* v. *O'Callaghan*, [1904] 1 I. R. 376).

(5.) Recognizances and statutes.

(6.) Specialty and simple contract debts, which stand in equal degree (see Administration of Estates Act, 1869, *infra*), including arrears of rent (*Re Hastings, Sherriff* v. *H.*, 6 Ch. D. 610). Simple contract debts due to the Crown have priority over simple contract debts due to a subject (Wms. Exors., 10th ed., 756). In a case of insolvency which occurred since the last-mentioned Act, the assets were apportioned rateably between the simple contract creditors (one of whom was the Crown) and the specialty creditor, and the Crown's debt was paid in priority out of the assets apportioned to the former class (*Re Bentinck, B.* v. *B.*, [1897] 1 Ch. 673).

As regards debts due from an incumbent's estate for dilapidations; where an order has been made under the Ecc. Dilapidations Act, 1871, these are under sect. 36 of that Act payable out of the assets of the deceased incumbent *pari passu* with his other debts (*Re Monk, Wayman* v. *M.*, 35 Ch. D. 583). As to the law before that Act, see *Bryan* v. *Clay*, 1 E. & B. 38, *Bissett* v. *Burgess*, 23 Beav. 278.

(7.) Voluntary bonds (*Markwell* v. *M.*, 34 Beav. 18; see as to voluntary notes *Re Whitaker*, 42 Ch. D. 119). If assigned

for value these bonds are specialties (*Payne* v. *Mortimer*, 4 De G. & J. 447). As to the payment of voluntary creditors in the administration of insolvent estates, see *Re Whitaker*, *W.* v. *Palmer*, [1901] 1 Ch. 9, quoted p. 483. 15 Geo. 5, c. 23, s. 32.

In the case of persons dying after 1869, no debt or liability of such person is entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, are treated as standing in equal degree, and paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable. But this does not prejudice or affect any lien, charge, or other security held by any creditor (Administration of Estates Act, 1869, s. 1, repealed as to deaths after 1925 by the present Act). See now the present section. 32 & 33 Vict. c. 46.

The Act of 1869 gave simple contract creditors who obtained judgment against the debtor's executor a right to be paid in priority to specialty creditors (*Re Williams*, *W.* v. *W.*, 15 Eq. 270). It did not deprive an executor of the power to prefer a simple contract to a specialty creditor (*Re Samson*, *Robbins* v. *Alexander*, [1906] 2 Ch. 584; and see sect. 34, sub-sect. 2, *post*). Nor did the Act (which did not affect the Crown) give a simple contract Crown debt priority over specialty debts due to subjects (*Re Bentinck*, *B.* v. *B.*, [1897] 1 Ch. 673). But it gave an executor the right to retain a simple contract debt as against specialty creditors (*Olpherts* v. *Corylon*, [1913] 1 I. R. 211; *Re Harris*, *Davis* v. *H.*, [1914] 2 Ch. 295, not following *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*, *Calver* v. *Laxton*, 31 Ch. D. 440; *Re Briggs*, *Earp* v. *B.* (1894), W. N. 162).

33.—(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives— Trust for sale.

(a) as to the real estate upon trust to sell the same; and

(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money,

with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels (*a*) be not sold except for special reason.

(2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act (*b*), and out of the residue of the said money the personal representa-

15 Geo. 5, c. 23, s. 33.

tive shall set aside a fund sufficient to provide for any pecuniary legacies (*c*) bequeathed by the will (*d*) (if any) of the deceased.

(3) During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money (*e*), with power, at the discretion of the personal representatives, to change such investments for others of a like nature.

(4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate."

(5) The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman.

(6) Nothing in this section affects the rights of any creditor of the deceased or the rights of the Crown in respect of death duties.

(7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will (*d*).

The provisions of this section are taken from the L. P. Acts of 1922 and 1924. See also L. P. Act, 1925, s. 33, *post*.

(*a*) For the meaning of "personal chattels" see sect. 55, sub-sect. 1 (x), *post*, p. 480.

(*b*) See the preceding section and notes, also sects. 34 and 35, *post*.

(*c*) For definition see sect. 55, sub-sect. 1 (ix), *post*.

(*d*) Includes codicil (sect. 55 sub-sect. 1 (xxviii), *post*).

(*e*) See sects. 1, 2 and 7 of the Trustee Act, 1925, *post*. See also sect. 42 of the present Act, *post*.

Administration of assets.

34.—(1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act (*a*).

(2.) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person. 15 Geo. 5, c. 23, s. 34.

Subject as aforesaid, nothing in this Act affects the right of retainer (*b*) of a personal representative, or his right to prefer creditors (*c*).

(3.) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act (*d*).

(*a*) See *post*, pp. 483—484.

(*b*) The law relating to retainer before the present Act was as follows:—

Retainer by executor.

An executor's right of retaining out of a testator's assets a debt owing to himself by the testator is the exercise by the executor in his own favour of the right of preference (*Talbot* v. *Frere*, 9 Ch. D. 571). It is a "privilege" of the executor personally (*Re Benett*, *Ward* v. *B.*, [1906] 1 Ch. 227); a common law right exercisable against legal assets (*Re Baker*, *Nicholls* v. *B.*, 44 Ch. D. 270), "given for this reason. When the creditor was also executor he could not sue himself. Any other creditor by suing the executor might get priority by judgment obtained; and the executor not being able to sue himself was allowed, as against other creditors, to retain" (*Re Illidge*, *Davidson* v. *I.*, 27 Ch. D. 481).

Origin of doctrine.

By whom right exercisable.

The right might be exercised by the executor of an executor if the right was claimed during the lifetime of the latter (*Wilson* v. *Coxwell*, 23 Ch. D. 764; see *Re Owen*, *Poe* v. *Shortt*, 23 L. R. Ir. 328); but only out of assets which came to the hands of the latter or were paid into Court in his lifetime (*Re Compton*, *Norton* v. *C.*, 30 Ch. D. 15). The right might also formerly be exercised by an administrator (*Re May*, *Crawford* v. *M.*, 45 Ch. D. 499). But see now the form of administration bond (Practice Note (1899), W. N. 262; see *Davies* v. *Parry*, [1899] 1 Ch. 602; *Re Belham*, *Richards* v. *Yates*, [1901] 2 Ch. 52).

Against whom.

An executor's retainer was not only not affected by Administration of Estates Act, 1869, s. 1 (*Crowder* v. *Stewart*, 16 Ch. D. 368); but was enlarged by it, so that it could be exercised against creditors in higher degree (*Re Harris*, *Davis* v. *H.*, [1914] 2 Ch. 395; following *Olpherts* v. *Coryton*, [1913] 1 I. R. 211, and not following *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*, *Calver* v. *Laxton*, 31 Ch. D. 440; *Re Briggs*, *Earp* v. *B.* (1894), W. N. 162; see *Re Samson*, *Robbins* v. *Alexander*, [1906] 2 Ch. 584; *Talbot* v. *Frere*, 9 Ch. D. 568; *Re Allen*, *Adcock* v. *Evans*, [1896] 2 Ch. 345; *Laver* v. *Botham*, [1895] 1 Q. B. 59). And before *Re Harris* (*supra*), a retainer made without notice of a debt of higher degree was held good (*Re Fludyer*, *Wingfield* v. *Erskine*, [1898] 2 Ch. 562).

Out of what property.

The right of retainer could be exercised out of legal assets (*Re Baker*, *Nicholls* v. *B.*, 44 Ch. D. 270), but not out of equitable assets (*ibid.*; *Re Poole*, *Thompson* v. *Bennett*, 6 Ch. D. 739; *Walters* v. *W.*, 18 Ch. D. 182; see as to legal and equitable assets, p. 440.

15 Geo. 5, c. 23, s. 34.

ante). As to a fund appointed under a general testamentary power, the right of retainer has been doubted (*Re Guedalla, Lee* v. *G.*, [1905] 2 Ch. 339). Such a fund has been held to be legal assets (*Re Hadley*, [1909] 1 Ch. 30; but see *O'Grady* v. *Wilmot*, [1916] A. C. 231, overruling that case on the incidence of estate duty). Real estate made assets under Administration of Estates Act, 1833, being equitable assets, an executor had no right of retainer out of it (*Walters* v. *W.*, 18 Ch. D. 182; *Re Illidge, Davidson* v. *I.*, 27 Ch. D. 478). The real estate of persons dying after 1897 was made legal assets by the L. T. Act, 1897; but it was held that sub-sect. 3 of sect. 2 of that Act prevented the right of retainer from applying (*Re Williams, Holder* v. *W.*, [1904] 1 Ch. 52). An executor could not retain out of assets got in by a receiver (*Re Jones, Calver* v. *Laxton*, 31 Ch. D. 440); but where the executor had paid a debt out of assets in his hands under an order of Court made "without prejudice to any question of retainer," he was allowed to retain out of assets subsequently got in by the receiver (*Re Lance, Sharp* v. *Rebbeck*, [1900] W. N. 29); and he might retain out of assets got in by himself and handed over to a receiver (*Re Harrison, Latimer* v. *H.*, 32 Ch. D. 395; *Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956); and also (where the estate was being administered in bankruptcy) out of assets got in by himself and paid over to the trustee in ignorance of the right (*Re Rhoades*, [1899] 2 Q. B. 347). He could also retain out of assets paid into Court by him either actually or in substance (*Richmond* v. *White*, 12 Ch. D. 361; *Re Giles, supra; Re Langley, Johnson* v. *L.*, 68 L. J. Ch. 361); but not out of a fund transferred from the credit of another suit to the credit of the administration action (*Pulman* v. *Meadows*, [1901] 1 Ch. 233). The Court has refused to pay funds out of Court to an executor to enable him to retain his debt (*Trevor* v. *Hutchins*, [1896] 1 Ch. 844). When the executor's debt exceeded the value of the assets he might retain the assets in specie (*Re Gilbert*, [1898] 1 Q. B. 282; see also *Re Broad*, 105 L. T. 719).

In respect of what debts.

An executor could retain in respect of debts whether legal or equitable (*Re Morris, M.* v. *M.*, 10 Ch. 68), even where an account must be taken (*ibid.*). He could retain in respect of a debt due to himself jointly with others (*Crowder* v. *Stewart*, 16 Ch. D. 368; *Re Hubback, International Co.* v. *Hawes*, 29 Ch. D. 935; *Re Bolton* (1892), W. N. 114; and he could retain in respect of a debt due to himself as trustee (*Re Hubback, supra*). The representative of a sole trustee who had committed a breach of trust might, if he had himself elected to act as trustee, be compelled to exercise the right of retainer for the benefit of the *c. q. trusts* (*Davies* v. *Parry*, [1899] 1 Ch. 607; *Re Benett, Ward* v. *B.*, [1906] 1 Ch. 233; see *Sander* v. *Heathfield*, 19 Eq. 21; *Re Faithfull*, 57 L. T. 14); *secus* if he had not accepted the position of trustee, at least where the debt was an equitable one (*Re Benett, Ward* v. *B.*, [1906] 1 Ch. 229, 230). An executor jointly guilty with the testator of breach of trust could not retain to the prejudice of other creditors (*Re Beavan, Davies* v. *B.*, [1913] 2 Ch. 595). Where the debt was a legal one and the estates of the debtor and creditor were both being administered by the Court, the administrator was ordered to retain (*Fox* v. *Garrett*, 28 Beav. 16; *Re Owen, Poe* v. *Shortt*, 23 L. R. Ir. 328; but see *Re Benett, supra*). An executor, however, could not retain a debt to which he was entitled as *c. q. t.*, the right to sue for which was vested in trustees (*Re Dunning*, 54 L. J. Ch. 900; *Re Hayward, Tweedie* v. *H.*, [1901] 1 Ch. 221; and see *Re Sutherland, Michell* v. *Bubna*, [1914] 2 Ch. 720). A person to whom administration was granted *durante minoritate*, or to the use of a lunatic, might retain for their benefit (*Franks* v. *Cooper*, 4 Ves.

763); but where the grant was made to the manager of a bank who were creditors (but not expressed to be made for the use of the bank), he could not retain the bank's debt (*Re Richards, Lawson* v. *Hervey*, [1901] 2 Ch. 399). The right might be exercised in respect of the right of indemnity as surety for the testator (*Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956; *contra*, *Re Beavan, Davies* v. *B.*, [1913] 2 Ch. 595), or in respect of claims for damages for breach of pecuniary contracts (*Re Compton, Norton* v. *C.*, 30 Ch. D. 15; see *Re Allen, Adcock* v. *Evans*, [1896] 2 Ch. 345). As to an executor of an executor, see *Re Funnell*, 107 L. T. 145, and as to two estates administered in one action, *Olpherts* v. *Coryton*, [1913] 1 I. R. 381. In the case of a debt payable in the form of an annuity where the estate was insolvent, an administratrix was allowed to retain arrears, but not the value of her future annuity (*Re Beeman, Fowler* v. *James*, [1896] 1 Ch. 48). An executor might retain a debt notwithstanding that the amount had not been ascertained (*Morris* v. *M.*, 10 Ch. 68); and in respect of a debt barred by the Statute of Limitations (*Beswick* v. *Orpen*, 16 Ch. D. 207; see *Re Rownson, Field* v. *White*, 29 Ch. D. 359), but not one barred by the Statute of Frauds (*Re Rownson, supra*). The right could be exercised by an administratrix in respect of moneys advanced out of her separate estate to her deceased husband for his business (*Re May, Crawford* v. *M.*, 45 Ch. D. 499; *Re Ambler, Woodhead* v. *A.*, [1905] 1 Ch. 697). A husband, as his wife's executor, could retain her funeral expenses out of assets appointed by her will (*Re M'Myn, Lightbown* v. *M.*, 33 Ch. D. 575). As to a bankrupt administrator, see *Wilson* v. *W.*, [1911] 1 K. B. 327.

15 Geo. 5, c. 23, s. 34.

Effect of proceedings on right.

The right need not be asserted before occasion arises (*Re Rhoades*, [1899] 2 Q. B. 347). It might be exercised after an administration judgment (*Re Barrett, Whitaker* v. *B.*, 43 Ch. D. 70; *Davies* v. *Parry*, [1899] 1 Ch. 602), even after certificate (*Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956). But it could not be exercised as against a simple contract creditor who had previously obtained judgment *de bonis testatoris* against the executrix in an action where the right of retainer had not been set up (*Re Marvin, Crawter* v. *M.*, [1905] 2 Ch. 490). The right was not waived by the executor commencing an administration action on behalf of himself and all other creditors, and submitting to account (*Ex parte Campbell, C.* v. *C.*, 16 Ch. D. 198). The Court would not interfere with the retainer by appointing a receiver (*Re Wells, Molony* v. *Brooke*, 45 Ch. D. 569). The right of retainer was not affected by the Jud. Act, 1875, s. 10 (*Lee* v. *Nuttall*, 12 Ch. D. 61; *Re May*, 45 Ch. D. 499; *Re Ambler*, [1905] 1 Ch. 697; see now Sched. I., Part I., *post*), nor (so far as regards assets got in by the executor) by the transfer of the administration to bankruptcy under sect. 125 of the Bankruptcy Act, 1883 (*Re Rhoades*, [1899] 2 Q. B. 347).

By heir-at-law.

It was said before the Land Transfer Act, 1897, that an heir-at-law or devisee, where the estate was not charged with debts, might retain a debt to which he was entitled by specialty in which the heirs were bound, but not a simple contract debt (*Re Illidge, Davidson* v. *I.*, 27 Ch. D. 478). Consider as to deaths between 1897 and 1926 the effect of the L. T. Act, 1897, *ante*, p. 415.

Retainer under the present Act.

The present section expressly indicates, as the property out of which retainer may be exercised in cases of deaths on and after January 1, 1926, all assets of the deceased (sub-sect. 2, *supra*); but excludes (*ibid.*) debts not owing to a representative in his own right. Apparently, therefore, the right can now be exercised out of both legal and equitable assets, and out of realty; but not, as heretofore, in respect of debts owing to the representative as a trustee (*Re Hubback*, 29 Ch. D. 935). *Quære*, whether the words "in his own

15 Geo. 5, c. 23, s. 34.

right" in sub-sect. 2 include debts to which he is equitably entitled (see *Re Hayward, Tweedie* v. *H.*, [1901] 1 Ch. 221). The right of retainer out of a fund appointed under a general testamentary power has been doubtful (*Re Gucdalla, Lee* v. *G.*, [1905] 2 Ch. 339). By sect. 3, sub-sect. 2 of the present Act, *ante*, a testator is deemed to have been entitled at his death to interests in real estate passing under gifts in his will which operated as an appointment; and by sect. 1, sub-sect. 1, real estate to which a deceased person was entitled for an interest not ceasing on his death, devolves on his personal representative in like manner as a chattel real. The effect of these provisions seems to be similar to that of sect. 1, sub-sects. 1 and 2 of L. T. Act, 1897, *ante*. Personal estate appointed by will under a general power was held to be legal assets (*Re Hadley*, [1909] 1 Ch. 30); but see *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, in which *Re Hadley* was overruled, it being held that the appointed property did not "pass to the executor as such" within sect. 9, sub-sect. 1, of the Finance Act, 1894. "Personal representative" includes (sect. 55, sub-sect. 1 (xi), *post*) an administrator.

Executor may prefer creditors.

(*c*) Before judgment in an administration action an executor or administrator may prefer one creditor to another (*Vane* v. *Rigden*, 5 Ch. 669; *Maltby* v. *Russell*, 2 Sim. & Stu. 227); even a simple contract to a specialty creditor (*Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584); and even though the preferred creditor be barred by statute (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 415); and even though the representative have notice of the commencement of an administration action (*European Society* v. *Radcliffe*, 7 Ch. D. 733). See also *Re Jones, Peak* v. *J.*, [1914] 1 Ch. 742. Nor will a receiver be appointed against an executor except where a case is shown of assets being wasted (*Harris* v. *H.*, 56 L. T. 507; *Re Wells, Moloney* v. *Brooke*, 45 Ch. D. 575).

(*d*) See as to charges on property sect. 35, *post*, and as to the order of application of assets, pp. 484—5, *post*.

Charges on property of deceased to be paid primarily out of the property charged.

35.—(1.) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

(2.) Such contrary or other intention shall not be deemed to be signified—

(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

(b) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly

or by necessary implication referring to all or some part of the charge. 15 Geo. 5, c. 23, s. 35.

(3.) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise.

This section replaces the Real Estate Charges Acts, 1854, 1867, and 1877 (repealed by the present Act as to deaths occurring after 1925), which provided as follows:—

THE REAL ESTATE CHARGES ACT, 1854.

17 & 18 Vict. c. 113.

An Act to amend the Law relating to the Administration of the Estates of Deceased Persons. 17 & 18 Vict. c. 113, s. 1.

[11th August, 1854.]

Whereas it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: be it enacted as follows:

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five.

Heir or devisee of real estate not to claim payment of mortgage out of personal assets.

Not to affect rights claimed under any will, &c., before January 1, 1855.

2. This Act shall not extend to Scotland.

Extent of Act.

THE REAL ESTATE CHARGES ACT, 1867.

"*An Act to explain the Operation of*" 17 & 18 Vict. c. 113.

30 & 31 Vict. c. 69.

30 & 31 Vict. c. 69, s. 1.

Whereas by an Act passed in the seventeenth and eighteenth years of her present Majesty it is enacted, among other things, that when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:

And whereas doubts may exist upon the construction of the said Act, and it is expedient that such doubts should for the future be removed:

Be it therefore enacted as follows:

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless such intention expressly implied.

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Interpretation of word "mortgage."

2. In the construction of the said Act and of this Act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator.

Extent of Act.

3. This Act shall not extend to Scotland.

THE REAL ESTATE CHARGES ACT, 1877.

"*An Act to amend*" 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69.

40 & 41 VICT. c. 34.

Be it enacted as follows:

40 & 41 Vict. c. 34, s. 1.

Application of Acts in schedule.

1. The Acts mentioned in the Schedule hereto shall, as to any testator or intestate dying after the thirty-first December, one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.

Act not to extend to Scotland.

2. This Act shall not extend to Scotland.

SCHEDULE.

17 & 18 Vict. c. 113	An Act to amend the law relating to the administration of the estates of deceased persons.
30 & 31 Vict. c. 69	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

(1.) *The Act of* 1854...453.
(2.) *The Act of* 1867...456.
(3.) *The Act of* 1877...457.
(4.) *The present section*...457.

(1) *The Real Estate Charges Act*, 1854.

Previous law as to the payment of mortgage debts.

The rule previous to the Act was, that the personal estate of the deceased debtor was the primary fund to pay off a mortgage, unless an intention was shown to throw the debt on the mortgaged estate. The object of the Act was to make the mortgaged estate the primary fund, unless an intention can be shown to throw the debt on the personalty (*Goodwin* v. *Lee*, 1 K. & J. 378; *Swainson* v. *S.*, 6 D. M. & G. 652). For the law before this Act, see further *Ancaster* v.

17 & 18 Vict. c. 113, s. 1.

Mayer (1 L. C. Eq.). The Act did not impose any personal liability on the devisee (*Syer* v. *Gladstone*, 30 Ch. D. 616).

Bequests of personal estate.

The Act did not apply to specific bequests of personal estate (*Re Bourne, Martin* v. *M.*, [1893] 1 Ch. 191). And in the case of specific bequests of chattels which are subject to charges, a distinction has been taken between charges created by the testator and charges incident to the chattel, such as calls on shares or the rents of leaseholds. In the first case the specific legatee is entitled to have the legacy freed from the charge, in the second case he is not so entitled (*Bothamley* v. *Sherson*, 20 Eq. 316; see *Lewis* v. *L.*, 13 Eq. 227). In one case it was held that the legatee of incumbered stock was not entitled to have the incumbrance paid off out of real estate charged with debts (*Re Butler, Le Bas* v. *Herbert*, [1894] 3 Ch. 250). In the case of bequests of shares not fully paid, any call made before the testator's death but remaining unpaid at that time, must be borne by the residuary estate, and calls made after the death by the legatee (*Armstrong* v. *Burnet*, 20 Beav. 424; *Addams* v. *Ferick*, 26 Beav. 384; *Day* v. *D.*, 1 Dr. & Sm. 261). So in bequests of leaseholds, the rent up to the testator's death must be borne by the residuary estate, and after that time by the specific legatee (*Hawkins* v. *H.*, 13 Ch. D. 470). See *Re Betty, B.* v. *Att.-Gen.* ([1899] 1 Ch. 821); *Re Gjers, Cooper* v. *G.* ([1899] 2 Ch. 54), and cases there referred to. Compare the case of the specific devise of a reversion, where the testator had entered into onerous covenants in the lease on which the reversion was expectant. The residue bore the burden of such a covenant, where it was not incident to the relation of landlord and tenant (*Eccles* v. *Mills*, [1898] A. C. 360); the devisee, where it was so incident (*Mansel* v. *Norton*, 22 Ch. D. 769). Compare also the case where a testator who had contracted for the erection of buildings on his freehold land died before the completion of the buildings, and the cost fell on the general personal estate (*Re Day, Sprake* v. *D.*, [1898] 2 Ch. 510).

Land, &c., within the Act.

The Act did not originally apply to leaseholds (*Solomon* v. *S.*, 12 W. R. 540; *Gael* v. *Fenwick*, 22 W. R. 211; *Re Wormsley, Hill* v. *W.*, 4 Ch. D. 665), but was applied to them by the Real Estate Charges Act, 1877. The Act applied to copyholds (*Piper* v. *P.*, 1 J. & H. 91). Where freeholds were settled by deed upon trusts for conversion, a share in the produce, which was under the deed taken as personal estate, was not an "interest in land" within the Act (*Lewis* v. *L.*, 13 Eq. 218; see *Re Bennett, Clarke* v. *White*, [1899] 1 Ch. 316). The Act applied where real and personal estate were given on trust for conversion, and after a life estate the mixed fund was divided between persons taking the personalty portion and persons taking the remaining portion (*Elliott* v. *Dearsley*, 16 Ch. D. 322). The Act did not apply to the gift by will of an option to purchase land at a fixed price (*Given* v. *Massey*, 31 L. R. Ir. 126; *Re Wilson, W.* v. *W.*, [1908] 1 Ch. 844).

Where freeholds and leaseholds were by will settled in the same way, different parts being subject to different charges, the beneficiaries took the aggregate estate, subject to the aggregate burden, the general personal estate being exonerated (*Re Kensington, Longford* v. *K.*, [1902] 1 Ch. 203; see *Frewen* v. *Law Society*, [1896] 2 Ch. 511; *Honeywood* v. *H.*, [1902] 1 Ch. 347; but see also *Re Holt, H.* v. *H.*, 85 L. J. Ch. 779).

Charge by way of mortgage within the Acts.

The Act only applied where a property was specifically charged (*Dunlop* v. *D.*, 21 Ch. D. 590; see *Hepworth* v. *Hill*, 30 Beav. 476). A banker's general lien was not within the Act (*Dunlop* v. *D.*, 21 Ch. D. 592; see as to a guarantee, *Re Hawkes, Reeve* v. *H.*, [1912] 2 Ch. 251). A general charge on real estate by a testator, in aid of his personal estate, is not within the Act, until the amount has,

17 & 18 Vict. c. 113, s. 1.

in the administration of the estate, been accurately defined, and the devisee has expressly taken the estate, subject to it (*Hepworth* v. *Hill*, 30 Beav. 476). An equitable mortgage by deposit and memorandum was within the Act (*Pembroke* v. *Friend*, 1 J. & H. 132; *Davis* v. *D.*, 24 W. R. 962); even where the memorandum expressed that the deposit was made as collateral security (*Coleby* v. *C.*, 2 Eq. 803). In Ireland a judgment mortgage was within the Act (*Nesbitt* v. *Lawder*, 17 L. R. Ir. 553). The R. E. Charges Act, 1877 extended the Act of 1854 to every description of equitable charge (*Re Bowerman, Porter* v. *B.*, [1908] 2 Ch. 344; *Re Sharland, Kemp* v. *Rozey*, 74 L. T. 664; *Nesbitt* v. *Lawder*, 17 L. R. Ir. 53), including the charge of estate duty under sect. 9, sub-sect. 1 of the Finance Act, 1894 (*Re Bowerman, supra*), and also the charge under the Judgments Act, 1838, s. 13 (see now L. P. Act, 1925, s. 195, *post*), arising by virtue of a delivery in execution (*Re Anthony, A.* v. *A.*, [1892] 1 Ch. 450); but not in the case of land of which the debtor was tenant in tail (*S. C.*, [1893] 3 Ch. 498). A lien for unpaid purchase-money was not originally within the Act (*Hood* v. *H.*, 5 W. R. 74; *Barnwell* v. *Ironmonger*, 1 Dr. & Sm. 260); but was brought within it by R. E. Charges Act, 1867, s. 2; R. E. Charges Act, 1877. Money payable under a building agreement was held to be in the nature of unpaid purchase-money, primarily payable out of the building land (*Re Kidd, Brooman* v. *Withall*, [1894] 3 Ch. 558). See also *Re Cockroft, Broadbent* v. *Groves* (24 Ch. D. 94). An annuity charged on land and secured by covenant was primarily payable, according to the law before this Act, out of a testator's personalty (*Yonge* v. *Furse*, 24 L. J. Ch. 643). But under the R. E. Charges Act, 1877, it was primarily payable out of the land (*Re Sharland, Kemp* v. *Rozey*, 74 L. T. 664).

Negative and positive provisions in the Act.

The negative provision commencing "the heir or devisee, etc." is the substantial part of the enactment (*Dacre* v. *Patrickson*, 1 Dr. & Sm. 191). The positive words which follow "but the land, etc." give effect to the negative provision (*Re Wilson, W.* v. *W.*, [1908] 1 Ch. 844). They do not narrow it. Accordingly where personalty went to the Crown who did not claim through the deceased, the negative provision applied and the Crown was not bound to discharge out of the personalty a mortgage debt charged on devised land (*Dacre* v. *Patrickson, supra*). Nor do the positive words widen the negative provision. Where a testator gave his son an option to purchase land at a fixed price, he was not an "heir or devisee" within the negative provision, and the positive words which follow did not bring the case within the Act (*Re Wilson, W.* v. *W., supra*). Having regard to the positive words referring to the persons claiming through the deceased, the Act did not affect the case where one partner gave a charge on his separate real estate to secure a joint partnership debt, and at the time of his death the joint assets were sufficient to answer the joint debts (*Re Ritson, R.* v. *R.*, [1899] 1 Ch. 128).

Proviso in the Act.

The final proviso applied (*Rolfe* v. *Perry*, 3 D. J. & S. 481); but not when the claim was by an heir (*Piper* v. *P.*, 1 J. & H. 91; *Power* v. *P.*, 8 Ir. Ch. R. 340; *Nelson* v. *Page*, 7 Eq. 25).

Contrary intention within the Act.

With regard to a contrary intention each case must rest on its own circumstances (*Rolfe* v. *Perry*, 3 D. J. & S. 486). See *Eno* v. *Tatham* (3 D. J. & S. 443); *Mellish* v. *Vallins* (2 J. & H. 199); *Smith* v. *S.* (3 Giff. 263). A contrary intention was collected from a will prior to the mortgage, the mortgage itself and a contemporaneous deed (*Re Campbell, C.* v. *C.*, [1893] 2 Ch. 206); and from a charge on Scotch land of a debt which had been secured on land in England (*Smith* v. *Moreton*, 37 L. J. Ch. 6; see also the Acts of 1867 and 1877, *ante*).

17 & 18 Vict. c. 113, s. 1.

Incidence of debt as between different properties in same mortgage.

As between different portions of an estate comprised in one mortgage which are devised to different persons, the Act, in the absence of a contrary intention, applied and compelled the devisees to contribute rateably (*Newmarch* v. *Storr*, 9 Ch. D. 17; which see as to the words "or any other real estate of such person"). As between different freehold estates comprised in the same mortgage, the mortgage debt must be borne rateably although one estate is specifically devised, and the other passes under a residuary devise (*Gibbins* v. *Eyden*, 7 Eq. 375; *Sackville* v. *Smyth*, 17 Eq. 153; see *Re Smith, Hannington* v. *True*, 33 Ch. D. 195). Where freeholds and leaseholds were mortgaged together, and the mortgagor died intestate, it was held, as between his heir and administrator, that the freeholds and leaseholds must bear the burden rateably (*Evans* v. *Wyatt*, 31 Beav. 217). And where freeholds and a policy were mortgaged together and the mortgagor's will declared different trusts of real and personal estate, the mortgage debt was borne rateably (*Trestrail* v. *Mason*, 7 Ch. D. 655; *Leonino* v. *L.*, 10 Ch. D. 460). An intention, however, may be expressed upon the mortgage documents that one property shall be the primary security (*Bute* v. *Cunynghame*, 2 Russ. 299; see 10 Ch. D. 465). Such an intention was found on the documents in *Lipscombe* v. *L.* (7 Eq. 501); *De Rochfort* v. *Dawes* (12 Eq. 540). The words "for further and better securing" were sufficient for the purpose (*Stringer* v. *Harper*, 26 Beav. 33); but not the words "collateral security" (*Athill* v. *A.*, 16 Ch. D. 211; *Williams* v. *Early*, 15 Ch. D. 214, n.). As to property of his wife mortgaged by a testator, see *Re Williams, Cunliffe* v. *W.*, [1915] 1 Ch. 450.

Contribution.

As to the apportionment of a mortgage debt between several estates comprised in the same mortgage, see Story, Eq. Jur., sects. 484, 1233 b.

Order in which funds are applicable where statutory rule excluded.

As to the order in which funds are to be applied in payment of a mortgage debt, where the statutory rule has been excluded by the expression of a contrary intention, see *Allen* v. *A.* (30 Beav. 395); and the argument in *Smith* v. *Moreton* (37 L. J. Ch. 6). It may be the result of a testator's words that a mortgaged estate is to be exonerated only so far as his personalty extends; and that there is no right to go upon the other real estate (*Rodhouse* v. *Mold*, 13 W. R. 854).

Marshalling.

Where the mortgage debts of a testator are (under a direction in his will) primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied (*Porcher* v. *Wilson*, 14 W. R. 1011; see *Re Smith, S.* v. *S.*, [1899] 1 Ch. 365). And where annuities were charged on lands, out of which a mortgage debt was, under this Act, held to be primarily payable, the Act did not preclude the right of the annuitants to have the assets marshalled (*Buckley* v. *B.*, 19 L. R. Ir. 544, followed in *Re Fry, F.* v. *F.*, [1912] 2 Ch. 86).

(2) *The Real Estate Charges Act*, 1867.

Expressions not excluding the Act.

Under sect. 1 a declaration of a contrary intention must unmistakably refer to mortgage debts (*Nelson* v. *Page*, 7 Eq. 28). Directions as to debts and liabilities generally were not sufficient to exclude the Act (*Bossiter* v. *R.*, 13 Ch. D. 355; *Buckley* v. *B.*, 19 L. R. Ir. 544; *Lewis* v. *L.*, 13 Eq. 218; *Re Smith, Hannington* v. *True*, 33 Ch. D. 195; *Newmarch* v. *Storr*, 9 Ch. D. 12; *Sackville* v. *Smyth*, 17 Eq. 153; *Re Hooper, Ashford* v. *Brooks*, [1892] W. N. 151; *Elliott* v. *Dearsley*, 16 Ch. D. 322). The Act, however, was excluded where there was a bequest of personal estate, "subject to

Act excluded.

the payment of my trade debts (which I hereby declare shall be a charge upon my personal estate)," and the real estate had been mortgaged to secure a trade account (*Re Fleck, Colston* v. *Roberts*, 37 Ch. D. 677; see *Thompson* v. *Bell*, [1903] 1 I. R. 489). Again, where there was a direction to pay out of residue debts "except mortgage debts on Blackacre" (*Re Valpy, V.* v. *V.*, [1906] 1 Ch. 531). The Act was also excluded in *Re Nevill, Robinson* v. *N.* (62 L. T. 864), and in *Re Campbell, C.* v. *C.* ([1893] 2 Ch. 206). The "declaration of intention" to exclude the Act must be a general one. It was not sufficient to direct exoneration from a single source, which proved insufficient (*Re Birch, Hunt* v. *Thorn*, [1909] 1 Ch. 787). See also note to the R. E. Charges Act, 1877, *infra*. 17 & 18 Vict. c. 113, s. 1.

Sect. 2 did not apply where the purchaser died intestate (*Harding* v. *H.*, 13 Eq. 493), but did apply where the purchaser devised the land to trustees, but died intestate as to the beneficial interest (*Dowdall* v. *McCartan*, 5 L. R. Ir. 313). See also note to R. E. Charges Act, 1877, and as to a direction to pay out of residue sums of money "secured on mortgage" not applying to a vendor's lien for unpaid purchase-money *Re Bernstein*, [1925] Ch. 12.

(3.) *The Real Estate Charges Act*, 1877.

See the notes to R. E. Charges Acts, 1854 and 1867, *supra*. The Act of 1877 extended the provisions of the former Acts to the leaseholds of a testator (*Re Kershaw, Drake* v. *K.*, 37 Ch. D. 674), and also it seems (notwithstanding the omission of "next-of-kin" in the second sentence) of an intestate (*Re Fraser, Lowther* v. *F.*, [1904] 1 Ch. 726; compare *Downes* v. *Morris*, 3 Hare, 399). A rent charge issuing out of leaseholds and belonging to an intestate was held to fall within the Acts notwithstanding that it was not the subject of tenure (*ibid.*). See as to such tenure Wms. R. P. 19th ed., p. 428: Challis R. P. 387. As to the construction of the words, "lands or other hereditaments of whatever tenure," compare *G. W. Ry.* v. *Swindon Co.*, 9 A. C. 808, a decision on sect. 2 of the L. C. C. Act, 1845. The Act also, in the case of a vendor's heir, extended the former Acts to intestates (*Re Cockcroft, Broadbent* v. *Groves*, 34 Ch. D. 100). It has been observed that the expression of a contrary intention referred to in this Act is limited to the case of a testator, the expression "by deed or other document" of such an intention not being mentioned (*ibid.*).

(4.) *The present section.*

For the statutory power to dispose of entailed interests, see sect. 176 of L. P. Act, 1925, *post*, p. 768; and as to legal mortgages, sect. 85 of that Act, *post*, p. 676. The reference to a general power of appointment does not occur in the former Acts. "Property" in the present Act includes a thing in action and any interest in real or personal property (sect. 55, sub-s. 1 (xvii), *post*). See as to the former Acts, p. 454, *ante*.

Effect of assent or conveyance by personal representative.

36.—(1.) A personal representative may assent (*a*) to the vesting, in any person who (whether by devise, bequest, devolution, appropriation (*b*) or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his

15 Geo. 5, c. 23, s. 36.

will, including the statutory power to dispose of entailed interests (*c*), and which devolved upon the personal representative.

(2.) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased.

(3.) The statutory covenants (*d*) implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed.

(4.) An assent to the vesting of a legal estate (*e*) shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate.

(5.) Any person in whose favour an assent or conveyance of a legal estate (*e*) is made by a personal representative may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate of the deceased, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed thereon or annexed thereto.

(6.) A statement in writing by a personal representative that he has not given or made an assent or conveyance in respect of a legal estate (*e*), shall, in favour of a purchaser (*f*), but without prejudice to any previous disposition made in favour of another purchaser deriving title mediately or immediately under the personal representative, be sufficient evidence that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration.

A conveyance by a personal representative of a legal estate to a purchaser accepted on the faith of such a statement shall (without prejudice as aforesaid and unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration) operate to transfer or create the legal estate expressed to be conveyed in like manner as if no previous assent or conveyance had been made by the personal representative.

A personal representative making a false statement, in regard to any such matter, shall be liable in like manner as if the statement had been contained in a statutory declaration.

15 Geo. 5, c. 23, s. 36.

(7.) An assent or conveyance by a personal representative in respect of a legal estate (*e*) shall, in favour of a purchaser (*f*), unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon.

(8.) A conveyance of a legal estate (*e*) by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral, and testamentary or administration expenses, duties, and legacies of the deceased have been discharged or provided for (*g*).

(9.) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser (*f*) of a legal estate (*e*), prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duties, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.

(10.) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duties, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties, debt or liability if reasonable arrangements have been made for discharging the same; and an assent may be given subject to any legal estate (*e*) or charge by way of legal mortgage (*h*).

(11.) This section shall not operate to impose any stamp duty in respect of an assent (*i*), and in this section "purchaser" means a purchaser for money or money's worth.

(12.) This section applies to assents and conveyances made after the commencement of this Act, whether the testator or intestate died before or after such commencement.

Assent by representatives.

(*a*) This section, taken from the L. P. Act, 1922, amplifies, in the case of all assents and conveyances made after December 31, 1925 (sub-s. 12, *supra*), the provisions as to the transfer of real estate by assent or conveyance contained in L. T. Act, 1897, s. 3 (*ante*, p. 422). Under that Act a personal representative could assent to a devise in preference to conveying (*Re Pix, Plomley* v. *Stileman*, [1901] W. N. 165). The doctrines laid down apart from

15 Geo. 5, c. 23, s. 36.

these enactments in relation to the assent of the representative to dispositions of personal estate are as follows: It was settled that, upon the assent of the executor, the title to leaseholds specifically bequeathed vested absolutely in the legatee without any deed of assignment (*Re Culverhouse, Cook* v. *Culverhouse*, [1896] 2 Ch. 251). It was not essential to the efficacy of an assent to a bequest that it should confer a legal interest or affect the mere legal title (*Trail* v. *Bull*, 1 Coll. 359; see *Doe* v. *Tatchell*, 3 B. & Ad. 675). The question whether there had been an assent or not might involve a matter of law, but was generally a question of fact (*Elliott* v. *E.*, 9 M. & W. 27; *Austin* v. *Beddoe*, 41 W. R. 619). An assent might result either from words or from acts; but it was necessary that the words or acts relied on should be unambiguous (*Doe* v. *Harris*, 16 M. & W. 517; *Thorne* v. *T.*, [1893,] 3 Ch. 187). Thus words were held to amount to an assent (*Camden* v. *Turner*, Cowp. 293; *Garrett* v. *Lister*, 1 Lev. 225; *Barnard* v. *Pumfrett*, 5 My. & Cr. 70; *Lampet's Case*, 10 Rep. 47A, 52B; see also Comyns, Dig. Administration, c. 6; Bac. Abr. Legacies (L.); Shep. Touchstone, (456). Acts might also amount to an assent. Thus, in the case of bequests of leaseholds, where the representative let the legatee into possession or receipt of the rents (*Austin* v. *Beddoe*, 41 W. R. 619; *Cole* v. *Miles*, 10 Ha. 179; *Spackman* v. *Timbrell*, 8 Sim. 261); and where the representative on behalf of the legatee paid a quit-rent charged on the property (*Doe* v. *Mabberley*, 6 C. & P. 126; see *Young* v. *Holmes*, 1 Str. 70). As to payments by the representative to the legatee on account of the rents, see *Re Charik, Abrahams* v. *Charik* (1889), W. N. 91; *Thorne* v. *T.*, [1893] 3 Ch. 196. Assent resulted from the executrix occupying the leaseholds and maintaining the testator's issue where the gift of the leaseholds was expressly made subject to this right (*Paramour* v. *Yardley*, Plowd. 539, 546). So assent was inferred from payment by the representative of interest on a legacy (*Wilson* v. *Rhodes*, 8 Ch. D. 777). Where, fourteen years after a testator's death, an executor pledged chattels, it was held that the executors had assented to the dispositions of the will and that there was no power to pledge (*Attenborough* v. *Solomon*, [1913] A. C. 76). And as to assent before a conveyance to a purchaser being a breach of the implied covenant for title see *Wise* v. *Whitburn*, [1924] 1 Ch. 460. An assent to one article comprised in a bequest was not necessarily an assent to all (*Elliott* v. *E.*, 9 M. & W. 23). Now by sub-s. 4, *supra*, an assent to the vesting of a legal estate in realty must be in writing. For forms see L. P. Act, 1925, Sched. 5, Forms 8 and 9, *post*, p. 830.

By words.

By acts.

Partial assent.

Assent to residuary gifts.

The doctrine of assent applied as well to residuary as to specific gifts (*Austin* v. *Beddoe*, 41 W. R. 619); and executors could assent so as to vest in the legatee part of the residue without vesting the whole (*ibid.*; see *Elliott* v. *E.*, *supra*). But where the executor was himself residuary legatee, an assent to take a part of the residue as legatee was an assent to take the whole (*Hinson* v. *Button*, 2 Roll. Rep. 158).

Assent by executor to his own legacy.

It was necessary that the executor should assent to his own legacy. As to the acts which amounted to such an assent, it was said that where an executor who was also specific legatee did an act respecting the subject of the specific bequest which was referable to either character, that did not prove or amount to an assent (*Trail* v. *Bull*, 1 Coll. 360; *Doe* v. *Sturges*, 7 Taunt. 222; see *Young* v. *Holmes*, 1 Str. 70; *Paramour* v. *Yardley*, Plowd. 539; *Garrett* v. *Lister*, 1 Lev. 25). As regards an executor's entry upon leaseholds in which he had an interest under the will, where that interest was absolute his entry amounted to an assent (*Doe* v. *Sturges*, 7 Taunt. 222). But where his interest was not absolute (*e.g.*, for life) a

mere entry was not sufficient (*ibid.*; *Doe* v. *Tatchell*, 3 B. & Ad. 680; see also *Pannell* v. *Fenn*, Cro. Eliz. 348; *Cray* v. *Willis*, 2 P. Wms. 531); not even though the legatee entered alone of the executors appointed by will (*Doe* v. *Sturges*, *supra*). Where leaseholds and the residue were given on trust for the testator's wife (one of the executors) for life, and after her death legacies were bequeathed, the surplus being given to four persons, one of whom was the wife of A (another executor), the executors did not by allowing the testator's wife to take possession assent to the bequest of leaseholds (*Att.-Gen.* v. *Potter*, 5 Beav. 164); nor did the execution by A of a deed of arrangement of the interests of the residuary legatees constitute an assent (*ibid.*). And where a chattel was bequeathed to an executrix for life, her taking possession of it while she knew of unpaid debts was not an assent to the bequest in remainder (*Richards* v. *Browne*, 3 Bing. N. C. 493). But an executor taking possession and disposing of the property by his will was deemed to have assented (*Fenton* v. *Clegy*, 9 Exch. 683). **15 Geo. 5, c. 23, s. 36.**

Who might assent.

An executor might assent before proving (*Johnson* v. *Warwick*, 17 C. B. 516); and if he subsequently died without proving, the assent was valid if the will was ultimately proved (*Brazier* v. *Hudson*, 8 Sim. 67). One of several executors might without his co-executors assent, even in the case of his own legacy (*Townson* v. *Tickell*, 3 B. & Ald. 40). *Qu.*, however, as to the effect under the L. T. Act, 1897, of an assent by one of several representatives in vesting freeholds in the devisee; see the concluding words of sect. 2, sub-s. 2. It was said that an administrator *durante minore ætate* could not assent to a legacy, unless there were assets sufficient to pay the debts (*Prince's Case*, 5 Co. 29a; but see *Re Cope*, *C.* v. *C.*, 16 Ch. D. 49). Before the M. W. P. Act, 1882, an executrix who was a married woman could not assent (*Cookes* v. *Bellamy*, 1 Sid. 188). That Act, however, contains special provisions as to a married woman being a representative (sects. 18 and 24, *ante*, pp. 389, 393). And by sect. 170, sub-sect. 2 of the L. P. Act, 1925, *post*, she can dispose of property held by her as personal representative as if she were a *feme sole*. It seems that under the present law she can assent to a devise of freeholds.

Married women.

Extent of an assent.

An assent to an estate in remainder was an assent to a present estate (Com. Dig. Administration, C. 6). Conversely, if leaseholds were given to A for life with remainder to B, the assent to A's estate also vested that of B (*Stevenson* v. *Liverpool*, L. R. 10 Q. B. 81). See, however, the exception where the executor was himself tenant for life, *Doe* v. *Sturges* (7 Taunt. 222), and other cases quoted *ante*, p. 460. The rule applied, it seems, to a bequest to A with an executory gift over to B (*Adams* v. *Pierce*, 3 P. W. 12; compare *Lampet's Case*, 10 Co. 47 b). In several cases of connected gifts (such as a bequest of leaseholds to A subject to a charge thereon in favour of B) an assent to one gift also vested the other (see *Young* v. *Holmes*, 1 Str. 70; *Goffe* v. *Haywood*, 1 Roll. Rep. 247, 368; see Plowd. 521 b).

Effect of an assent:

on the legatee's title:

An assent when given related back to the testator's death (Wentworth, 445, 446, 14th ed.; compare *Saunder's Case*, 5 Co. 12 b). Upon the assent of the executor to a specific legacy, the property in the thing bequeathed vested in the legatee (*Doe* v. *Guy*, 3 East 120; *Re Culverhouse*, *Cook* v. *Culverhouse*, [1896] 2 Ch. 251; see *Mead* v. *Orrery*, 3 Atk. 238; *Re West*, *W.* v. *Roberts*, [1909] 2 Ch. 180). So the legatee might, after assent, bring action to recover possession of the property even against the executor (*Doe* v. *Guy*, *supra*; *Williams* v. *Lee*, 3 Atk. 223). Nor could the executor, after assenting to a bequest of leaseholds, claim indemnity out of the general personal estate in respect of the testator's liability under

on the executor's position.

15 Geo. 5, c. 23, s. 36.

the leases (*Chadbolt* v. *Woodfall*, 2 Coll. 30). Upon assenting to a specific bequest given to them on trust, executors became trustees (*Dix* v. *Burford*, 19 Beav. 409; *Clegg* v. *Rowland*, 3 Eq. 372). But an executor did not by assenting to an absolute legacy make himself a trustee of that legacy (*Re Rowe, Jacobs* v. *Hind*, 60 L. T. 599). As to an executor in such a case pleading the Stat. of Lim., see *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491.

Retractation of assent.

In general an assent once given could not be withdrawn (*Noell* v. *Robinson*, 2 Ventr. 358; Wentworth, Off. Ex. 415, 14th ed.; Com. Dig. Admon. C. 8) except under very special circumstances (*Crowe* v. *Menton*, 28 L. R. Ir. 525). But it was said that the executor could probably withdraw his assent in cases where, if the legacy had been paid over, refunding would have been ordered at the instance of the executor (cf. 1 Rop. Leg. 743, 3rd ed.; Wms. Exors. 1108, 10th ed.). It was clear that where a legacy was paid by executors without notice of a debt which they were subsequently compelled to satisfy, the executors could compel refunding (*Whittaker* v. *Kershaw*, 45 Ch. D. 320).

Legatee's interest before assent.

Before assent a legatee had an inchoate right to a legacy which, if he died, went to his executors (Wentworth, Off. Ex. 69, 14th ed.); and the legatee could assign his legacy before assent (Toller, 311, 7th ed.; cf. *Cooper* v. *C.*, L. R. 7 H. L. 65, 66; but see Wentworth, Off. Ex. *ubi supra*).

(*b*) See as to appropriation, sect. 41 and notes, *post*.

(*c*) See L. P. Act, 1925, s. 176, *post*, p. 768.

(*d*) See *ibid.* sect. 76, sub-sect. 1 (F), and Sched. 2, Part VI.

(*e*) *i.e.* (sect. 55, sub-s. 1 (vii), *post*), the estates, charges and interests in or over land (subsisting or created at law) which are by statute authorised to subsist or be created at law (see L. P. Act, 1925, s. 1, *post*, p. 598).

(*f*) See sub-s. 11 of the present section.

(*g*) As to the former law see note to sect. 32, *ante*, p. 440.

(*h*) See L. P. Act, 1925, s. 87, *post*, p. 678.

(*i*) Under L. T. Act, 1897, it was held that a written assent, not under seal, was not liable to stamp duty as a conveyance (*Kemp* v. *Commrs. of Revenue*, [1905] 1 K. B. 581).

Validity of conveyance not affected by revocation of representation.

37.—(1.) All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration.

(2.) This section takes effect without prejudice to any order of the court made before the commencement of this Act, and applies whether the testator or intestate died before or after such commencement.

This section, taken from L. P. Act, 1922 (from which, or from the Amendment Act of 1924, all the sections down to sect. 43 are derived), gives statutory confirmation to the decision of the C. A. in *Hewson* v. *Shelley*, [1914] 2 Ch. 13, overruling *Graysbrook* v. *Fox*, 1 Plowd. 275; *Abram* v. *Cunningham*, 2 Lev. 182, and *Ellis* v. *E.*, [1905] 1 Ch. 613.

Right to follow property

38.—(1.) An assent or conveyance by a personal representative to a person other than a purchaser does not

prejudice the rights of any person to follow the property to which the assent or conveyance relates, or any property representing the same, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person (not being a purchaser) who may have received the same or in whom it may be vested. 15 Geo. 5, c. 23, s. 38.

and powers of the Court in relation thereto.

(2.) Notwithstanding any such assent or conveyance the court may, on the application of any creditor or other person interested,—

(a) order a sale, exchange, mortgage, charge, lease, payment, transfer or other transaction to be carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested;

(b) declare that the person, not being a purchaser, in whom the property is vested is a trustee for those purposes;

(c) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order;

(d) make any vesting order, or appoint a person to convey in accordance with the provisions of the Trustee Act, 1925. 15 Geo. 5, c. 19.

(3.) This section does not prejudice the rights of a purchaser or a person deriving title under him, but applies whether the testator or intestate died before or after the commencement of this Act.

See as to following assets, sects. 26 and 27 of the Trustee Act, 1925, and notes, pp. 1045, 1046, 1047, *post*, and as to vesting orders and appointing persons to convey, sects. 47 and 50 of that Act and notes. For definition of purchaser see sect. 55, sub-sect. 1 (xviii), of the present Act, *post*.

Orders for sale.

Under R. S. C. Ord. 51, r. 1, the Court has power in any cause or matter relating to real estate to order a sale; that is, a sale for the purposes of the action (*Re Robinson, Pickard* v. *Wheater*, 31 Ch. D. 247; compare the similar power in 15 & 16 Vict. c. 86, s. 55, now repealed, which was intended to apply to administration suits; *London & County Co.* v. *Dover*, 11 Ch. D. 204). And the ordinary form of creditors decree for the administration of realty and personalty directs sale of the realty, "in case the personal estate shall be insufficient for payment of debts and funeral expenses," and see Seton, 7th ed., 1440.

Powers of management.

39.—(1.) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have—

(i) the same powers and discretions, including power to raise money by mortgage or charge (whether or

15 Geo. 5, c. 23, s. 39.

not by deposit of documents), as a personal representative had before the commencement of this Act, with respect to personal estate vested in him (*a*), and such power of raising money by mortgage may in the case of land be exercised by way of legal mortgage (*b*); and

(ii) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale) (*c*); and

(iii) all the powers conferred by statute on trustees for sale (*d*), and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect, or be varied or rescinded by him, and, in the case of a contract entered into by a predecessor, as if it had been entered into by himself (*e*).

(2.) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made (*f*).

(3.) This section applies whether the testator or intestate died before or after the commencement of this Act.

(*a*) As to the powers of a personal representative see note to sect. 2 of the L. T. Act, 1897, *ante*, p. 419.
(*b*) See sect. 85 of the L. P. Act, 1925, *post*, p. 676.
(*c*) See sect. 28, sub-s. 1, of that Act, *post*, p. 618.
(*d*) See sects. 25, 28, 29 and 33 of that Act.
(*e*) Cf. S. L. Act, 1925, s. 90 (2), *post*, p. 950.
(*f*) See sect. 36, *ante*.

Powers of personal representative for raising money, &c.

40.—(1.) For giving effect to beneficial interests the personal representative may limit or demise land for a term of years absolute (*g*), with or without impeachment for waste, to trustees on usual trusts for raising or securing any principal sum and the interest thereon for which the land, or any part thereof, is liable, and may limit or grant a rentcharge for giving effect to any annual or periodical sum for which the land or the income thereof or any part thereof is liable.

(2.) This section applies whether the testator or intestate died before or after the commencement of this Act.

(*g*) See sect. 55, sub-sect. 1 (xxiv), *post*, and S. L. Act, 1925, s. 117 (1) (xxix), *post*.

Powers of personal representative as to

41.—(1.) The personal representative may appropriate any part of the real or personal estate, including things in action, of the deceased in the actual condition or state of

appropriation.

investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased, or of any other interest or share in his property, whether settled (*a*) or not, as to the personal representative may seem just and reasonable, according to the respective rights of the persons interested in the property of the deceased:

Provided that—

(i) an appropriation shall not be made under this section so as to affect prejudicially any specific devise or bequest;

(ii) an appropriation of property, whether or not being an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, shall not (save as hereinafter mentioned) be made under this section except with the following consents:—

(a) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person;

(b) when made in respect of any settled legacy share or interest, the consent of either the trustee thereof, if any (not being also the personal representative), or the person who may for the time being be entitled to the income:

If the person whose consent is so required as aforesaid is an infant or a lunatic or defective (*b*), the consent shall be given on his behalf by his parents or parent, testamentary or other guardian, committee or receiver, or if, in the case of an infant, there is no such parent or guardian, by the court on the application of his next friend;

(iii) no consent (save of such trustee as aforesaid) shall be required on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time;

(iv) if no committee or receiver of a lunatic or defective (*b*) has been appointed, then, if the appropriation is of an investment authorised by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent shall be required on behalf of the lunatic or defective;

(v) if, independently of the personal representative, there is no trustee of a settled legacy share or interest, and no person of full age and capacity entitled to the income thereof, no consent shall be required to an appropriation in respect of such legacy share or interest, provided that the appro-

15 Geo. 5, c. 23, s. 41.

priation is of an investment authorised as aforesaid.

(2.) Any property duly appropriated under the powers conferred by this section shall thereafter be treated as an authorised investment, and may be retained or dealt with accordingly.

(3.) For the purposes of such appropriation, the personal representative may ascertain and fix the value of the respective parts of the real and personal estate and the liabilities of the deceased as he may think fit, and shall for that purpose employ a duly qualified valuer in any case where such employment may be necessary; and may make any conveyance (including an assent) (*c*) which may be requisite for giving effect to the appropriation.

(4.) An appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite.

(5.) The personal representative shall, in making the appropriation, have regard to the rights of any person who may thereafter come into existence, or who cannot be found or ascertained at the time of appropriation, and of any other person whose consent is not required by this section.

(6.) This section does not prejudice any other power of appropriation conferred by law or by the will (if any) of the deceased, and takes effect with any extended powers conferred by the will (if any) of the deceased, and where an appropriation is made under this section, in respect of a settled legacy, share or interest, the property appropriated shall remain subject to all trusts for sale and powers of leasing, disposition, and management or varying investments which would have been applicable thereto or to the legacy, share or interest in respect of which the appropriation is made, if no such appropriation had been made.

(7.) If after any real estate has been appropriated in purported exercise of the powers conferred by this section, the person to whom it was conveyed disposes of it or any interest therein, then, in favour of a purchaser (*a*), the appropriation shall be deemed to have been made in accordance with the requirements of this section and after all requisite consents, if any, had been given.

(8.) In this section, a settled legacy, share or interest includes any legacy, share or interest to which a person is not absolutely entitled in possession at the date of the appropriation, also an annuity, and "purchaser" means a purchaser for money or money's worth.

(9.) This section applies whether the deceased died intestate or not, and whether before or after the com-

mencement of this Act, and extends to property over which a testator exercises a general power of appointment, including the statutory power to dispose of entailed interests (*d*), and authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise.

15 Geo. 5, c. 23, s. 41.

(*a*) See sub-sect. 8.
(*b*) For definition of defective see sect. 55, sub-sect. 1 (viii), *post*.
(*c*) As to assents see sect. 36, *ante*.
(*d*) See L. P. Act, 1925, s. 176, *post*, p. 768.

Compare with the powers given by this section the power of appropriation conferred by sect. 4 of L. T. Act, 1897, *ante*, p. 423. The present section applies in the case of deaths before as well as in and after 1926, and in cases of intestacy (sub-sect. 9, *supra*).

Law apart from section : appropriations independently of express powers :

Previous to the L. T. Act, 1897, appropriations in or towards discharge of absolute shares or interests in the estate of a deceased person had been held valid. Thus, where there was no trust for conversion, executors could, without conversion and by agreement with a legatee, appropriate to him specific personal assets, even in a case where the legatee was one of the executors (*Re Richardson, Morgan* v. *R.*, [1896] 1 Ch. 512). Similarly, an administrator who was one of the next of kin, could, out of the assets, appropriate to his own share either chattels (*Elliott* v. *Kemp*, 7 M. & W. 313) or choses in action (*Barclay* v. *Owen*, 60 L. T. 220). But a sole executor cannot appropriate to his own legacy securities having no market value, at his own price (*Re Bythway, Gough* v. *Dames*, 80 L. J. Ch. 246). Further, where there was a trust for conversion, trustees could appropriate specific personal assets to answer either an absolute share or interest (*Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 218, where the legatee consented; see *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128, 144), or a settled share (*Re Nickels, N.* v. *N.*, [1898] 1 Ch. 630; see *Re Brooks, Coles* v. *Davis*, 76 L. T. 771; *Fraser* v. *Murdoch*, 6 App. Cas. 855, but see *Re Craven, Watson* v. *C.*, [1914] 1 Ch. 358, where the investments were not authorised by the will). Executors had a similar power as regards a deferred legacy (*Re Waters, Preston* v. *W.* (1889), W. N. 39). The principle on which the power of appropriation was based where there was a trust for conversion, was that the particular assets could be sold to the legatees and the purchase-money set off against the legacy (*Re Beverly, Watson* v. *W.*, [1901] 1 Ch. 681). The doctrine extends to chattels real, and real estate subject to a trust for conversion (*ibid.*) An executor's power of appropriation for satisfying vested legacies, whether given absolutely or settled, does not extend to purely contingent legacies (*Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 233; see *Webber* v. *W.*, 1 S. & S. 311; see also *Re Bowlby, B.* v. *B.*, [1904] 2 Ch. 685, where an appropriation in satisfaction of contingent legacies was made under a special power). As to an infant's legacy, see *Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 50; see now sect. 42, *post*.

A valid appropriation could only be made of authorised investments (*Re Waters, Preston* v. *W.*, *supra*; see *Re Douglas and Powell*, [1902] 2 Ch. 296); including investments retained under a power (*Re Brooks, Coles* v. *Davis*, *supra*); but not necessarily those authorised by the Trustee Act, 1893 (*Re Owthwaite, O.* v. *Taylor*, [1891] 3 Ch. 494). Where a will directed a sum of money to be invested on mortgage and held on certain trusts, mortgages which belonged to the testator at his death and were properly secured could be appropriated (*Ames* v. *Parkinson*, 7 Beav. 379).

15 Geo. 5, c. 23, s. 41.

An appropriation was not valid where the executrix took part of the intermediate interest (*Cooper* v. *Douglas*, 2 Bro. C. C. 232). After appropriation to answer a particular share, the beneficiary took the appropriated assets for better for worse (*Re Waters, Preston* v. *W.* (1889), W. N. 39; see *Ballard* v. *Marsden*, 14 Ch. D. 376; *Re Richardson, Moryan* v. *R.*, [1896] 1 Ch. 512). Such assets were liable to provide the costs of litigation in respect of such share (*Att.-Gen.* v. *Lawes*, 8 Ha. 43), but were not applicable in relief of expenses incurred on behalf of other parts of the trust estate (*Fraser* v. *Murdoch*, 6 App. Cas. 873). Appropriated assets could not be retained or impounded to answer the legatee's debt to the testator (*Ballard* v. *Marsden*, 14 Ch. D. 374).

It was not, it seems, necessary that an appropriation should be evidenced by deed or writing (*Barclay* v. *Owen*, 60 L. T. 222). The following acts were held to amount to a valid appropriation:—Handing over a mortgage deed to the legatee, no legal transfer being executed (*Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210); making entries in the trust accounts and paying the income of the appropriated stocks to the legatee (*Re Nickels, N.* v. *N.*, [1898] 1 Ch. 630; *Fraser* v. *Murdoch*, 6 App. Cas. 855).

express powers.

The above cases were decided independently of express powers of appropriation. These were in practice commonly inserted in wills, and the validity of an appropriation made under them would turn on the words of the power.

Power to appoint trustees of infants' property.

42.—(1.) Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called "the deceased") to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation (*a*) or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority (*b*), and may execute or do any assurance or thing requisite for vesting such devise, legacy, residue or share in the trustee or trustees so appointed.

15 Geo. 5, c. 18.

On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue, or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorised investment.

(2.) Where a personal representative has before the commencement of this Act retained or sold any such devise, legacy, residue or share, and invested the same or

the proceeds thereof in any investments in which he was authorised to invest money subject to the trust, then, subject to any order of the court made before such commencement, he shall not be deemed to have incurred any liability on that account, or by reason of not having paid or transferred the money or property into court (*c*). 15 Geo. 5, c. 23, s. 42.

(*a*) For definition of "trust corporation" see p. 794, *post*.
(*b*) See sect. 102 of S. L. Act, 1925, *post*, p. 959.
(*c*) In *Re Salomons, Public Trustee* v. *Wortley*, [1920] 1 Ch. 290, it had been held that an executor and trustee could only free himself from liability and safely distribute the residue by paying an infant's legacy into Court.

Obligations of personal representative as to giving possession of land and powers of the Court.

43.—(1) A personal representative, before giving an assent or making a conveyance (*d*) in favour of any person entitled, may permit that person to take possession of the land, and such possession shall not prejudicially affect the right of the personal representative to take or resume possession nor his power to convey the land as if he were in possession thereof, but subject to the interest of any lessee, tenant or occupier in possession or in actual occupation of the land.

(2.) Any person who as against the personal representative claims possession of real estate, or the appointment of a receiver thereof, or a conveyance thereof, or an assent to the vesting thereof, or to be registered as proprietor thereof under the Land Registration Act, 1925 (*e*), may apply to the court for directions with reference thereto, and the court may make such vesting or other order as may be deemed proper, and the provisions of the Trustee Act, 1925 (*f*), relating to vesting orders and to the appointment of a person to convey, shall apply.

(3.) This section applies whether the testator or intestate died before or after the commencement of this Act.

(*d*) See sect. 36, *ante*.
(*e*) See that Act, *post*.
(*f*) See sects. 44—50 of that Act, *post*.

Power to postpone distribution.

44. Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death.

See as to the executor's year Wms. Exors., 11th ed., pp 1113 *et seq*. The Statute of Distributions, 1670 (22 and 23 Car. 2, c. 10, s. 5), repealed by the present Act as to deaths after 1925, provided that an intestate's goods should not be distributed till after the expiration of one year from his death.

15 Geo. 5, c. 23, s. 45.

Part IV.

Distribution of Residuary Estate.

Abolition of descent to heir, curtesy, dower and escheat.

45.—(1.) With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished—

(a) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever; and

(b) Tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate, whether arising under the general law or by custom or otherwise; and

(c) Dower and freebench and every other estate and interest of a wife in real estate as to which her husband dies intestate, whether arising under the general law or by custom or otherwise: Provided that where a right (if any) to freebench or other like right has attached before the commencement of this Act which cannot be barred by a testamentary or other disposition made by the husband, such right shall, unless released, remain in force as an equitable interest; and

(d) Escheat to the Crown or the Duchy of Lancaster or the Duke of Cornwall or to a mesne lord for want of heirs.

(2.) Nothing in this section affects the descent or devolution of an entailed interest.

The provisions of this Part of the Act are taken from the L. P. Act, 1922, and the Amendment Act of 1924, and establish entirely new rules for the distribution of property, real as well as personal, on intestacy, in the case of all deaths after December 31, 1925. As to the meaning of "real and personal estate" see sect. 52, *post*. For the rules which till 1926 governed the descent of real estate see the Inheritance Act, 1833, *ante*, and as to the devolution of personal estate till then the Statutes of Distribution, 1670 (22 and 23 Car. 2, c. 10), and 1685 (1 Jac. 2, c. 17) (repealed by the present Act), which are printed with notes in 4 Chitty's Statutes (6th ed.), pp. 564—569 and 570—1. See as to special occupancy sect. 6 of the Wills Act, 1837, and note, p. 496, *post*, as to gavelkind and borough English, p. 410, *ante*; as to tenancy by the curtesy, dower and freebench, pp. 405 and 397 *et seq.*, *ante*; and as to escheat, p. 142, *ante*. As to entailed interests see sect. 130 of L. P. Act, 1925, *post*, and sect. 51, sub-s. 4, of the present Act, *post*. "Equitable interests" (sub-s. 1 (c)) are interests and charges in or over land other than those which under sect. 1 of L. P. Act, 1925, *post*, can subsist or be created at law (see sect. 55, sub-sect. 1 (vii), *post*). As to lunatics see sect. 51, sub-sect. 2, *post*.

15 Geo. 5, c. 23, s. 46.

Succession to real and personal estate on intestacy.

46.—(1.) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—

(i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

(a) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life;

(b) If the intestate leaves issue, upon trust, as to one half, for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life:

(ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;

(iii) If the intestate leaves no issue but both parents, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;

(iv) If the intestate leaves no issue but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;

(v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at

15 Geo. 5, c. 23, s. 46.

the death of the intestate, and in the following order and manner, namely:—

First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Sixthly, for the surviving husband or wife of the intestate absolutely;

(vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.

10 Edw. 7 and 1 Geo. 5, c. 28.

The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

See also as to the rights of relatives of lunatics and defectives L. P. Act, 1925, sect. 171, *post*. As to partial intestacy see sect. 49, *post*. Under the Statutes of Distribution the husband was not next-of-kin to his wife (*Milne* v. *Gilbart*, 5 De G. M. & G. 510); the half-blood and whole blood took equally; and descendants of remoter ancestors than grandparents were entitled to share. For "the statutory trusts" see sect 47, *post*, under the provisions of

which vested interests are attained only at twenty-one or marriage. For the meaning of "personal chattels" see sect. 55, sub-s. 1 (x), *post*, and as to raising sums for surviving husband or wife sect. 48, *post*. With regard to the practice of the Crown referred to in sub-s. 1 (vi) see 4 Chitty's Statutes (6th ed.), p. 656. See as to sale sect. 33, *ante*.

15 Geo. 5, c. 23, s. 46.

(2.) A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons.

Cf. L. P. Act, 1925, s. 37, *post*.

Statutory trusts in favour of issue and other classes of relatives of intestate.

47.—(1.) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:—

(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;

(ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;

(iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into

15 Geo. 5, c. 23, s. 47.

account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives;

(iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the personal representatives may consider reasonable, and without being liable to account for any consequential loss.

(2.) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

(a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;

(b) references in this Part of this Act to the intestate "leaving no issue" shall be construed as "leaving no issue who attain an absolutely vested interest";

(c) references in this Part of this Act to the intestate "leaving issue" or "leaving a child or other issue" shall be construed as "leaving issue who attain an absolutely vested interest."

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

See as to advancement under the former law *Re Ford*, [1902] 2 Ch. 605. References to a child or issue living at the death of any person include a child or issue *en ventre sa mere* at the death (sect. 55, sub-s. 2, *post*). With the provision as to infant's receipts in sub-sect. 1 (ii), cf. L. P. Act, 1925, s. 21, and Trustee Act, 1925, s. 31 (2), *post*.

Powers of personal representative in respect of

48. -(1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal

representative) or, where the tenant for life is the sole personal representative, with the leave of the Court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.

15 Geo. 5, c. 23, s. 48.

interests of surviving spouse.

(2) The personal representatives may raise—

(a) the net sum of one thousand pounds or any part thereof and the interest thereon payable to the surviving husband or wife of the intestate on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf; and

(b) in like manner the capital sum, if any, required for the purchase or redemption of the life interest of the surviving husband or wife of the intestate, or any part thereof not satisfied by the application for that purpose of any part of the residuary estate of the intestate;

and in either case the amount, if any, properly required for the payment of the costs of the transaction.

As to "personal chattels" see sect. 55, sub-s. 1 (x), *post*.

49. Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—

Application to cases of partial intestacy.

(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons:

(b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part of this Act in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.

This section replaces the Executors Act, 1830 (11 Geo. 4 and 1 Will. 4, c. 48) in the case of deaths after 1925. As to bringing

15 Geo. 5, c. 23, s. 49.

property into account under that Act see *Re Roby*, [1908] 1 Ch. 71. The Act did not apply where the residue was expressly bequeathed to the executor but only to property which he could claim *virtute officii* (*Williams* v. *Arkle*, L. R. 7 H. L. 606). Parol evidence that the executor was intended to take beneficially is not admissible (*Onslow* v. *Wallis*, 16 Sim. 483). As to what is sufficient evidence of intention see *Love* v. *Gaze*, 8 Beav. 472; *Andrew* v. *A.*, 1 Coll. 686; *Mapp* v. *Elcock*, 2 Ph. 793; 3 H. L. Cas. 492; *Saltmarsh* v. *Barrett*, 29 Beav. 474; *Juler* v. *J.*, *ibid.* 34; *Re Reeve's Trusts*, 4 Ch. D. 841; *Clarke* v. *Hilton*, 2 Eq. 810; *Bird* v. *Harris*, 9 Eq. 204; *Travers* v. *T.*, 14 Eq. 275; *Re Howell, Liggins* v. *Buckingham*, [1915] 1 Ch. 241; *Re Jones, Johnson* v. *Att.-Gen.*, [1925] Ch. 340; cf. *Re Foord, F.* v. *F.*, [1922] 2 Ch. 519; *Re Falkiner, Mead* v. *Smith*, [1924] 1 Ch. 88, where trustees were held to take beneficially. Under the Act of 1830 the executor retained against the Crown the right to undisposed of personalty in the absence of next-of-kin (*Russell* v. *Clowes*, 2 Coll. 648; see *Att.-Gen.* v. *Jefferys*, [1908] A. C. 411; *Dacre* v. *Patrickson*, 29 L. J. Ch. 846). *Quære*, whether the Crown is included in "the persons entitled under this Part of this Act" within clause (b). Sect. 46, sub-s. 1 (vi), *ante*, p. 472, provides that the residuary estate of an intestate (which includes partial intestacy, sect. 55, sub-s. 1 (vi), *post*) shall belong to the Crown, the Duke of Lancaster, or the Duke of Cornwall, as the case may be, as *bona vacantia* on the failure of all the preceding interests under the section; and the Crown and Duchies are bound by the Act except as regards limitation of proceedings (sect. 57, sub-s. 1, *post*). "Person," unless the contrary intention appears, includes any body of persons corporate or unincorporate (Interpretation Act, 1889, s. 19). The Crown is a corporation sole (see sect. 3, sub-s. 5, *ante*, p. 429). But the Crown has not been included in the words "person or persons, bodies politic or corporate" (see p. 143, *ante*). The Act of 1830 made the executor a trustee for the person or persons (if any) entitled under the Statute of Distribution.

Evidence of intention that executor shall take beneficially.

Crown.

Construction of documents.

50.—(1) References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act.

(2) Trusts declared in an instrument inter vivos made, or in a will coming into operation, before the commencement of this Act by reference to the Statutes of Distribution, shall, unless the contrary thereby appears, be construed as referring to the enactments (other than the Intestates' Estates Act, 1890) relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act.

53 & 54 Vict. c. 29.

The Intestates' Estates Act, 1890 (repealed by this Act as to deaths after 1925) was not properly included in the phrase "Statutes of Distribution" (*Re Morgan, M.* v. *M.*, [1920] 1 Ch. 196). See as to it, p. 403, *ante*.

15 Geo. 5, c. 23, s. 51.

Savings.

51.—(1) Nothing in this Part of this Act affects the right of any person to take beneficially, by purchase, as heir either general or special (*a*).

(2) The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective (*b*) living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) (*c*) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case (*d*).

For the purposes of this subsection, a lunatic or defective (*b*) who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged.

(3) Where an infant dies after the commencement of this Act without having been married, and independently of this subsection he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly (*e*).

(4) This Part of this Act does not affect the devolution of an entailed interest as an equitable interest (*e*).

(*a*) See L. P. Act, 1925, s. 132 and note, *post*, p. 720.

(*b*) For definition see sect. 55, sub-sect. 1 (viii), *post*.

(*c*) See sect. 3, sub-sects. 2—5, *ante*, p. 428.

(*d*) See the Inheritance Act, 1833, and notes, *ante*.

(*e*) As to "entailed interests" see sects. 130 and 176 of L. P. Act, 1925, *post*, pp. 718, 768, the latter section enabling them to be disposed of by will by tenants in tail of full age. The effect of sub-sects. 3 and 4 of the present section appears to be that entailed interests are to devolve (though as equitable interests only—see sect. 130 of L. P. Act, 1925) in the same manner as under the previous law, and that an unmarried infant's interest in realty, though absolute, are to be treated as entailed interests, and thus are not to pass on his death under the provisions of sect. 46, *ante*, but to devolve under the settlement. Cf. S. L. Act, 1925, s. 26, *post*, p. 884. An infant cannot hold a legal estate (L. P. Act, 1925, s. 1 (6), *post*, p. 598). "Will" includes codicil (sect. 55, sub-sect. 1 (xxviii), *post*). As to the testamentary capacity of infants, see sects. 7 and 11 of the Wills Act, 1837, and notes, pp. 497, 507, *post*. Sect. 11 (relating to soldiers' and sailors' wills) is explained and extended by the Wills (Soldiers and Sailors) Act, 1918. for

15 Geo. 5, c. 23, s. 51.

which see notes to sect. 11; and sect. 3, sub-sect. 1 of the last-named Act gives infants a power to dispose by will of real estate though the disposition was not made in such manner and form as at the date of the passing of the Act was required by law. *Quære*, whether these words would cover a testamentary disposition of an entailed interest in realty by an infant soldier or sailor, testamentary dispositions of estates tail having been unknown to the law in 1918.

Interpretation of Part IV.

52. In this Part of this Act "real and personal estate" means every beneficial interest (including rights of entry and reverter) (*a*) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) (*b*) he could, if of full age and capacity, have disposed of by his will.

(*a*) See L. P. Act, 1925, ss. 3 (3) and 4 (2) (b), and notes, *post*.
(*b*) See *ibid.*, s. 176.

Part V.

Supplemental.

General savings.

53.—(1) Nothing in this Act shall derogate from the powers of the High Court which exist independently of this Act or alter the distribution of business between the several divisions of the High Court, or operate to transfer any jurisdiction from the High Court to any other court.

(2) Nothing in this Act shall affect any unrepealed enactment in a public general Act dispensing with probate or administration as respects personal estate not including chattels real.

(3) Nothing in this Act shall—

(a) alter any death duty payable in respect of real estate or impose any new duty thereon:

(b) render any real estate liable to legacy duty or exempt it from succession duty:

(c) alter the incidence of any death duties.

Such a provision as is referred to in sub-sect. 2 was made by the Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8.

Application of Act.

54. Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before the commencement of this Act.

Definitions.

55. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

(1) (i) "Administration" means, with reference to the real and personal estate of a deceased person, letters of administration, whether

general or limited, or with the will annexed or otherwise: 15 Geo. 5, c. 23, s. 55.

(ii) "Administrator" means a person to whom administration is granted:

(iii) "Conveyance" includes a mortgage, charge by way of legal mortgage, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will, and "convey" has a corresponding meaning, and "disposition" includes a "conveyance" also a devise bequest and an appointment of property contained in a will, and "dispose of" has a corresponding meaning:

(iv) "the Court" means the High Court, and also the county court, where that court has jurisdiction, and as respects the administration of estates "court" also includes the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham where those courts respectively have jurisdiction:

(v) "Income" includes rents and profits:

(vi) "Intestate" includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate:

(vii) "Legal estates" mean the estates charges and interests in or over land (subsisting or created at law) which are by statute authorised to subsist or to be created at law (*a*); and "equitable interests" mean all other interests and charges in or over land or in the proceeds of sale thereof:

(viii) "Lunatic" includes a lunatic whether so found or not, and in relation to a lunatic not so found; "committee" includes a person on whom the powers of a committee are conferred under section one of the Lunacy Act, 1908; and "defective" includes every person affected by the provisions of section one hundred and sixteen of the Lunacy Act, 1890, as extended by section sixty-four of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed: 8 Edw. 7, c. 47. 53 & 54 Vict. c. 5. 3 & 4 Geo. 5, c. 28.

(ix) "Pecuniary legacy" includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general

15 Geo. 5, c. 23, s. 55.

direction by a testator for the payment of money, including all death duties free from which any devise, bequest, or payment is made to take effect:

(x) "Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money:

(xi) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court, and "executor" includes a person deemed to be appointed executor as respects settled land:

(xii) "Possession" includes the receipt of rents and profits or the right to receive the same, if any:

(xiii) "Prescribed" means prescribed by rules of court or by probate rules made pursuant to this Act:

(xiv) "Probate" means the probate of a will:

(xv) "Probate judge" means the President of the Probate, Divorce and Admiralty Division of the High Court:

(xvi) "Probate rules" mean rules and orders made by the Probate Judge for regulating the procedure and practice of the High Court in regard to non-contentious or common form probate business:

(xvii) "Property" includes a thing in action and any interest in real or personal property:

(xviii) "Purchaser" means a lessee, mortgagee or other person who in good faith acquires an interest in property for valuable consideration, also an intending purchaser and

"valuable consideration" includes marriage, but does not include a nominal consideration in money: 15 Geo. 5, c. 23, s. 55.

(xix) "Real estate" save as provided in Part IV. of this Act means real estate, including chattels real, which by virtue of Part I. of this Act devolves on the personal representative of a deceased person:

(xx) "Representation" means the probate of a will and administration, and the expression "taking out representation" refers to the obtaining of the probate of a will or of the grant of administration:

(xxi) "Rent" includes a rent service or a rentcharge, or other rent, toll, duty or annual or periodical payment in money or money's worth, issuing out of or charged upon land, but does not include mortgage interest; and "rentcharge" includes a fee farm rent:

(xxii) "Rules of Court" include, in relation to noncontentious or common form probate business, probate rules:

(xxiii) "Securities" include stocks, funds, or shares:

(xxiv) "Tenant for life," "statutory owner," "land," "settled land," "settlement," "trustees of the settlement," "term of years absolute," "death duties," and "legal mortgage," have the same meanings as in the Settled Land Act, 1925 (*b*), and "entailed interest" and "charge by way of legal mortgage" have the same meanings as in the Law of Property Act, 1925 (*c*): 15 Geo. 5, c. 18. 15 Geo. 5, c. 20.

(xxv) "Treasury solicitor" means the solicitor for the affairs of His Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster:

(xxvi) "Trust corporation" (*d*): 6 Edw. 7, c. 55.

(xxvii) "Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion;

(xxviii) "Will" includes codicil:

(2.) References to a child or issue living at the death of any person include a child or issue en ventre sa mere at the death.

15 Geo. 5, c. 23, s. 55.

(3.) References to the estate of a deceased person include property over which the deceased exercises a general power of appointment (including the statutory power to dispose of entailed interests) (*e*) by his will.

(*a*) See L. P. Act, 1925, s. 1, *post*, p. 598.
(*b*) See sect. 117, sub-sect. 1 of that Act.
(*c*) See L. P. Act, 1925, ss. 130 and 87.
(*d*) See note to L. P. Act, 1925, s. 205 (1) (xxviii), *post*, p. 794.
(*e*) See sect. 176 of that Act.

Repeal.

56. The Acts mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule, but as respects the Acts mentioned in Part I. of that Schedule only so far as they apply to deaths occurring after the commencement of this Act.

Application to Crown.

57.—(1.) The provisions of this Act bind the Crown and the Duchy of Lancaster, and the Duke of Cornwall for the time being, as respects the estates of persons dying after the commencement of this Act, but not so as to affect the time within which proceedings for the recovery of real or personal estate vesting in or devolving on His Majesty in right of His Crown, or His Duchy of Lancaster, or on the Duke of Cornwall, may be instituted (*f*).

(*f*) See pp. 144, 145, *ante*.

(2.) Nothing in this Act in any manner affects or alters the descent or devolution of any property for the time being vested in His Majesty either in right of the Crown or of the Duchy of Lancaster or of any property for the time being belonging to the Duchy of Cornwall.

Short title, commencement and extent.

58.—(1.) This Act may be cited as the Administration of Estates Act, 1925.

(2.) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3.) This Act extends to England and Wales only.

15 Geo. 5, c. 23, Sch. 1.

SCHEDULES.

FIRST SCHEDULE. Section 34.

Part I.

Rules as to Payment of Debts where the Estate is Insolvent.

1. The funeral, testamentary, and administration expenses have priority.

2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

Former law.

The Jud. Act, 1875, s. 10 (repealed by this Act as to deaths after 1925), made the same provision, but only as to estates administered by the Court. Insufficiency of assets to pay the interest on debts brings the case within the provision (*Re Whitaker, W.* v. *Palmer*, [1904] 1 Ch. 299). See also as to insolvency, *Re Pink*, [1926] W. N. 278.

Section 10 did not render applicable to the administration in Chancery of the assets of a deceased person the rules in Bankruptcy which increase a bankrupt's assets, e.g., the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions. Those assets must be ascertained by applying the general laws of property and not the special rules applicable only to cases of bankruptcy (*Re Leng, Tarn* v. *Emerson*, [1895] 1 Ch. 655). But the section imported the Bankruptcy Rules "as to debts and liabilities provable"; including the general rule as to the payment of debts *pari passu* (*Re Leng, Tarn* v. *Emerson*, [1895] 1 Ch. 656), e.g., voluntary creditors and creditors for value (*Re Whitaker, W.* v. *Palmer*, [1901] 1 Ch. 9); and including the rules prescribed by the Preferential Payments in Bankruptcy Act, 1888 (*Re Heywood, Partington* v. *H.*, [1897] 2 Ch. 593; see now Bankruptcy Act, 1914, s. 33); and the rule postponing a widow's claim for money lent to the deceased for the purposes of his trade (*Re Leng, Tarn* v. *Emerson, supra*). The section did not interfere with an executor's right of retainer (*Lee* v. *Nuttall*, 12 Ch. D. 61; *Re May, Crawford* v. *M.*, 45 Ch. D. 499; *Re Ambler, Woodhead* v. *A.*, [1905] 1 Ch. 697). See further as to this section the notes thereto in the Annual Practice. Sect. 33 of the Bankruptcy Act, 1914, did not deprive a Crown debt of priority in the administration out of Court of an insolvent estate (*Re Laycock, L.* v. *Income Tax Commrs.*, [1919] 1 Ch. 241).

Bankruptcy Act, 1914, s. 130.

The Bankruptcy Act, 1914, s. 130, replacing sect. 125 of the Bankruptcy Act, 1883, gave power to transfer the administration of an insolvent estate to bankruptcy. As to the general effect of sect. 130, see *Re Williams, Jones* v. *W.* (36 Ch. D. 573); *Watkins*

15 Geo. 5, c. 23, sch. 1.

v. *Barnard* ([1897] 2 Q. B. 521); *Hasluck* v. *Clark* ([1899] 1 Q. B. 699).

The power to make an order was discretionary (*Higgs* v. *Weaver*, 29 Ch. D. 236). As to an executor's right of retainer being exercisable after such an order, see *Re Rhoades* ([1899] 2 Q. B. 347).

But sect. 130 of the Bankruptcy Act, 1914, is repealed by the present Act as to deaths after 1925.

Part II.

Order of Application of Assets where the Estate is Solvent.

1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.

4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.

5. The fund, if any, retained to meet pecuniary legacies.

6. Property specifically devised or bequeathed, rateably according to value.

7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

8. The following provisions shall also apply—

(a) The order of application may be varied by the will of the deceased.

(b) This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

For the power to dispose of entailed interests, see L. P. Act, 1925, s. 176, *post*.

Order in which assets were formerly applied in payment of debts.

The Land Transfer Act, 1897 (see sect. 2, sub-sect. 3, *ante*, p. 420), did not alter the old rule as to the order in which assets were applicable to the payment of debts. The order was as follows:—

(1.) The general personal estate not disposed of in the way of specific bequests, unless it be exempted from its primary liability by express words or necessary implication (*Re Banks, B.* v. *Burbridge*, [1905] 1 Ch. 547; see *Ancaster* v. *Mayer*, 1 L. C. Eq.). It has been held that such general personal estate includes personal estate subject to a general power exercised by virtue of sect. 27 (*post*) of the Wills Act,

1837 (*Re Hartley, Williams* v. *Jones*, [1900] 1 Ch. 152; but see *Fleming* v. *Buchanan*, 3 D. M. G. 979). As to personal estate disposed in the way of general pecuniary legacies, see No. 5 *infra*. A lapsed share of residuary personalty contributes rateably with the other shares (*Trethewy* v. *Helyar*, 4 Ch. D. 53; *Fenton* v. *Wills*, 7 Ch. D. 33). As to a specific part of the residue affected by a secret trust, see *Re Maddock, Llewellyn* v. *Washington*, [1902] 2 Ch. 220.

(2.) Real estate devised or ordered to be sold for payment of debts, not simply charged (*Harmood* v. *Oglander*, 8 Ves. 124; *Philips* v. *Parry*, 22 Beav. 279; *Re Balls, Trewby* v. *B.*, [1909] 1 Ch. 794).

(3.) Real estate descended (*Milnes* v. *Slater*, 8 Ves. 295; see *Stead* v. *Hardaker*, 15 Eq. 175; *Hurst* v. *H.*, 28 Ch. D. 159); and as to real estate escheated, see *Evans* v. *Brown*, 5 Beav. 114; *Downe* v. *Morris*, 3 Hare, 398; *Re Ball*, [1902] W. N. 226.

(4.) Real estate simply charged with debts (*Irvin* v. *Ironmonger*, 2 R. & M. 531; see *Re Banks, supra; Re Balls, supra;* and No. 6 *infra*). A lapsed share contributes as if the devisee had survived (*Ryves* v. *R.*, 11 Eq. 539.)

(5.) Personal estate disposed of in the way of general pecuniary legacies (*Re Roberts; R.* v. *R.*, [1902] 2 Ch. 834, and cases there mentioned; *Re Kempster, K.* v. *K.*, [1906] 1 Ch. 446). Pecuniary legacies charged on residuary real estate did not contribute to debts till after No. 6 (*Re Bawden, National Provincial Bank* v. *Cresswell*, [1894] 1 Ch. 693). As to priority between devisees and pecuniary legatees as regards the payment of mortgage debts where the Real Estate Charges Acts (see now sect. 35 of the present Act, *ante*) were excluded, see *Re Smith, S.* v. *S.*, [1899] 1 Ch. 365.

(6.) Real estate specifically devised, or comprised in a residuary devise, and not charged with debts, and personal estate specifically bequeathed, each contributing rateably (*Eddels* v. *Johnson*, 1 Giff. 22; *Hensman* v. *Fryer*, 3 Ch. 420; *Lancefield* v. *Iggulden*, 10 Ch. 136). The rule was applied in paying costs of administration (*Jackson* v. *Pease*, 19 Eq. 96). Real estate charged with legacies contributes according to its full value as if not so charged (*Re Saunders-Davies, S.* v. *S.*, 34 Ch. D. 482; *Re Bawden, supra*).

(7.) Real or personal estate expressly appointed under a general power vested in testator (*Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Re Peacock, Kelsey* v. *Harrison*, [1902] 1 Ch. 555; *Commrs. of Stamps* v. *Stephen*, [1904] A. C. 140; see *Re Hartley, Williams* v. *Jones*, [1900] 1 Ch. 152; and compare the case of bankruptcy, *Re Guedalla, Lee* v. *G.*, [1905] 2 Ch. 331). Where funds were appointed by will in pursuance of a covenant entered into on borrowing money by the donee of a general testamentary power that he would by testamentary appointment give the lender a first charge on the funds, the lender had no priority over other creditors (*Beyfus* v. *Lawley*, [1903] A. C. 411).

The liability of property appointed by a married woman's will is dealt with in the note to sect. 4 of the M. W. P. Act, 1882, *ante*, p. 380.

Assets are applicable in payment of testamentary expenses in the same order in which they are applicable in payment of debts (*Re Pullen, Parker* v. *Pullen*, [1910] 1 Ch. 564).

15 Geo. 5, c. 23, sch. 2.

Section 56.

SECOND SCHEDULE.

Enactments Repealed.

Part I.

Repeals not affecting Cases where the Death occurred before the Commencement of this Act.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
13 Edw. 1 (*Stat. Westm. sec.*) c. 19.	The ordinary chargeable to pay the debts of an intestate.	The whole chapter.
13 Edw. 1 (*Stat. Westm. sec.*) c. 23.	Writ of accompt for executors.	The whole chapter.
13 Edw. 1 (*Stat. Westm. sec.*) c. 34.	Dower forfeited by elopement with adulterer.	From "and if a wife willingly leave her husband" to "in which case she shall be restored to her action."
25 Edw. 1, c. 7.	Widow; her marriage estate; quarantine; estovers; dower; re-marriage.	The whole chapter.
25 Edw. 1, c. 18.	The King's tenant, his debtor.	From "and the residue" to "reasonable parts."
Statute (*temp. incert.*).	Statute concerning tenants by the Curtesy of England.	The whole statute.
Statute Prerogativa Regis (*temp. incert.*) c. 18.	Customs of Gloucester and Kent.	From "Nevertheless it is used" to the end of the chapter.
4 Edw. 3, c. 7.	Executors shall have an action of trespass for a wrong done to their testator.	The whole chapter.
25 Edw. 3, st. 5, c. 5.	Executors of executors shall have the same rights and duties as the first executors.	The whole chapter.
31 Edw. 3, st. 1, c. 11.	The ordinary shall commit administration upon an intestacy. The administrators shall have the same rights and charges as executors.	The whole chapter.
21 Hen. 8, c. 1.	An Acte concninge Executors of Last Willes and Testamentě.	The whole Act.

SECOND SCHEDULE—*continued.*

15 Geo. 5, c. 23, sch. 2.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
21 Hen. 8, c. 5.	An Acte concninge Fynes & sōmes of Moneye to be taken by the Ministers of Busshops and other Ordinaries of Holye Churche for the pbate of Testamtĕ.	The whole Act.
32 Hen. 8, c. 37.	For recoving of Arreragĕ by Executors and Administrators.	Sections one, two and three.
1 Edw. 6, c. 12.	An Acte for the repeale of certaine statutes concerninge treasons, felonyes, &c.	Section sixteen.
5 & 6 Edw. 6, c. 11.	An Acte for the punyshment of divśe treasons.	Section eleven.
5 & 6 Edw. 6, c. 12.	An Acte for the declaracon of a statute made for the marriage of Prieste and for the legittamacon of their children.	Section two.
43 Eliz. c. 8.	An Acte against fraudulent administracon of intestates goodes.	The whole Act.
12 Chas. 2, c. 24.	An Acte taking away the Court of Wards and Liveries and Tenures in Capite and by Knights Service and Purveyance and for settling a Revenue upon His Majesty in Lieu thereof.	Section seven from "tenures in franke almoigne" to "nor to take away."
22 & 23 Chas. 2, c. 10.	The Statute of Distribution.	The whole Act.
29 Chas. 2, c. 3.	The Statute of Frauds.	Sections ten, eleven, twenty-three, twenty-four, so far as unrepealed.
30 Chas. 2, c. 7.	An Act to enable creditors to recover their debts of the executors and administrators of executors in their own wrong.	The whole Act.
1 Jas. 2, c. 17.	An Act for reviveing and continuance of severall Acts of Parlyament therein mentioned.	The whole Act.
4 Will. & Mar. c. 24.	An Act for reviving, cotinuing and explaining several laws therein mentioned that are expired and neare expiring.	Section twelve.
38 Geo. 3, c. 87.	The Administration of Estates Act, 1798.	The whole Act.
11 Geo. 4 & 1 Will. 4, c. 40.	The Executors Act, 1830.	The whole Act.
11 Geo. 4 & 1 Will. 4, c. 47.	The Debts Recovery Act, 1830.	The whole Act.

15 Geo. 5, c. 23, sch. 2.

SECOND SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeal.
3 & 4 Will. 4, c. 27.	The Real Property Limitation Act, 1833.	Section forty-one.
3 & 4 Will. 4, c. 42.	The Civil Procedure Act, 1833.	Sections two, thirty-seven and thirty-eight.
3 & 4 Will. 4, c. 74.	The Fines and Recoveries Act, 1833.	In section twenty-seven the words "no woman in respect of her dower and."
3 & 4 Will. 4, c. 104.	The Administration of Estates Act, 1833.	The whole Act.
3 & 4 Will. 4, c. 105.	The Dower Act, 1833.	The whole Act.
2 & 3 Vict. c. 60.	The Debts Recovery Act, 1839.	The whole Act.
11 & 12 Vict. c. 87.	The Debts Recovery Act, 1848.	The whole Act.
17 & 18 Vict. c. 113.	The Real Estate Charges Act, 1854.	The whole Act.
20 & 21 Vict. c. 77.	The Court of Probate Act, 1857.	Sections seventy to eighty.
21 & 22 Vict. c. 95.	The Court of Probate Act, 1858.	Sections sixteen, eighteen, nineteen, twenty-one, and twenty-two.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections fourteen to eighteen.
30 & 31 Vict. c. 69.	The Real Estate Charges Act, 1867.	The whole Act.
32 & 33 Vict. c. 46.	The Administration of Estates Act, 1869.	The whole Act.
38 & 39 Vict. c. 77.	The Supreme Court of Judicature Act, 1875.	Section ten.
40 & 41 Vict. c. 34.	The Real Estate Charges Act, 1877.	The whole Act.
47 & 48 Vict. c. 71.	The Intestates Estates Act, 1884.	The whole Act.
53 & 54 Vict. c. 29.	The Intestates Estates Act, 1890.	The whole Act.
4 & 5 Geo. 5, c. 59.	The Bankruptcy Act, 1914.	Section one hundred and thirty.

15 Geo. 5, c. 23, sch. 2.

Part II.

Repeals applying where the Death occurred before or after the Commencement of this Act.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
10 & 11 Geo. 5, c. 81.	The Administration of Justice Act, 1920.	Section seventeen.
12 & 13 Geo. 5, c. 16.	The Law of Property Act, 1922.	Subsection (7) of section one hundred and ten; Part VIII. except section one hundred and fifty-two; and Part IX. except subsection (13) of section one hundred and fifty-six; and sub-paragraphs (2) and (3) of paragraph five of the Sixth Schedule.
15 Geo. 5, c. 5.	The Law of Property (Amendment) Act, 1924.	Section seven and the Seventh Schedule.

AMENDMENT OF THE LAW RESPECTING WILLS.

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I.—The Wills Act, 1837.

1 Vict. c. 26.

An Act for the Amendment of the Laws with respect to Wills. [3rd July, 1837.]

1 Vict. c. 26, s. 1.

Meaning of certain words in this Act;

"Will":

12 Car. 2, c. 24.

14 & 15 Car. 2 (I.).

"Real estate":

"Personal estate":

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power (*a*), and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real (*b*) and also to moneys, shares of government and other funds, securities

for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator (*c*), and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

1 Vict. c. 26, s. 1.

Number :

Gender :

(*a*) See *Re Barnett, Dawes* v. *Ixer*, [1908] 1 Ch. 402; *Battye's Trustees* v. *B.*, [1917] S. C. 385.
(*b*) See *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 590.
(*c*) See *Chandler* v. *Pocock*, 15 Ch. D. 498; 16 Ch. D. 653.

[Sect. 2, repealing 32 Hen. 8, c. 1, 34 & 35 Hen. 8, c. 5, 10 Car. 1, sess. 2, c. 2 (I.) sects. 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds (29 Car. 2, c. 3), 7 Will. 3, c. 12 (I.), sect. 14 of 4 & 5 Anne, c. 16, 6 Anne, c. 10 (I.), sect. 9 of 14 Geo. 2, c. 20, 25 Geo. 2, c. 6 (except as to colonies in America), 25 Geo. 2, c. 11 (I.), and 55 Geo. 3, c. 192, except so far as they related to wills or estates *pur autre vie* to which the present Act does not extend, was itself repealed by S. L. Rev. Act, 1874.]

3. It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*b*); and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold (*c*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie;*

1 Vict. c. 26, s. 3.

tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate (*d*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

contingent interests;

rights of entry; and property acquired after execution of the will.

Wills of realty governed by the *lex loci rei sitæ*; wills of personalty by the *lex domicilii*.

According to the law of England a will of realty is governed by the *lex loci rei sitæ* (1 Jarm. Wills, 1). As to leaseholds see the note to sect. 1 of the Wills Act, 1861 (*post*); and see as to proceeds of sale of land in a colony *Rea* v. *R.*, [1902] 1 I. R. 451; or abroad, *Re Piercy, Whitwham* v. *P.*, [1895] 1 Ch. 83, where the proceeds were applied in accordance with English law. In the case of personalty other than leaseholds, the law of the country in which the deceased was domiciled at his death governs the succession thereto (*Lynch* v. *Paraguay*, L. R. 2 P. & M. 258), including questions of testacy and intestacy, and of the construction of the will (*Enohin* v. *Wylie*, 10 H. L. C. 1; *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 437); the law applied being the law as it existed at the death (*Lynch* v. *Paraguay*, *supra*). In special cases the law applicable may be the law of the domicil of origin (*Re Johnson, Roberts* v. *Att.-Gen.*, [1903] 1 Ch. 821; *Re Bowes, Bates* v. *Wengel*, 22 Times L. R. 711). And the above rule is subject, in the case of British subjects, to the Wills Act, 1861 (*post*). As regards foreign personal assets, however, these are governed by the law of their own locality for the purpose of legal representation, collection, and administration, as distinguished from distribution among the successors (*Blackwood* v. *The Queen*, 8 App. Cas. 82; *Commr. of Stamps* v. *Hope*, [1891] A. C. 476; see *Re Kloebe Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175; *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch. 836). The provisions of the Wills Act, 1837, apply only to wills of persons who have an English or Irish domicile (*Croker* v. *Hertford*, 4 Moore, P. C. 339; *Bremer* v. *Freeman*, 10 Moore, P. C. 306; see *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211); or who if foreigners domiciled abroad are disposing of real or leasehold property in England (*Pepin* v. *Bruyere*, [1902] 1 Ch. 24; see *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123). As to the form, however, in which wills of personalty may be executed by British subjects dying after August 6, 1861, see now the Wills Act, 1861, *post*. As to conventions between this country and foreign countries for the purpose of determining the domicile of deceased persons, see the Domicil Act, 1861, *post*. See *Re Annesley*, [1926] Ch. 692.

Aliens.

Aliens were formerly incapable of devising realty (*Fourdrin* v. *Gowdey*, 3 M. & K. 383). As to aliens claiming under a devise, see *Davies* v. *Lynch* (I. R. 4 C. L. 570). But now real and personal property of every description may be acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and title may be derived through an alien, in the same

manner (British Nationality and Status of Aliens Act, 1914, s. 17, re-enacting Naturalisation Act, 1870, s. 2). This last section was not retrospective (*Sharp* v. *St. Sauveur*, 7 Ch. 343); and did not confer upon aliens the privileges of the Wills Act, 1861, *post* (*Bloxam* v. *Favre*, 9 P. Div. 130). 1 Vict. c. 26, s. 3.

As to the power of the Sovereign to devise realty and to dispose of personalty by will, see the Crown Private Estate Act, 1800, s. 10. See further, *Att.-Gen.* v. *Windsor* (8 H. L. C. 369); *Re Geo.* 3 (3 Sw. & Tr. 199); *Re Best* ([1901] P. 333). The sovereign.

See as to the wills of infants, sect. 7 of this Act; of married women, sect. 8; of soldiers and seamen, sect. 11; of lunatics, *Smith* v. *Tebbitt*, L. R. 1 P. & M. 398; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; Pope on Lunacy, 2nd ed. 352; L. P. Act, 1925, s. 171, *post*. Infants, married women, soldiers and seamen, lunatics.

The effect of probate as regards wills of real estate is dealt with by sects. 61—64 of the Court of Probate Act, 1857; which sections apply exclusively to cases where the whole will (including codicils) has been executed in accordance with the present Act (*Campbell* v. *Lucy*, L. R. 2 P. & M. 209). Probate of wills of real estate.

If the will be proved in solemn form, probate is conclusive evidence of the validity and contents of the will (sect. 62), and bound the heir even if he had been cited in his character of one of the next-of-kin (*Beardsley* v. *B.*, [1899] 1 Q. B. 746).

If the probate be in common form it did not (before the L. T. Act, 1897) bind the heir, but might in a subsequent action (by a notice under sect. 64 of the Court of Probate Act, 1857) have been made *prima facie* evidence of the validity and contents of the will (*Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612). The effect, however, of the L. T. Act, 1897, s. 2 (2), (4) (see pp. 419, 421, *ante*), should be considered as regards cases between 1898 and 1926. As regards all deaths after 1925, all existing rules of descent and devolution of real estate were abolished by sect. 45 of Administration of Estates Act, 1925, *ante*.

As to the jurisdiction of the Chancery Division in the matter of probate, see *Pinney* v. *Hunt* (6 Ch. D. 98); *Bradford* v. *Young* (26 Ch. D. 656); and *Priestman* v. *Thomas* (9 P. D. 210).

(*b*) It was never intended that this section should make any kind of personalty bequeathable which was not bequeathable before. Therefore a testator cannot bequeath a promissory note, made to him, so as to pass the right to sue on it: such right is in the executor (*Bishop* v. *Curtis*, 18 Q. B. 879). Chose in action.

A person in possession of land without other title has a devisable interest (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Clarke* v. *C.*, I. R. 2 C. L. 395; *Calder* v. *Alexander*, 16 Times L. R. 294). Even before the passing of this Act a person who had sold an estate under circumstances which entitled him in equity to have the sale set aside had in the estate an interest of such a nature as to be devisable (*Gresley* v. *Mousley*, 4 De G. & J. 78). Devisable interests in land.

A doubt existed whether this Act extends to the case of a testator dying without heirs, and whether, therefore, in order to prevent an escheat, three witnesses should not in such a case attest the will as under the old law (Williams, R. P. 56, note (*i*), 19th ed.). But by sect. 178 of L. P. Act, 1925, *post*, the present section authorises and is to be deemed always to have authorised dispositions of realty or chattels real by persons without heir or next-of-kin. Testator dying without heirs.

(*c*) The effect of this section was to enable a copyholder to devise his estate, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till admittance of the devisee (*Garland* v. *Mead*, L. R. 6 Q. B. 441). There might, however, be a custom preventing the admission of more than one of several joint Copyholds—Estate remains in heir till admittance of devisee.

1 Vict. c. 26, s. 3.

devisees (*Howard* v. *Gwynn*, 84 L. T. 505). Where a copyholder devised his estate to trustees, appointing them guardians of his customary heir, who was an infant, and the trustees without disclaiming tendered the heir for admittance, and the lord would not admit on account of the devise, the Court refused a mandamus to compel admittance (*R.* v. *Garland*, L. R. 5 Q. B. 269); but subsequently held, that the lord could not seize *quousque* for want of a tenant (*Garland* v. *Mead*, L. R. 6 Q. B. 441). The section enabled a testator to devise copyholds free from the widow's right to freebench (*Lacey* v. *Hill*, L. R. 19 Eq. 346). Copyhold and customary tenure were abolished as from January 1, 1926, by Part V. of L. P. Act, 1922, and freebench by sect. 45 of Administration of Estates Act, 1925.

Contingent and executory interests.

(*d*) Before this Act, contingent and executory estates and possibilities accompanied with an interest were devisable (*Selwin* v. *Selwin*, Burr. 1131; *Moore* v. *Hawkins*, 2 Eden's C. C. 342; *Roe* v. *Griffiths*, 1 Bl. Rep. 605; *Roe* v. *Jones*, 1 Hen. Bl. 30; *Jones* v. *Roe*, 3 T. R. 88; *Scawen* v. *Blunt*, 7 Ves. 300). But not where the person who was to take was not ascertainable before the contingency happened (*Doe* v. *Tomkinson*, 2 M. & S. 164). As to the exercise by will since the Wills Act, 1837, of a power of appointing an equitable estate given to two persons or the survivor, see *Thomas* v. *Jones* (1 D. J. & S. 63). By this section contingent interests are devisable whether the testator may or may not be ascertained as the person in whom the same may become vested. A contingent estate in fee under a shifting clause may be devised both under the old and new law (*Ingilby* v. *Amcotts*, 21 Beav. 585).

Possibilities in personal estate could be disposed of by will as well as assigned in equity before this statute and the Real Property Act, 1845 (Fearne, 439; Pollexf. 44; 2 Freem. 250; 9 Mod. 101; 2 P. Wms. 608; 1 P. Wms. 572; 3 P. Wms. 132). But a *spes successionis* is not a title to property by English law (*Re Parsons, Stockley* v. *P.*, 45 Ch. D. 51); see *Re Mudge*, [1914] 1 Ch. 115; cf. L. P. Act, 1925, s. 4, and note, *post*.

Rights of entry.

The possibility of reverter on failure of a fee simple conditional is a "right of entry" within this section (*Pemberton* v. *Barnes*, [1899] 1 Ch. 544).

See further as to what property may be devised or bequeathed, 1 Jarm. Wills, 65 *et seq.*, 6th ed.

As to the fees and fines payable by devisees of customary and copyhold estates.

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted

thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid. 1 Vict. c. 26, s. 4.

See the Copyhold Act, 1894, ss. 84, 85, as to the admittance of devisees of copyholds and the fines payable; see Elton, 89, 173; Lewin on Trusts, p. 252, 10th ed.; copyhold and customary tenure were abolished as from January 1, 1926, by L. P. Act, 1922, Part V.

5. When any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the Court rolls;

and the lord to be entitled to the same fine, &c., when such estates are not now devisable as he would have been from the heir in case of descent.

See note to preceding section.

1 Vict. c. 26, s. 6.

Estates *pur autre vie.*

6. If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Estates *pur autre vie.*

An estate *pur autre vie* may arise on a conveyance to A for the life of B, or again where a tenant for his own life grants over his estate (Co. Litt. 41 b). Where an estate *pur autre vie* is limited (1) to A and his heirs, the heir takes on A's death as special occupant (*Re Michell, Moore* v. *M.*, [1892] 2 Ch. 96); or (2) to A, his executors and administrators, the executor takes as special occupant (*Northen* v. *Carnegie*, 4 Drew. 491); or (3) to A, his heirs, executors and administrators, the heir takes as special occupant (*Atkinson* v. *Baker*, 4 T. R. 229). See now p. 470, *ante.*

Prior to the Statute of Frauds, if the limitation were simply to A for the life of B, the estate went on A's death to the first person who took possession, who was termed a general occupant (*Re Michell, Moore* v. *M.*, *supra*). Further, inasmuch as an heir who took as special occupant did not take by descent, he was not liable to his ancestor's debts (*Doe* v. *Luxton*, 6 T. R. 292). To remedy these defects in the law, sect. 3 of the Statute of Frauds and sect. 9 of 14 Geo. 2, c. 20, were passed, which sections have been repealed by sect. 2 of the present Act and the above section substituted for them.

As to estates *pur autre vie*, see further *Lewis Bowles's Case*, Tud. L. C. Conv., 4th ed. 98.

Cases under the section.

Where rents were devised to A, B, C and their issue in equal shares during their lives and the life of the longer liver, and A died before B and C, leaving a child, the child was held to take an estate *pur autre vie*, and on his death intestate his interest (no special occupant having been named) was held to pass under this section to his legal personal representative (*Re Sheppard, S.* v. *Manning*, [1897] 2 Ch. 67; cf. *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192). Where an estate *pur autre vie* was conveyed to trustees and their heirs upon trust for an infant, the infant's estate passed under this section to his administratrix (*Mount Cashell* v. *More-Smythe*, [1896] A. C. 158). Where an equitable estate *pur autre vie* limited to A his heirs and assigns was devised by A to trustees their heirs and assigns for the use of B, B's estate passed on his death to his administrator (*Re Inman, I.* v. *I.*, [1903] 1 Ch. 241).

The words "in case there shall be no special occupant" in this section include both the case where there is no special occupant named in the grant, as also the case where the heir is named as special occupant, but the grantee dies without leaving an heir

(*Plunket* v. *Reilly*, 2 Ir. Ch. R. 585; *Reynolds* v. *Wright*, 2 D. F. & J. 589). 1 Vict. c. 26, s. 6.

In the case of death since 1897, it seems that all estates *pur autre vie* of a freehold nature, which before the Land Transfer Act, 1897, would have come to the heir as special occupant, have vested in the personal representative (see Administration of Estates Act, 1925, s. 1, *ante*, replacing L. T. Act, 1897, s. 1). Land Transfer Act, 1897.

7. No will made by any person under the age of twenty-one years shall be valid. No will of a person under age valid;

Sect. 24 makes a will speak from the testator's death; but this does not extend to the testator's capacity, and the will of an infant would not become operative by his attaining his majority (Sugd. R. P. Stat. 330). The power given by 12 Car. 2, c. 24, s. 8, to infants to appoint guardians of their children by will appears to be repealed (*ibid.*; but see now the Wills (Soldiers and Sailors) Act, 1918, stated in the notes to sect. 11, *post*). As to an infant appointing a guardian by deed, see *Morgan* v. *Hatchell* (19 Beav. 86); *Re Brown* (18 Ch. D. 61).

A will made by an infant seaman was held valid under sect. 11 (*Re M'Murdo*, L. R. 1 P. & M. 540). See that section and notes, *infra*.

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act. nor of a *feme covert*, except such as might now be made.

Under sect. 1, sub-sect. 1 of the M. W. P. Act, 1882, a married woman is, in accordance with that Act, capable of disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole* (see note to that section, *ante*, p. 373); and by sect. 3 of the M. W. P. Act, 1893, sect. 24 of the present Act is made applicable to the wills of married women (see *ante*, p. 395). The M. W. P. Act, 1882, applies to every woman married after 1882 (sect. 2), and to every woman married before 1883 as regards property the title to which accrued after 1882 (sect. 5). And by sect. 37 of the L. P. Act, 1925, *post*, a husband and wife are, for all purposes of acquisition of any interest in property under a disposition made or coming into operation after 1925, to be treated as two persons. The following note relates to the law independent of the effect of these sections. M. W. P. Acts, 1882 and 1893.

A married woman has, properly speaking, no testamentary capacity (*Dye* v. *D.*, 13 Q. B. D. 156). The present section preserved the incapacity of coverture as it stood before that Act (*Bernard* v. *Minshull*, Johns. 297; *Thomas* v. *Jones*, 2 J. & H. 483; 1 D. J. & S. 81). The only cases, accordingly, in which a married woman can, independently of the M. W. P. Acts, make a will are as follows:— Wills of married women independently of the M. W. P. Acts, 1882 and 1893.

(1.) She can dispose by will of separate estate, real and personal (*Taylor* v. *Meads*, 4 D. J. & S. 597; see *Dye* v. *D.*, 13 Q. B. D. 147).

(2.) She can, in exercise of a power, dispose by will of real and personal estate (*Noble* v. *Willock*, L. R. 7 H. L. 580; *Thomas* v. *Jones*, 1 D. J. & S. 63), and to such a will sect. 27 of the Wills Act, 1837, *post*, applies (*Bernard* v. *Minshull*, Johns. 296). As to the revocation of such a will, see *Hawksley* v. *Barrow* (L. R. 1 P. & M. 147); *Re Tenney* (45 L. T. 78).

1 Vict. c. 26, s. 8.

(3.) She can, with the assent of her husband, dispose by will of personal estate (*Willock* v. *Noble*, L. R. 7 H. L. 580). His assent, however, to the particular will must be proved; a general assent is not sufficient (*ibid.*, 597). The husband must survive the wife (*ibid.*, 591), and if he does he can assent after her death (*Elliot* v. *North*, [1901] 1 Ch. 424). The husband has a *locus pœnitentiæ* until he has either acted on the will or has assented to probate (*Willock* v. *Noble*, 8 Ch. 790). An expression by a husband after his wife's death of an intention to prove was held sufficient assent (*Re Cooper*, 6 P. D. 34); but according to the present practice a husband by proving his wife's will in general form does not assent to the disposition (*Re Atkinson*, *Waller* v. *A.*, [1899] 2 Ch. 1).

(4.) A married woman who is an executrix has, as such, power to make a will and to appoint an executor for the purpose of continuing the representation to the original testator (*Noble* v. *Willock*, L. R. 7 H. L. 590). The administrator with the will annexed, however, of the estate of a married woman does not, as such, represent an estate of which the married woman was executrix (*Re Bridger*, 4 P. D. 77).

(5.) A married woman who has obtained a protection order can dispose by will of property acquired during desertion (*Re Elliott*, L. R. 2 P. & M. 274).

Law before M. W. P. Act, 1893, as to the application to the wills of married women of sect. 24.

Before the M. W. P. Act, 1893, the will made during coverture of a married woman who died during coverture passed after-acquired separate estate, even where she had no separate estate at the date of her will (*Charlemont* v. *Spencer*, 11 L. R. Ir. 490; see *Re Bowen*, *James* v. *J.*, [1892] 2 Ch. 291). Where, however, a married woman, entitled to £3,800 for her separate use, made a will which disposed of the £3,800 and also contained a residuary gift, and her husband subsequently died, having left all his property to his wife, and she died without having re-executed her will after her husband's death, her will only disposed of the £3,800, and not of the property left by her husband (*Willock* v. *Noble*, L. R. 7 H. L. 580; see *Re Price*, *Stafford* v. *S.*, 28 Ch. D. 709; *Re Cuno*, *Mansfield* v. *M.*, 43 Ch. D. 12; *Re Smith*, *Bilke* v. *Roper*, 45 Ch. D. 632, where a married woman's will was held not to have been republished after her husband's death). Where a married woman, entitled for life to a rentcharge for her separate use, made a will during coverture, which she did not re-execute after her husband's death, the will passed accumulations made during coverture, but not afterwards (*Re Wilson*, *Menteath* v. *Campbell*, 26 W. R. 848). Where, however, personal estate was settled in case A. should survive her husband, in trust for her separate use absolutely, and A. survived her husband, her will made during the coverture passed the property (*Bishop* v. *Wall*, 3 Ch. D. 194).

Of sects. 24 and 27.

It was decided that, notwithstanding sect. 8 of the Wills Act, 1837, a general gift in the will of a married woman operated, under sect. 27, to pass property over which she had only a testamentary power (*Bernard* v. *Minshull*, Johns. 276; see *Re Ludlam*, 63 L. T. 330; *Re Hernando*, *H.* v. *Sawtell*, 27 Ch. D. 284; *Re Price*, *Tomlin* v. *Latter*, [1900] 1 Ch. 442). And where a general power was vested in the survivor of A., B., and C., and C. ultimately became the survivor, it was held (under sects. 24 and 27) that the power was well exercised by a residuary devise in the will of C., made after the death of A., but during the life of B.; C. having been a married woman both at the date of her will and the date of her death (*Thomas* v. *Jones*, 1 D. J. & S. 63).

1 Vict. c. 26, s. 8.

In a case before the M. W. P. Act, 1893, trust funds were limited to a married woman if she survived her husband, but if she predeceased him, she was to have a general power of appointment by will. During the coverture she made her will disposing of the property; she survived her husband, but did not re-execute her will. It was held that the power had not arisen, and the will was therefore inoperative (*Trimmell* v. *Fell*, 16 Beav. 537; *Price* v. *Parker*, 16 Sim. 198; see *Jones* v. *Southall*, 30 Beav. 187; *Blaiklock* v. *Grindle*, 7 Eq. 215; and compare the decision since the M. W. P. Act, 1893, in *Re James*, *Hole* v. *Bethune*, [1910] 1 Ch. 157, quoted *ante*, p. 395).

Wills of married woman in execution of power which never arises.

Before the Jud. Acts it was held that in the case of a will executed by a married woman, under a power, the Court of Probate must determine whether or not there was a will (*Re Hallyburton*, L. R. 1 P. & M. 90); and should see that every properly executed testamentary paper, material for the consideration of the Court of Chancery, was included in the probate (*Re Fenwick*, L. R. 1 P. & M. 319); but that the Court of Probate would not determine whether or not the testatrix was testable (*Barnes* v. *Vincent*, 5 Moore, P. C. 201); nor whether the power had been duly executed (*Paglar* v. *Tongue*, L. R. 1 P. & M. 158); nor would it decide questions of construction (*Re De Pradel*, L. R. 1 P. & M. 454), all of which were questions for the Court of Chancery. The usual form of probate was limited to the property which the deceased had power to dispose of, and had disposed of, accordingly; and her husband or her next-of-kin were entitled to a grant of administration *cæterorum* (*Re Crofts*, L. R. 2 P. & M. 18; *Re Graham*, *ibid.* 385; *Noble* v. *Phelps*, *ibid.* 276, where see form of probate).

Function of the Probate Division.

Form of probate.

In a case decided after the Jud. Acts, but before the M. W. P. Act, 1882, and where probate had been granted in the limited form, the C. A. laid down that upon an application for probate, the Probate Division should as far as possible determine whether the married woman had separate property or had duly executed the power (*Re Tharp*, 3 P. D. 76; see *Att.-Gen.* v. *Ailesbury*, 12 A. C. 696). But that Division may not have the requisite machinery (*Harding* v. *Sutton*, 59 L. T. 838).

Now, according to the Probate rules of 1887, probates of wills of married women and of widows made during coverture, and letters of administration with such wills annexed, are granted in ordinary form with no limitation (*Re Price*, 12 P. D. 137; see, however, the limited forms of grant in *Re Leman*, [1898] P. 215; *Re Trefond*, [1899] P. 247; *Re Vannini*, [1901] P. 330). The general form was adopted even in the case of a will made in exercise of a power (*Re Jevers*, 13 L. R. Ir. 1). And *semble* upon an application for probate there is a presumption that the married woman had separate property (*Harding* v. *Sutton*, 59 L. T. 838). The effect of the probate in general form is to enable the executor to get in the wife's assets, whether she had power to dispose of them by will or not, and does not affect the beneficial title, which may be subsequently decided in the Chancery Division (*Smart* v. *Tranter*, 43 Ch. D. 587; *Re Lambert*, *Stanton* v. *L.*, 39 Ch. D. 626; see *Re Smith*, *Bilke* v. *Roper*, 45 Ch. D. 638). As to the effect of probate by a husband, see *Re Atkinson*, *Waller* v. *A.*, [1899] 2 Ch. 1.

Every will shall be in writing and signed by the testator in the presence of two

9. No will shall be valid unless it shall be in writing (*e*) and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof (*f*) by the testator or by some other person in his presence and by his direction (*g*); and such signature

1 Vict. c. 26, s. 9.

witnesses at one time.

shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (*h*); and such witnesses shall attest and shall subscribe the will in the presence of the testator (*i*), but no form of attestation shall be necessary (*k*).

(*e*) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence (*Sugden* v. *St. Leonards*, 1 P. D. 154; see *Woodward* v. *Gouldstone*, 11 App. Cas. 469; *Re Phibbs*, [1917] P. 93). But declarations made by a testator after the date of an alleged will are not admissible to prove either the due execution thereof (*Re Ripley*, 1 Sw. & Tr. 68; *Sugden* v. *St. Leonards*, *supra*; *Eyre* v. *E.*, [1903] P. 137); or that it was executed in duplicate (*Atkinson* v. *Morris*, [1897] P. 40).

Where a will, the contents of which have been brought to the knowledge of a testator, has been executed by him, words cannot be omitted therefrom on the ground of error in the preparation of the will (*Harter* v. *H.*, L. R. 3 P. & M. 11; *Rhodes* v. *R.*, 7 App. Cas. 192; see rules stated in *Guardhouse* v. *Blackburn*, L. R. 1 P. & M. 109; *Garnett Botfield* v. *G. B.*, [1901] P. 335; *Collins* v. *Elstone*, [1893] P. 1). But words inserted by fraud or by mistake without the knowledge of the testator may be rejected (*Morell* v. *M.*, 7 P. D. 68; *Fulton* v. *Andrew*, L. R. 7 H. L. 448); see *Briscoe* v. *Baillie Hamilton*, [1902] P. 234; *Gregson* v. *Taylor*, [1917] P. 256. As to the case where such a rejection would alter the sense of the remainder, see *Rhodes* v. *R.*, 7 A. C. 198; *Re Boehm*, [1891] P. 251.

(*f*) As to the position of the signature of the testator, see the Wills Act Amdt. Act, 1852, s. 1, *post*, p. 537, and cases there quoted.

Signature by testator.

(*g*) A signature by the testator of his name after the attestation by the witnesses, although in their presence, is not a compliance with the statute (*Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117). A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised, a doubt upon the point (*Cooper* v. *Bockett*, 3 Curt. 648; *Brenchley* v. *Still*, 2 Rob. 162; *Thompson* v. *Hall*, 16 Jur. 1144; *Re Jones* (1877), W. N. 10). A mark by the testator for a signature was held sufficient, although the name did not appear (*Re Bryce*, 2 Curt. 325); and even where a wrong name was added to the mark, but there was no doubt as to the identity of the testator, the execution was held good (*Re Clarke*, 1 Sw. & Tr. 22; *Re Douce*, 2 Sw. & Tr. 593).

By some other person by testator's direction.

An attesting witness may sign the will for the testator by his direction (*Re Bailey*, 1 Curt. 914). The witness, in fact, attests the *direction* of the testator, and that direction amounts to an acknowledgment (*Smith* v. *Roberts*, 1 Rob. 262). But such signature, although made by the testator's direction, is insufficient if not made in his presence (*Kevil* v. *Lynch*, I. R. 8 Eq. 244). A party signing a will for a testator, who was too ill to sign, by his direction signed it in his own name, but expressed it to be on behalf of the testator. This was deemed sufficient (*Clark's Case*, 2 Curt. 329). Where A. in the presence of a testator, and by his direction, impressed the testator's usual signature at the foot of a codicil, by means of a stamp, the will was duly signed (*Jenkyns* v. *Gaisford*, 11 W. R. 854). There must be some act or word on the part of the testator to show that the signature was made at his request (*Re Marshall*, 13 L. T. 643).

Signature made in presence of witnesses.

(*h*) The testator's signature must be made or acknowledged in the presence of the witnesses. Where the witnesses had seen the testatrix write what the Court presumed to be her signature, it was held sufficient, although they did not see the signature, and she did not

acknowledge it to them (*Smith* v. *S.*, L. R. 1 P. & M. 143). "Presence" means the actual visual presence (*Brown* v. *Skirrow*, [1902] P. 3). 1 Vict. c. 26, s. 9.

There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by the witnesses is his will, or state that his signature is inside the will (*Blake* v. *B.*, 7 P. D. 102; following *Hudson* v. *Parker*, 1 Rob. 14; and disapproving of *Becket* v. *Howe*, L. R. 2 P. & M. 1; and *Gwillim* v. *G.*, 2 Sw. & Tr. 200). Both witnesses must sign after the testator's signature shall have been made and acknowledged to them when both are present at the same time (*Moore* v. *King*, 3 Curt. Ecc. 243; *Wyatt* v. *Berry*, [1893] P. 5). As to acknowledging a former signature, see *Re Pattison*, [1918] 2 I. R. 90. Acknowledgment of signature in presence of witnesses.

Where a will is signed by the testator before the witnesses are called in, the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument does not amount to a sufficient acknowledgment (*Ilott* v. *Genge*, 4 Moo. P. C. 265; *Re Swinford*, L. R. 1 P. & M. 630; *Pearson* v. *P.*, L. R. 2 P. & M. 451). It is not, however, necessary that the testator should say in express terms to the witnesses "That is my signature." A request for subscription has been held sufficient (*Keigwin* v. *K.*, 3 Curt. 607; *Re Ashmore*, *ibid.*, 756; *Gaze* v. *G.*, *ibid.*, 451; *Re Davies*, 2 Rob. 337; *Re Claridge*, 39 L. T. 612; *Daintree* v. *Butcher*, 13 P. D. 102). Where the request for subscription was made to the witnesses by a third party in the presence of the testatrix who said no word during the proceeding, there was a sufficient acknowledgment (*Inglesant* v. *I.*, L. R. 3 P. & M. 172; *Re Bishop*, 30 W. R. 567; but see *Morritt* v. *Douglas*, L. R. 3 P. & M. 1). Where A placed his seal on the paper, and delivered it as his act and deed, it was held there was no sufficient acknowledgment (*Re Sumners*, 2 Robb. 295).

(*i*) It has long been settled, that after a will has been signed or acknowledged by the testator, there must be the subscription of the witnesses in the presence of the testator (*White* v. *British Museum*, 6 Bing. 310). To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of the witness's name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160). Nor the adding of an address (*Re Trevanion*, 2 Rob. 315). Nor the acknowledgment by a witness of his signature by putting a dry pen over it (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160; *Playne* v. *Scriven*, 1 Rob. 772; *Horne* v. *Featherstone*, 73 L. T. 32). The court must be satisfied that the act done by the witness was intended by him to evidence his attestation. Where a man wrote the word "witness," it was held an insufficient attestation (*Re Eynon*, L. R. 3 P. & M. 92); also where another, after writing his christian name, was unable through feebleness to complete his signature (*Re Maddock*, L. R. 3 P. & M. 169). Attestation and subscription by witnesses.

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under this Act (*Re Christian*, 2 Rob. 110; *Re Martin*, 6 Not. Cas. 694; *Re Blewitt*, 5 P. D. 116; *Margary* v. *Robinson*, 12 P. D. 8). Where one of the attesting witnesses subscribed his description, without signing his name, it was held sufficient (*Re Sperling*, 12 W. R. 354). A will may be attested by the witnesses making marks (*Re Amiss*, 2 Rob. 116); and the testator may write the names of the witnesses opposite their respective marks (*Re Ashmore*, 3 Curt. 756). But an attesting witness, able

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to write, cannot subscribe for another witness who is unable to write (1 Not. Cas. 456). A husband who is witness to a will cannot also subscribe for his wife (*Re White*, 2 Not. Cas. 461); nor a wife for her husband (*Re Duggins*, 39 L. J. Prob. 34). A will was attested by one witness in his own handwriting. He also held and guided the hand of a second witness who could neither read nor write; this was held sufficient (*Harrison* v. *Elvin*, 3 Q. B. 117; *Re Frith*, 27 L. J. Prob. 6). Where the names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen, the will was duly attested (*Re Lewis*, 31 L. J. Prob. 153; see *Re Cope*, 2 Rob. 335). For a case where the name of a witness was erased by the testator and re-written by the witness, see *Re Coleman* (2 Sw. & Tr. 314); and for a case where the signatures of the witnesses were sworn to be in the handwriting of the testator, see *Re Lee* (4 Jur. (N.S.) 790).

If both the witnesses are dead, it will not be presumed that they did not both sign at the same time, from the difference in the colour of the ink (*Trott* v. *T.*, 29 L. J. Prob. 156).

It is not necessary that the name of the witness should be written upon the same side of the paper on which the name of the testator occurs (*Re Chamney*, 1 Rob. 757; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Margary* v. *Robinson*, 12 P. D. 8); but the Court must be satisfied that the name of the witness was subscribed for the purpose of attesting the testator's signature (*Re Wilson*, L. R. 1 P. & M. 269; *Griffiths* v. *G.*, L. R. 2 P. & M. 300; see *Re Streatley* (1891), P. 172); and the testator's signature attested must be the operative one (*Sweetland* v. *S.*, 4 Sw. & Tr. 6; *Ewen* v. *Franklin*, 1 Jur. (N.S.) 1220; *Re Dilkes*, L. R. 3 P. & M. 164; *Phipps* v. *Hale*, *ibid.* 166). The attestation of the witness, if not on the same sheet of paper as the signature of the testator, must be on paper physically connected therewith (*Re Braddock*, 1 P. D. 433; *Re Hatton*, 6 P. D. 204; see *Lewis* v. *L.*, [1908] P. 1).

Testator's presence.

The execution must be attested by the witnesses in the actual or constructive presence of the testator (*Newton* v. *Clarke*, 2 Curt. 320; *Tribe* v. *T.*, 1 Rob. 275; *Longford* v. *Eyre*, 1 P. W. 740; *Casson* v. *Dade*, 1 Br. C. C. 99). Even in the case of a blind person it must appear that the will was so attested that the testator, if he had had his eyesight, could have seen the witnesses subscribe (*Re Piercy*, 1 Rob. 278). Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (*Norton* v. *Bazett*, 3 Jur. (N.S.) 1084; *Jenner* v. *Ffinch*, 5 P. D. 106; *Carter* v. *Seaton*, 17 Times L. R. 671; *Betts* v. *Gannell*, 19 Times L. R. 304). But it is not necessary that the witnesses should subscribe in the presence of each other (*Faulds* v. *Jackson*, 6 Not. Cas. Suppl. 1; *Re Webb*, 2 Jur. (N.S.) 309).

Attestation clause should be added.

(*k*) Although a will may be valid without any attestation clause (*Bryan* v. *White*, 2 Robert. 315), yet one should be added; otherwise, in order to obtain probate, it is necessary to have an affidavit of one of the subscribing witnesses to prove that the provisions of the Act, in reference to the execution of the will, have in fact been complied with (*Belbin* v. *Skeats*, 1 Sw. & Tr. 148; see *Re Thomas*, 1 Sw. & Tr. 255; *Byles* v. *Cox*, 74 L. T. 222).

Presumption in favour of due execution in absence of evidence.

If upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses; in the absence or death of the witnesses, the *prima facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that

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they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same (*Burgoyne* v. *Showler*, 1 Rob. 5; *Foot* v. *Stanton*, 2 Jur. (N.S.) 380; *Re Torre*, 8 Jur. (N.S.) 494; *Re Colyer*, 14 P. D. 48; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Vinnicombe* v. *Butler*, 13 W. R. 392; *Re Puddephatt*, L. R. 2 P. & M. 97; see *Re Peverett*, [1902] P. 205). But see *Strong* v. *Hadden*, [1915] P. 211. Where, however, the witnesses negative compliance with the requisites of the Act, the will cannot be supported unless their evidence be rebutted by proof of circumstances showing that the witnesses cannot be credited, or that from the facts and circumstances which they state their recollection fails them (*Re Ayling*, 1 Curt. 913; *Gove* v. *Gawen*, 3 Curt. 151; *Pennant* v. *Kingscote*, *ibid.* 642; *Bennett* v. *Sharp*, 1 Jur. (N.S.) 456; *Leech* v. *Bates*, 1 Rob. 714; *Noding* v. *Alliston*, 14 Jur. 904; *Glover* v. *Smith*, 57 L. T. 60; *Crofts* v. *C.*, 13 W. R. 526; *Wright* v. *Rogers*, L. R. 1 P. & M. 678; *Bailey* v. *Frowan*, 19 W. R. 511; *Dayman* v. *D.*, 71 L. T. 699; see *Pilkington* v. *Gray*, [1899] A. C. 401). Where witnesses have deposed, the one positively that the will was not attested in the testator's presence, and the other as positively declared that it was, the Court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause (*Brenchley* v. *Still*, 2 Rob. 176, 177; *Farmar* v. *Brock*, 1 Deane, 187; 2 Jur. 670). Declarations by the testator are inadmissible (*Sugden* v. *St. Leonards*, 1 P. D. 227; *Eyre* v. *E.*, [1903] P. 137; see *Atkinson* v. *Morris*, [1897] P. 40; *Re Chappell*, [1894] P. 98). The execution was allowed to be proved by a person present who was not an attesting witness (*Mackay* v. *Rawlinson*, 35 Times L. R. 223). See as to evidence in an action for revocation on the ground of undue execution *Patrick* v. *Havercroft*, 123 L. T. 201.

Evidence showing that statutory requisites were not complied with.

Although a testamentary instrument is not properly executed or attested, yet, if it is clearly referred to by one of later date properly executed and attested, it will be operative (*Ingoldby* v. *I.*, 4 Not. Cas. 493; *Re Hilhouse*, 1 Eccl. & Adm. Rep. 111). The rule applies where there is a will informally executed, which in a codicil duly executed is described as a codicil "to my last will" (*Hill's Case*, 4 Not. Cas. 404; *Hally's Case*, 5 Not. Cas. 510); it is not properly a question of incorporation (see *ibid.* 512).

Invalid testamentary instrument rendered valid by subsequent instrument duly executed.

An unattested paper which would have been incorporated in an attested will executed according to the Statute of Frauds, is now incorporated, if the will is executed according to this section (*Allen* v. *Maddock*, 11 Moore, P. C. 427; see *Anderson* v. *A.*, 13 Eq. 381). The paper to be incorporated, whether of itself void or valid, is equally entitled to probate (*Sheldon* v. *S.*, 1 Robert. 81; *Dicken's Case*, 3 Curt. 60; *Willesford's Case*, *ibid.* 77; *Bacon's Case*, 3 Not. Cas. 644; *Smartt's Case*, 4 Not. Cas. 38; *Darby's Case*, 4 Not. Cas. 427). But the paper intended to be incorporated must be shown to have been in existence at the time the will was executed (*Singleton* v. *Tomlinson*, 3 App. Cas. 404; *Ferraris* v. *Hertford*, 3 Curt. 468; *Re Watkins*, L. R. 1 P. & M. 19; as to lists of articles referred to, see *Re Ash*, 2 Jur. (N.S.) 526; *Re Rendle*, 68 L. J. Prob. 125; and as to a paper coming into existence between the execution of a will and a codicil, see *Re Truro*, L. R. 1 P. & M. 201). The will must refer to the paper as existing (*Durham* v. *Northen*, [1895] P. 66; *Re Hyslop*, *H.* v. *Chamberlain*, [1894] 3 Ch. 522; *Re Phillips*, *Boyle* v. *Thompson*, 34 Times L. R. 256). And the objects expressed in the paper fail if the will states that the paper is not to form part of it (*Re Louis*, 32 Times L. R. 313). The description of it given in the will must clearly identify the paper (*Singleton* v.

Incorporation of unattested papers.

Paper must be in existence,

and capable of identification.

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Tomlinson, supra; Smart v. *Prujean*, 6 Ves. 565; *Von Straubenzee* v. *Monck*, 11 W. R. 109; *Re Norris*, 14 W. R. 348; *Re Garnett* [1894] P. 90; see *Re Daniell*, 8 P. D. 14; *Symes* v. *Appelbe*, 57 L. T. 599). A reference in a will to documents "accompanying this my will," was an insufficient identification (*Re Yockey*, 29 L. T. 699). So a reference to "any memorandum amongst my papers" (*University Coll.* v. *Taylor*, [1908] P. 140). Where there is a reference in a duly executed testamentary instrument to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence (*Allen* v. *Maddock*, 11 Moore, P. C. 427; see Wigram on Evid., prop. 5; *Re White, Knight* v. *Briggs*, 69 S. J. 213). Thus, where a codicil referred to "the last will of me," parol evidence was admitted to identify the will (*Re Heathcote*, 6 P. D. 30). The principle, however, will not be extended (*Re Greves*, 1 Sw. & Tr. 250). Where the will did not refer to a document as then existing, the Court refused to receive parol evidence, to show that the document was written before the will was signed (*Re Dallow*, L. R. 1 P. & M. 189; *Re Sunderland, ibid.* 198). Where a will, if read as speaking at the date of a codicil, contains language which would operate as an incorporation of a document, such document is entitled to probate by force of the codicil, although not in existence until after the execution of the will (*Re Truro*, L. R. 1 P. & M. 201; see *Re Macgregor*, 60 L. T. 840; *Re Rendle*, 68 L. J. Prob. 125); but only if the language of the will refers to the document as existing (*Durham* v. *Northen*, [1895] P. 66; see *Re Smart*, [1902] P. 238).

Effect of codicil on papers referred to in will.

Probate of incorporated documents.

In requiring the probate of an incorporated document the Court exercises a discretion, and does not require it where the person having custody of the document refuses to produce it (*Re Sibthorp*, L. R. 1 P. & M. 106; or where the document is bulky (*Re Balme*, [1897] P. 261), or cannot be found (*Quihampton* v. *Going*, 24 W. R. 917). Where a foreign will was confirmed by an English will, probate of both was required (*Re Howden*, 30 L. T. 768; 43 L. J. Prob. 26; see *Re Donaldson*, L. R. 3 P. & M. 45; *Re Bolton*, 12 P. D. 202; *Re Lockhart*, [1893] W. N. 80). *Secus*, where there was no such confirmation (*Re Astor*, 1 P. D. 150; see *Re De la Rue*, 15 P. D. 185; *Re Callaway, ibid.*, 147; *Re Seaman*, [1891] P. 253; *Re Fraser, ibid.*, 285; *Re Murray*, [1896] P. 65); *Re Todd*, [1926] P. 173. As to probate of an English translation of a French will see *Re Cliff*, [1892] 2 Ch. 229. And see *Re Von Linden*, [1896] P. 148; *Re Greaves*, 127 L. T. 371.

Whether probate be granted or not the incorporated document will be regarded as part of the will (*Bizzey* v. *Flight*, 3 Ch. D. 269; *Quihampton* v. *Going, supra*). Even where not incorporated, memoranda in a ledger may be *prima facie* evidence as to advances (*Whately* v. *Spooner*, 3 K. & J. 542; see *Smith* v. *Conder*, 9 Ch. D. 170).

Will in form of a deed.

Probate has been granted of a document in the form of a deed poll, properly executed, upon evidence that it was intended as a will (*Re Slimm*, 15 P. D. 156; *Milnes* v. *Foden, ibid.*, 105; see *Re Colyer*, 14 P. D. 48).

Appointments by will to be executed like other wills, and to be valid, although

10. No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall

have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. 1 Vict. c. 26, s. 10.

other required solemnities are not observed.

A reference should be made to sect. 1 (*ante*, p. 490), which extends the word "will" to "an appointment by will or by writing in the nature of a will in exercise of a power." And it should be observed that the present section is composed of (1) a prohibitory portion and (2) an enabling portion (see *Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 452).

Prohibitory portion of section.

As regards the prohibitory portion—where a power of appointing personalty was exercisable by writing signed in the presence of two witnesses, and the donee signed in the presence of two witnesses a writing which from its form was intended to take effect on her death and not before, but the signature not being at the foot, it was not admitted to probate, it was held that such writing was a will within sect. 1, and that the first portion of sect. 10 prevented it from exercising the power (*Re Barnett, Dawes* v. *Ixer*, [1908] 1 Ch. 402; not following *Re Broad, Smith* v. *Draeger*, [1901] 2 Ch. 86; see *Re Daly*, 25 Beav. 456; *Gullan* v. *Grove*, 26 Beav. 64).

Enabling portion of section.

As regards the enabling portion of sect. 10. Where the power is in terms a power to appoint by will, and it further requires the will to be sealed, the enabling portion of the section applies, and declares that a will without sealing is sufficient (*Taylor* v. *Meads*, 4 D. J. & S. 602).

Where the power is exercisable by an instrument in writing, it may be exercised by will (*Taylor* v. *Meads*, 4 D. J. & S. 601). Where it was exercisable by an instrument in writing signed, sealed and delivered, it was well exercised by a will signed, sealed and published, publication being equivalent to delivery (*Smith* v. *Adkins*, 14 Eq. 402). But it was not exercised by a will duly executed in conformity with sect. 9 but not sealed, the enabling portion of sect. 10 not applying (*Taylor* v. *Meads*, 4 D. J. & S. 602).

Foreign domicil.

Execution of wills made by persons domiciled abroad in exercise of powers of appointing personalty.

The present statute only applies, so far as wills of personalty are concerned, to persons having an English domicil (*Bremer* v. *Freeman*, 10 Moore, P. C. 359). Accordingly, as regards the necessary formalities for the execution of a will of personalty, the will of a person domiciled abroad is not affected by the prohibitory portion of sect. 10 (*Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 452; *Re Walker, MacColl* v. *Bruce*, [1908] 1 Ch. 566). Thus a power of appointing personalty by will, where no special formalities are required, can be exercised by the will (proved in England) of a domiciled foreigner, invalid according to English law, but valid according to the law of the domicil (*D'Huart* v. *Harkness*, 34 Beav. 324; *Re Price, supra; Re Walker, supra; contra, Hummel* v. *H.*, [1898] 1 Ch. 642).

Again, in the case of a person domiciled abroad, his will can derive no validity from the enabling portion of the above section (*Re Price, Tomlin* v. *Latter, supra*). Thus, where the instrument creating the power requires special formalities, a will which does not comply with such formalities does not execute the power, although it be valid according to the law of domicil and as such admitted to probate in England (*Barretto* v. *Young*, [1900] 2 Ch. 339, the case of a domiciled French subject). But in such a case the defective execution may be aided by a Court of equity (*Re Walker, MacColl* v. *Bruce, supra*). The decision in *Re Kirwan*, 25 Ch. D. 373, the case of a British subject domiciled abroad, was not followed in *Re Simpson, Coutts* v. *Church Missionary Society*, [1916] 1 Ch. 502; and see *Re Wilkinson, Butler* v. *W.*, [1917] 1 Ch. 620.

1 Vict. c. 26, s. 10.

Construction of wills made by persons domiciled abroad in exercise of powers of appointing personalty.

As regards the construction of a will (exercising a power) of a person domiciled abroad, which is invalid according to English law but valid according to the law of the domicil, it is *prima facie* to be construed according to the law of the domicil (*Re Price, supra; Re D'Este, Poulter* v. *D'E.*, [1903] 1 Ch. 903). And having regard to this principle, the will in French form of a domiciled Frenchman was not construed in accordance with the English rule introduced by sect. 27 of the present Act (*Re D'Este, supra*; see the apparently contrary decision in *Re Harman, Lloyd* v. *Tardy*, [1894] 3 Ch. 607). But the words of such a will may show that it was written with reference to the law of England, and if so it may be construed in accordance with sect. 27 (*Re Price, supra; Re Simpson, supra*). Where the will was in English form it was construed in accordance with sect. 27 (*Re Baker, Hunt* v. *B.*, [1908] W. N. 161; see *Murray* v. *Champernowne*, [1901] 2 I. R. 232). The question of the evidence admissible as to intention to exercise the power was treated as a question of English law (*Re Scholefield, S.* v. *St. John*, [1905] 2 Ch. 408; compromised on appeal, [1907] 1 Ch. 664).

Capacity of donee.

In the case of a testamentary power created by English instruments, appointees were held entitled to take under the wills in English form of married women domiciled abroad notwithstanding the limitations imposed upon the donee by the law of the domicil (*Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Re Megret, Tweedy* v. *Maunder*, [1901] 1 Ch. 547). Where the law of the domicil restricted the amount of which the donee could dispose, the power was exercised only to that amount (*Re Pryce, Lawford* v. *P.*, [1911] 2 Ch. 286; *Re Lewal, Gould* v. *L.*, [1918] 2 Ch. 391; cf. *Re Groos, G.* v. *G.*, [1915] 1 Ch. 572. Compare *De Serre* v. *Clarke*, 18 Eq. 587; *Re Bald*, 76 L. T. 462; *Re Hernando, H.* v. *Sawtell*, 27 Ch. D. 284; *Murray* v. *Champernowne*, [1901] 2 I. R. 232; *Murphy* v. *Deichler*, [1909] W. N. 167).

Probate.

To render a testamentary appointment available probate should be obtained (see Wms. Exors., 11th ed., 278); and in the case of donees domiciled abroad of testamentary powers created by English instruments, the Probate Division has admitted to probate wills valid by the law of the testator's domicil but invalid according to English law (*Barretto* v. *Young*, [1900] 2 Ch. 339; and also wills invalid according to the law of the domicil but valid according to English law (*Re Hallyburton*, L. R. 1 P. & M. 90; *Re Huber*, [1896] P. 209; *Murphy* v. *Deichler*, [1909] W. N. 167). In the latter case the rule is to grant administration with the will annexed; the grant in the case of a married woman whose husband does not consent being limited to such property as the deceased had power to dispose of and did dispose of by the document (*Re Trefond*, [1899] P. 247; *Re Vannini*, [1901] P. 330).

Soldiers' and mariners' wills excepted.

11. Provided always, and be it further enacted, that any soldier being in actual military service (*l*), or any mariner or seaman being at sea (*m*), may dispose of his personal estate as he might have done before the making of this Act.

Law before the Act.

(*l*) According to the law existing before the Statute of Frauds, "Testaments as regarded personal property might be either written or verbal, otherwise called nuncupative; of which the former were committed to writing and published or declared by the testator as his will, the latter depended on merely oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing . . . written wills of personalty needed not in general any witnesses . . . and though written in

another man's hand and never signed by the testator, yet if it proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate" (2 Steph. Com. 202, 203, 5th ed.). 1 Vict. c. 26, s. 11.

The Statute of Frauds (29 Car. 2, c. 3), which restricted the mode of making wills, contained an exception in favour of the wills of soldiers in actual military service, and of seamen being at sea: and this exception has been continued by the present section. In the case, however, of wills disposing of the wages or effects of merchant seaman, regard must be had to 57 & 58 Vict. c. 60, s. 177, and in the case of wills of petty officers and seamen in the Royal Navy, and of marines and non-commissioned officers of marines, so far as the same relate to money payable by the Admiralty or effects or money in charge of the Admiralty, regard must be had to 28 & 29 Vict. c. 72. Statute of Frauds.

The wills of soldiers and sailors are now governed by this section as extended by the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58). By sect. 1 of that Act, sect. 11 of the Act of 1837 is declared to authorise and always to have authorised any soldier being on actual military service, or mariner or seaman being at sea, to dispose of personal estate as he could have done before the passing of the Act of 1837, though under the age of twenty-one. By sect. 2 of the Act of 1918, sect. 11 extends to any member of His Majesty's naval or marine force not only when at sea, but when so circumstanced that, if a soldier, he would be on actual military service within sect. 11 (see *infra*). By sect. 3, sub-sect. 1 of the Act of 1918, a testamentary disposition of real estate in England or Ireland by any person to whom sect. 11 applies, and who dies after February 6, 1918, is, although the person making it was at the time of making it under twenty-one years of age, or the disposition was not made in such manner and form as at the date of passing of the Act of 1918 was required by law, to be valid in any case where the person making it was of such age and the disposition has been made in such manner and form as, if it were a disposition of personal estate made by a person domiciled in England or Ireland, would be valid. (Sub-sect. 2 contains a similar provision as to Scotland.) By sect. 4, where any person dies after February 6, 1918, having made a will which is, or if it were a disposition of property would have been, rendered valid by sect. 11 of the Act of 1837, any appointment in that will of any person as guardian of the infant children of the testator is to be of full force and effect. By sect. 5, for the purposes of sect. 11 and of the Act of 1918, "soldier" includes a member of the Air Force, and references in the Act of 1918 to sect. 11 include a reference to that section as explained and extended by the Act of 1918. As regards "actual military service," the phrase has been held to be confined to those *on an expedition*; the will of a soldier made while quartered in barracks, either at home (*Drummond* v. *Parish*, 3 Curt. 522), or in the colonies (*White* v. *Repton*, 3 Curt. 818; *Re Phipps*, 2 Curt. 368; *Re Johnson*, 2 Curt. 341), is not privileged. The same was held as to the will made at Bangalore of a soldier who died on a tour of inspection (*Re Hill*, 1 Rob. 276). The test is whether under orders some step has been taken preparatory to joining forces in the field (*Re Hiscock*, [1901 P. 78; *Re Kitchen*, 35 Times L. R. 612; *Re Booth*, [1926] P. 118). A letter written by a soldier after mobilisation of his battalion was privileged as a will (*Gattward* v. *Knee*, [1902] P. 99), and the privilege continues till the full conclusion of the operations (*Re Limond*, [1915] 2 Ch. 240; see also *Re Gray*, [1922] P. 140) and during intervals of leave (*Re Stanley*, [1916] P. 192). And where an officer was on his way from one Soldiers.

1 Vict. c. 26, s. 11.

regiment to another, both regiments being at the time on active service, his will was privileged (*Herbert* v. *H.*, D. & Sw. 10). The will may consist of a declaration made at the instance of the military authorities (*Re Scott*, [1903] P. 243). An unattested will, made by an officer on service at Berbice, was allowed to pass as that of a soldier in actual military service at the prayer of the party whose interest was prejudiced by such will (*Re Phipps*, 2 Curt. 368). The term "soldier" in this section extended to persons in the military service of the East India Company (*Re Donaldson*, 2 Curt. 386), and now includes members of the Air Force (sect. 5 of the Act of 1918, *supra*). As to obtaining probate of soldiers' wills privileged under this section, see *Re Hackett* (28 L. J. Prob. 42); *Re Neville* (*ibid.* 52); *Re Thorne* (4 Sw. & Tr. 36). Probate was granted of the testamentary part only of a letter, the military authorities objecting to probate of the whole (*Re Heywood*, [1916] P. 47). As to probate of several documents see *Re Vernon*, 33 Times L. R. 11; *Nixon* v. *Prince*, 34 Times L. R. 444. Alterations occurring in a will made by a soldier in actual military service will be presumed to have been made during such service (*Re Tweedale*, L. R. 3 P. & M. 204). A will made on active service may be conditional on death during such service (see *Re Spratt*, [1897] P. 28, and cases in the last paragraph of this note). A general testamentary power of appointment of personalty may be exercised by a soldier or sailor under 21 (*Re Wernher, W.* v. *Bett*, [1918] 2 Ch. 82). Sect. 4 of the Act of 1918 reverses *Re Tollemache*, [1917] P. 246, as to the appointment of a guardian. As to the testamentary intention required see *Re Stable*, 35 Times L. R. 66; *Dalrymple* v. *Campbell*, [1919] P. 7; *Re Donner*, 34 Times L. R. 138; *Beech* v. *Pub. Trustee*, [1923] P. 46; *Selwood* v. *S.*, 125 L. T. 26. A will may be revoked informally by letter or otherwise without the making of a new will (*Re Gossage*, [1921] P. 194).

Seamen.

(*m*) The term "mariner or seaman" does not exclude any person in His Majesty's navy, being "at sea" (though superior of the ship), from the exception contained in this Act (*Re Hayes*, 2 Curt. 338). The section applies to the purser of a man-of-war (*ibid.*) and to a surgeon in the navy (*Re Saunders*, L. R. 1 P. & M. 16), and to seamen, whether in the King's or merchant service (*Re Milligan*, 2 Rob. 108; *Morrell* v. *M.*, 1 Hagg. 51), and extends to all persons, male or female, employed in any branch of the Royal Navy or merchant service, when at sea (*Re Hale*, [1915] 2 I. R. 362, the will of a female typist; *Re Stanley*, [1916] P. 192 (a nurse)). And see sect. 2 of the Act of 1918, *supra*, which extends to wills made before Feb. 6, 1918, if the testator died after that date (*Re Yates*, [1919] P. 93).

At sea.

This section applied to the will of a commander-in-chief engaged in a naval operation on board a Queen's ship in a river (*Re Austen*, 2 Rob. 611). But not of a commander-in-chief, living on shore at the official residence (*Seymour's Case*, cited 3 Curt. 530; 2 Curt. 339). Where a naval officer, invalided at a foreign station, was returning home in a steamer, his will was privileged (*Re Saunders*, L. R. 1 P. & M. 16). As also the will of a seaman on board a man-of-war permanently stationed in Portsmouth Harbour (*Re M'Murdo*, L. R. 1 P. & M. 540). Where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage is within the exception, although such will was in fact made on shore (*Re Lay*, 2 Curt. 375). The section applied to a will made on board a ship lying in harbour preparatory to sailing (*Re Patterson*, 79 L. T. 123); but not to a letter stating that the deceased had shipped on board a vessel, where it did not appear whether the letter was written before or after he went on board (*Re Corby*, 18 Jur. 634).

1 Vict. c. 26, s. 11.

See also *Re Anderson, A.* v. *Downes,* [1916] P. 49; *Barnard* v. *Birch,* [1919] 2 I. R. 404; *Re Thomas,* 34 Times L. R. 626. But see now sect. 2 of the Act of 1918, *supra.*

A will under this section remains operative unless expressly revoked, although the maker lives in England several years after (*Re Leese,* 17 Jur. 216; *Re Coleman,* [1920] 2 I. R. 332). Probate was refused when the will was in a conditional form, *e.g.*, "Instructions to be followed if I die at sea or abroad" (*Lindsay* v. *L.,* L. R. 2 P. & M. 459; *Re Porter, ibid.* 22; *Re Robinson, ibid.* 171; see *Re Spratt,* [1897] P. 28), and see *Broughton-Knight v. Wilson,* 32 Times L. R. 146 (alternative drafts). See, however, *Re Pawle, Winter* v. *P.,* 34 Times L. R. 437. But a letter may operate as a will notwithstanding an expressed intention to make a formal will (*May* v. *M.,* [1902] P. 103). A gift of personalty to an attesting witness in a soldier's or sailor's will is valid, notwithstanding sect. 15, *post* (*Re Limond,* [1915] 2 Ch. 240). But a soldier's or sailor's will is revoked under sect. 18 by marriage (*Re Wardrop,* [1917] P. 54).

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

[**12.** This Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.]

This section, and 11 Geo. 4 & 1 Will. 4, c. 20 (which bound the Crown: *Re Bevan,* 14 W. R. 147), were repealed by 28 & 29 Vict. c. 112, s. 1.

Publication not to be requisite.

13. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

14. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

15. If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person

1 Vict. c. 26, s. 15.

claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will.

The section does not apply to a solder's or sailor's will which requires no attestation under sect. 11, *ante* (*Re Limond*, [1915] 2 Ch. 240).

The will must first be construed and then the above section must be applied (*Aplin* v. *Stone*, [1904] 1 Ch. 548). Where accordingingly there was a devise to A. for life with remainder (in effect) to B. if living at A.'s death, otherwise to B.'s children, and B. was living at A.'s death, but her husband had attested the will, there was an intestacy (*ibid.*).

Where a life estate was rendered void by this section the interest of a remainderman in existence was accelerated (*Jull* v. *Jacobs*, 3 Ch. D. 703; *Re Clark, C.* v. *Randall*, 31 Ch. D. 72; compare *Re Whitehorne, W.* v. *Best*, [1906] 2 Ch. 121); *secus* where contingent remaindermen were not in existence (*Re Townsend, T.* v. *T.*, 34 Ch. D. 257; *Kearney* v. *K.* [1911] 1 I. R. 137).

As regards class gifts. A person incapable of taking under the section cannot be reckoned in a class (*Re Coleman and Jarrom*, 4 Ch. D. 172). Where, accordingly, there was a devise to A.'s children as tenants in common, and one of A.'s children was an attesting witness, his share went to the rest of the class (*Fell* v. *Biddolph*, L. R. 10 C. P. 701). The decision was similar where the gift was to a class as joint tenants (*Young* v. *Davies*, 2 Dr. & Sm. 167).

Where the execution of a will was attested by two marksmen and signed also by two other persons as witnesses, the two latter were held to have attested the will, and a legacy to the wife of one failed (*Wigan* v. *Rowland*, 11 Hare, 157). And where a devisee attested a will as a third witness at the request of another person, the testator objecting, his interest failed (*Randfield* v. *R.*, 11 W. R. 847). So where the third attestation was at the request of the testator (*Cozens* v. *Crout*, 21 W. R. 781). Where a will was executed in the presence of two witnesses, and the signature of a third person, who was residuary legatee, appeared also at foot of the will, the Court received evidence that the legatee's name was not written to attest the testator's signature, and ordered it to be omitted in the probate (*Re Sharman*, L. R. 1 P. & M. 661; see *Re Purssglove*, 26 L. T. 405; *Re Smith*, 15 P. D. 2).

Attestation of codicil by legatee.

Where a legacy was given by will, and the legatee attested a codicil confirming the will, the gift was good (*Gurney* v. *G.*, 3 Drew, 208; *Tempest* v. *T.*, 2 K. & J. 635; *Re Marcus*, 57 L. T. 399; see *Gaskin* v. *Rogers*, 2 Eq. 284). So where the legatee had attested one of many separate sheets of paper which formed the will (*Re Craven, Crewdson* v. *Craven*, 24 Times L. R. 750). Where one of the attesting witnesses to a will which gave residue to B. was B.'s wife, and by a codicil, attested by other witnesses, the testatrix confirmed her will, the codicil incorporated the will so as to render the gift to B. valid (*Anderson* v. *A.*, 13 Eq. 381; see *Burton* v. *Newbery*, 1 Ch. D. 234). In such a case the benefit is not lost by the legatee attesting a second codicil which confirms the will and first codicil (*Re Trotter, T.* v. *T.*, [1899] 1 Ch. 764).

Will attested by legatee's wife confirmed by codicil.

The marriage, after attestation of a will, of a devisee to the

attesting witness, does not affect the validity of the devise (*Thorpe* v. *Bestwick*, 6 Q. B. D. 311). 1 Vict. c. 26, s. 15.

A bequest in trust was not invalidated by the wife of the trustee attesting the signature of the testatrix (*Cresswell* v. *C.*, 6 Eq. 69). But where, by a codicil attested by A., personal estate was given to B. upon parol trusts in favour (amongst others) of A.; A.'s interest was held to fail, just as it would have done had the trust been declared in the codicil (*Re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594). Gift in trust.

Where a solicitor attested a will in which he was named trustee, and by which he was empowered to make professional charges, the above section deprived him of any right to profit costs (*Re Pooley*, 40 Ch. D. 1; *Re Barber, Burgess* v. *Vinnicome*, 31 Ch. D. 665).

16. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. Creditor attesting to be admitted a witness.

17. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. Executor to be admitted a witness.

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions). Will to be revoked by marriage.

Under the old law the marriage of a testator did not revoke his will; but under certain circumstances there was an implied revocation by marriage and the birth of issue (1 Wms. Exors., 10th ed., 138). A will, made on or after January 1, 1926, expressed to be made in contemplation of a marriage is not revoked by that marriage (L. P. Act, 1925, s. 177, *post*). Old law.

It seems that the present section applies to a will of movables made either by a male foreigner domiciled in England or by a woman who marries a male foreigner domiciled in England; but not to such will made by a male foreigner domiciled abroad or by a woman who marries a male foreigner domiciled abroad (*Re Martin, Loustalan* v. *L.*, [1900], P. 211). It applies to a soldier's or sailor's will validated by sect. 11, *ante* (*Re Wardrop*, [1917] P. 54). Foreigners.

Under this section it was held that a will was not revoked by a marriage with a deceased wife's sister; and that there was no distinction in such a case between a natural-born subject and a naturalized British subject (*Mette* v. *M.*, 1 Sw. & Tr. 416). See as to the effect of the Deceased Wife's Sister's Marriage Act, 1907 (7 Ed. 7, c. 47) on rights to property, *Re Whitfield, Hill* v. *Mathie*, [1911] 1 Ch. 310; *Re Butler, Joyce* v. *Brew*, [1918] 1 I. R. 394. A will executed after a marriage invalid under the Indian Marriage with deceased wife's sister.

1 Vict. c. 26, s. 18.

Divorce Act, was revoked by a subsequent marriage between the same parties (*Warter* v. *W.*, 15 P. D. 152).

Exception in case of wills in execution of powers.

Where by a settlement freeholds were, in default of appointment by A's will limited to A, her heirs and assigns, A's will exercising the power was revoked by marriage, the exception not applying (*Vaughan* v. *Vanderstegen*, 2 Drew, 168; see *Logan* v. *Bell*, 1 C. B. 872). The reason for the exception is, that a revocation of the will in a case to which the exception applies, would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit from it (*Re Fitzroy*, 1 Sw. & Tr. 133). The exception applies where in any contingency the property, in default of appointment, would not pass to the heir, &c. of the deceased (*Re Fenwick*, L. R. I. P. & M. 319). Also, where such persons take under the settlement, and not by descent or under the Statute of Distribution (*Re Fitzroy*, 1 Sw. & Tr. 133; *Re Worthington*, 20 W. R. 260). The provisions of the Inheritance Act, 1833, and the Statutes of Distribution are, as to all deaths after 1925, superseded (with the exceptions as to inheritance there noted) by sects. 45 *et seq.* of the Admon. of Estates Act, 1925, *ante*). The exception also applied where next of kin would have taken, not next of kin under the statute (*Re McVicar*, L. R. 1 P. & M. 671). Where, after making a will exercising a power and disposing of absolute property, a testator married, the exercise of the power was held to fall within the exception and limited administration was granted (*Re Russell*, 15 P. D. 111). See also *Poole* v. *P.*, [1919] P. 10; *Re Paul, Pub. Trustee* v. *Pearce*, [1921] 2 Ch. 1.

No will to be revoked by presumption.

19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

See *Re Wells, Hardisty* v. *W.* (42 Ch. D. 646); *Re Booth*, [1926] P. 118.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (*o*), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (*p*), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*q*).

Words "last will."

(*o*) The use of the words "last and only will" in a testamentary paper does not necessarily import a revocation of all previous instruments (*Simpson* v. *Foxon*, [1907] P. 54; see *Cutto* v. *Gilbert*, 9 Moo. P. C. 131; *Lemage* v. *Goodban*, L. R. 1 P. & M. 61; and in the case of real estate *Freeman* v. *F.*, 5 D. M. & G. 704).

Express revocatory clause.

An express revocatory clause in general terms revokes all former wills (*Sotheran* v. *Dening*, 20 Ch. Div. 99; *Harvey* v. *H.*, 32 L. T. 141; see *Cottrell* v. *C.*, L. R. 2 P. & M. 397); even when the testatrix was assured it would not have such effect, and only executed on this understanding (*Collins* v. *Elstone*, [1893] P. 1). A revocatory clause in an Italian will was held to revoke an English will so far as regards personal estate and executors (*Cottrell* v. *C.*, *supra*). But an express revocatory clause is not essential (*Dempsey* v. *Lawson*, 2 P. D. 98). "The question is, What disposition did the testator intend? not Which or what number of papers did he desire or expect to be admitted to probate?" (*Dempsey* v. *Lawson*, 2 P. D.

107). Where, accordingly, a subsequent will contained all testamentary dispositions which the testatrix intended at that time to constitute her last will, a prior will was revoked, although the subsequent will contained no residuary or revocatory clauses (*Dempsey* v. *Lawson, ubi supra*; see *Henfrey* v. *H.*, 4 Moo. P. C. 29; *McAra* v. *M'Cay*, 21 L. R. Ir. 138; *Palmer* v. *Peat*, 58 L. J. Prob. 44; *Cadell* v. *Wilcocks*, [1898] P. 21). On the other hand, a prior will was admitted to probate on the ground that the subsequent will did not dispose of the residue (*Re Petchell*, L. R. 3 P. & M. 153); *Re Hartley*, 29 W. R. 356). And if on the face of the documents the intention remain in doubt, extrinsic evidence of surrounding circumstances may be admitted (*Re Bryan*, [1907] P. 125; see *Jenner* v. *Ffinch*, 5 P. D. 206; *Paton* v. *Ormerod*, [1892] P. 247). 1 Vict. c. 26, s. 20.

Where the subsequent will is not forthcoming, the evidence as to its contents must be conclusive (*Cutto* v. *Gilbert*, 9 Moo. P. C. 131; *Wood* v. *W.*, L. R. 1 P. & M. 309; *Brown* v. *B.*, 8 E. & B. 876).

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate (*Lemage* v. *Goodban*, L. R. 1 P. & M. 57; *Geaves* v. *Price*, 11 W. R. 809; see *Re Howard*, L. R. 1 P. & M. 636; *Cadell* v. *Wilcocks*, [1898] P. 21; *Townsend* v. *Moore*, [1905] P. 78; *Deakin* v. *Garvie*, 36 Times L. R. 122). A testator left four testamentary instruments duly executed. After the ecclesiastical Court had held that the second and third alone were valid as to the personal estate (1 Rob. 204), the Court of Chancery, on the certificate of the Common Pleas (6 C. B. 201), decided that, as to the real estate, the last instrument alone constituted the last will (*Plenty* v. *West*, 16 Beav. 173). Revocation by another will or codicil.

Where two testamentary documents of the same date contain provisions apparently inconsistent, the Court will reconcile them if possible, so that probate may be granted of both. Where reconciliation is impossible probate will be granted of neither (*Townsend* v. *Moore*, [1905] P. 66). See also *Re Southernden*, [1925] P. 177.

As regards the beneficial disposition, it has been said that a distinct disposition by will cannot be revoked except through words equally distinct (*Kellett* v. *K.*, L. R. 3 H. L. 167; *Re Wilcock, Kay* v. *Dewhirst*, [1898] 1 Ch. 98). Intention to revoke must be shown with reasonable certainty (*Randfield* v. *R.*, 8 H. L. C. 235; *Foxwell* v. *Van Grutten*, [1897] A. C. 694); and the revocation must not exceed what is necessary to give effect to the later gift (*Re Freme*, [1895] 2 Ch. 783; *Cleobury* v. *Beckett*, 14 Beav. 586; *Re Percival, Boote* v. *Dutton*, 59 L. T. 21; *Re Wood, W.* v. *W.*, 83 L. T. 157; *Re Whitehorne, W.* v. *Best*, [1906] 2 Ch. 126).

In the absence of express revocation, a later inconsistent disposition, which is not valid in itself, does not revoke an earlier disposition (*Alexander* v. *Kirkpatrick*, L. R. 2 H. L. Sc. 403; *Re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594; *Duguid* v. *Fraser*, 31 Ch. D. 449; see *contra, Baker* v. *Story*, 31 L. T. 631).

(*p*) A testatrix devised real estates, and by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. The deed, however, being void as a *turpis contractus*, was held not to be a writing declaring an intention to revoke (*Ford* v. *De Pontes*, 30 Beav. 572). A writing, by which a testator merely revokes a prior testamentary disposition, will not be admitted to probate (*Re Fraser*, L. R. 2 P. & M. 40; *Re Irvine*, [1919] 2 I. R. 485); *secus*, if it be of a testamentary character (*Re Durance*, L. R. 2 P. & M. 406; *Re Hubbard*, L. R. 1 P. & M. 53; *Re Hicks, ibid.* 683; see *Tooner* v. *Sobinska*, [1907] P. 106). Revocation by writing declaring an intention to revoke.

(*q*) Mere abandonment is not sufficient revocation. There must

1 Vict. c. 26, s. 20.

be some act done (*Andrew* v. *Motley*, 12 C. B. (N.S.) 514). All acts by which a testator may destroy or mutilate a testamentary instrument are in their nature equivocal: unless the act be done *animo revocandi*, there is no revocation (*Powell* v. *P.*, L. R. 1 P. & M. 212). Where, therefore, the destruction is referable solely to the intention of setting up some other paper, the *animus revocandi* has only a conditional existence, the condition being the validity of the other paper; where the condition is unfulfilled, there is no revocation (*ibid.*; *Dancer* v. *Crabb*, L. R. 3 P. & M. 98; *Cossey* v. *C.*, 82 L. T. 203; see *Stamford* v. *White*, [1901] P. 46; *West* v. *W.*, [1921] 2 I. R. 34). So where there was an intention (never carried out) of executing a fresh will (*Dixon* v. *Treasury Solicitor*, [1905] P. 42). But the evidence must be clear as to the intention of the destruction (*Eckersley* v. *Platt*, L. R. 1 P. & M. 281); and subsequent declarations by the testator will not be admitted (*Re Weston*, L. R. 1 P. & M. 633; see the principle stated and discussed Wms. Exors., 11th ed., 113).

Revocation by an act of destruction.

Animus revocandi necessary.

Dependent relative revocation.

Mistake.

Where a testator tore up his will under a mistaken impression that it was invalid, there was no revocation (*Giles* v. *Warren*, L. R. 2 P. & M. 401; *Re Thornton*, 14 P. D. 82; *Beardsley* v. *Lacey*, 67 L. J. P. 35; 78 L. T. 25; distinguish *Collins* v. *Elstone*, [1893] P. 1); and so where a man destroyed his will in a fit of delirium tremens (*Brunt* v. *B.*, L. R. 3 P. & M. 37; see *Re Hine*, [1893] P. 282). But a testator may subsequently adopt the Act so as to effect a revocation (*James* v. *Shrimpton*, 1 P. D. 433).

Part of will may be revoked by tearing.

It is not the manual operation which will satisfy the section; there must be the *animus* as well as the act. It is the *animus*, also, which must govern the extent and measure of operation to be attributed to the act (*Clarke* v. *Scripps*, 2 Rob. 567; *Clarkson* v. *C.*, 2 Sw. & Tr. 497; see *Doe* v. *Harris*, 6 Ad. & Ell. 209). Thus, where the first seven or eight lines of a will have been cut and torn off, it was admitted to probate in its incomplete state (*Re Woodward*, L. R. 2 P. & M. 206: *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; see *Re Leach*, 63 L. T. 111; *Re Maley*, 12 P. D. 134). But where a testator destroyed some sheets of a will and substituted others, but did not re-execute, the whole will was revoked (*Treloar* v. *Lean*, 14 P. D. 49; see *Gullan* v. *Grove*, 26 Beav. 64; *Leonard* v. *L.*, [1902] P. 243).

Tearing off seal.

A testator having made a will executed under seal, and published and attested as a sealed instrument, afterwards for the purpose of revoking it tore off the seal and with it part of a word, the tearing off the seal was sufficient to revoke the will (*Price* v. *Powell*, 3 H. & N. 341; see *Doe* v. *Harris*, 6 Ad. & E. 209). By the statement in the witnessing clause at the end that the testator had set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will, and if he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation (*Williams* v. *Tyley*, Johns. 530). A will was revoked by the testator cutting out his signature (*Hobbs* v. *Knight*, 1 Curt. 768; *Walker* v. *Armstrong*, 21 Beav. 305; on appeal, 4 W. R. 770), or erasing his own signature and those of the witnesses (*Re Morton*, 12 P. D. 141); but not where the signature was cut out under a mistaken belief (*Stamford* v. *White*, [1901] P. 46). Where the signature was scratched with a knife, but was still legible, probate was granted (*Re Godfrey*, 69 L. T. 22); and the accidental cutting through the signature of one of the witnesses was not a revocation (*Re Taylor*, 63 L. T. 230); nor was the erasure by the witnesses of their own signatures (*Margary* v. *Robinson*, 12 P. D. 8). Probate was granted in a case where the testator directed the name of an attesting witness to be erased (*Re Greenwood*, [1892] P. 7).

Tearing off signatures.

1 Vict. c. 26, s. 20.

A testator cut out of his will the names of the attesting witnesses, and afterwards on the same day replaced the piece so cut, saying that the will would do for the present. The Court granted probate (*Re Eeles*, 32 L. J. Prob. 4; see *Re De Bode*, 5 Not. Cas. 189). Where the signature of the testator to a will had been cut out, but gummed on to its former place, the will was not admitted to probate (*Bell* v. *Fothergill*, L. R. 2 P. & M. 148; *Magnesi* v. *Hazelton*, 44 L. T. 586; but where a testator partially erased his own signature, and then re-wrote it, probate was granted, (*Re Kennett*, 2 N. R. 461).

Signatures replaced.

Cancelling.

A will is not destroyed by being struck through with a pen, the name of the testator and the names of the attesting witnesses being struck through. "Otherwise destroying" a will, means some mode of destruction *ejusdem generis* (*Stephens* v. *Taprell*, 2 Curt. 465; *Re Brewster*, 6 Jur. (N.S.) 56).

Destruction by any person other than the testator.

If the act of destruction be done by any person other than the testator, it must be by the testator's order and in his presence (*Re Dadds*, D. & Sw. 290). Destruction by another in the presence of the testatrix was held not ratified (*Mills* v. *Milward*, 15 P. D. 20).

Onus of proof of revocation.

Will in testator's custody not forthcoming at his death;

After proof of execution of a will, the burden lies upon those who set up revocation; and revocation will not be presumed (*Benson* v. *B.*, L. R. 2 P. & M. 172). But where a will remains in the custody of the testator from the time when it is made until his death, and cannot then be found, the presumption of law is, that it was destroyed by the testator, *animo revocandi* (*Eckersley* v. *Platt*, L. R. 1 P. & M. 281; *Sugden* v. *St. Leonards*, 1 P. D. 231; *Allan* v. *Morrison*, [1900] A. C. 604). The presumption applies even where a duplicate copy properly executed exists in the custody of the solicitor (*Jones* v. *Harding*, 58 L. T. 60; *Paige* v. *Brooks*, 75 L. T. 455). The Court must be satisfied that the will in the custody of the testator was not in existence at the time of his death (*Finch* v. *F.*, L. R. 1 P. & M. 371). Where a will and a codicil revoking part of the will were in the custody of the testator, and only the will was forthcoming, the codicil was presumed to be revoked, but probate of the will was only granted so far as not revoked by the codicil (*Sanger* v. *Hart*, 77 L. T. 374). To rebut the presumption, declarations made by the testator are admissible in evidence (*Whiteley* v. *King*, 17 C. B. (N.S.) 756; *Sugden* v. *St. Leonard's*, 1 P. D. 231), declarations to a contrary effect being admissible in answer (*Keen* v. *K.*, L. R. 3 P. & M. 105; see *Re Sykes, Drake* v. *S.*, 23 Times L. R. 747). The presumption does not not apply where the testator becomes insane after the execution, and continues insane until his death (*Sprigge* v. *S.*, L. R. 1 P. & M. 608; *Re Taylor, National Provincial Bank* v. *T.*, 64 S. J. 14).

found mutilated at his death.

Where a will in the custody of a testator is found after his death mutilated, the presumption in the absence of evidence is that it was mutilated by him after its execution, and, if there be a codicil, after the execution of the codicil (*Christmas* v. *Whinyates*, 2 Sw. & Tr. 81; 11 W. R. 371).

Revocation of codicils.

Under the law before this statute, a codicil stood or fell with the will; under the new law, a codicil can only be revoked by one of the modes indicated in this section, and is not revoked by the revocation of the will (*Re Savage*, L. R. 2 P. & M. 78; *Re Turner*, *ibid.* 403; *Black* v. *Jobling*, L. R. 1 P. & M. 635; *Farrer* v. *St. Catharine's College*, 16 Eq. 19; *Gardiner* v. *Courthope*, 12 P. D. 14), unless there was an intention to revoke both (*Re Bleckley*, 8 P. D. 169; see the earlier cases, *Re Greig*, L. R. 1 P. & M. 72; *Re Ellice*, 12 W. R. 353).

Where a codicil confirms a will in general terms, the will, together with all previous codicils, is taken to have been confirmed

1 Vict. c. 26, s. 20.

(*Green* v. *Tribe*, 9 Ch. D. 231, 234); and a reference to the date of the will in the confirming codicil does not constitute an implied revocation of antecedent codicils (*Green* v. *Tribe, supra; Re De La Saussaye*, L. R. 3 P. & M. 42). So where a third codicil confirmed a will (referred to by date) except as altered by a first codicil, it was held there was no implied revocation of a second codicil (*Follett* v. *Pettman*, 23 Ch. D. 337). An earlier codicil was, however, held under the circumstances to have been impliedly revoked (*McLeod* v. *McNab*, [1891] A. C. 471; see *Chichester* v. *Quatrefages*, [1895] P. 186; *Re Carritt*, 66 L. T. 379). And where a codicil is of itself inoperative, a confirmation by a later codicil of a will which is referred to by date and is antecedent to the inoperative codicil will not operate so as to set up the inoperative codicil (*Burton* v. *Newbery*, 1 Ch. 234; see *French* v. *Hoey*, [1899] 2 Ir. 472).

Revocation by married woman; or of testamentary appointments.

A married woman may revoke a will made under a power in any of the modes pointed out by this section (*Hawksley* v. *Barrow*, L. R. 1 P. & M. 147). As to the revocation of testamentary appointments generally, see p. 530, *post*.

No alteration in a will shall have any effect unless executed as a will.

21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Presumption as to time of alterations in wills.

The mere circumstance of the amount or the name of the legatee being inserted in different ink and in a different handwriting does not alone constitute an obliteration, interlineation or other alteration within the meaning of this section, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been super-induced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator (*Greville* v. *Tylee*, 7 Moo. P. C. C. 320; *Williams* v. *Ashton*, J. & H. 115; *Simmons* v. *Rudall*, 1 Sim. (N.S.) 137).

More generally the rule is stated thus:—In the absence of evidence there is a presumption that alterations on the face of a will were made after its execution (*Cooper* v. *Bockett*, 4 Moo. P. C. C. 439; *Re Sykes*, L. R. 3 P. & M. 26); and when a will has been republished by a codicil, after the execution of the codicil also (*Lushington* v. *Onslow*, 6 Not. Cas. 183). This presumption will not be rebutted by the fact that the alterations bear in the handwriting of the testator an earlier date than the will (*Re Adamson*, L. R. 3 P. & M. 253); but may be rebutted by evidence of declarations made by the testator before execution of the will (*Doe* v. *Palmer*, 16 Q. B. 747; *Dench* v. *D.*, 2 P. D. 60), or of the

codicil (*Re Sykes, supra*); or by evidence of other persons that the alterations in the will were made prior to the execution of the codicil (*Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216; see *Re Greenwood*, [1892] P. 7); or by the language of the codicil (*Re Heath*, [1892] P. 253; see *Re Hay, Kerr* v. *Stinnear*, [1904] 1 Ch. 321). The Court may look at any evidence for the purpose (*Re Tonge*, 66 L. T. 60). 1 Vict. c. 26, s. 21.

Where an expert deposed that in his opinion some trifling alterations and interlineations appearing on the face of a will were written at the same time as the rest, they were admitted to probate (*Re Hindmarch* L. R. 1 P. & M. 307; *Moore* v. *M.*, I. R. 6 Eq. 166); and from the nature of certain interlineations and the internal evidence furnished by the document itself, the Court concluded that they were made before execution and admitted them to probate (*Re Cadge*, L. R. 1 P. & M. 543; *Re Duffy*, I R. 5 Eq. 506). Certain words were admitted as being in the nature of an interlineation (*Re Birt*, L. R. 2 P. & M. 214; see *Royle* v. *Harris*, [1895] P. 163). A second codicil included and rendered valid an interlineation in a first codicil (*Oldroyd* v. *Harvey*, [1907] P. 326). Form of probate.

Where it appears that alterations have been made before execution, the probate is usually engrossed fair; but where the construction may be affected by the appearance of the original paper, probate is sometimes granted in facsimile (1 Wms. Exors. 11th ed. 234). Where probate was granted with lines drawn in ink over the bequest of certain legacies, the Court of Chancery inferred the meaning of the testator from the instrument in that form (*Gann* v. *Gregory* 3 D. M. G. 777; *Shea* v. *Boschetti*, 18 Beav. 321). In some cases the Court of Chancery has looked at the original will (*Manning* v. *Purcell*, 7 D. M. G. 55; *Compton* v. *Bloxham*, 2 Coll. 201; see *Oppenheim* v. *Henry*, 9 Hare, 802, note (*b*); *Child* v. *Elsworth*, 2 D. M. G. 683; *Re Harrison, Turner* v. *Hellard*, 30 Ch. D. 390). Meaning of "apparent."

Where alterations made subsequently to the execution of the will are not attested in the manner required by this section, probate will be granted of the will as it originally stood, if that is apparent (*Re Beavan*, 2 Curt. 369; *Re Martin*, 1 Rob. 712; *Re Gaussen*, 16 W. R. 212); but if not, probate will be granted in blank as to such parts of the will as cannot be read (*Re Ibbetson*, 2 Curt. 337). In order to discover the words as they originally stood, the Court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses, or by evidence of that nature (*ibid.*; *Ffinch* v. *Combe*, [1894] P. 191; *Re Brasier*, [1899] P. 36). Chemical agents have not been resorted to (*Re Horsford*, L. R. 3 P. & M. 211).

Pasting paper over words in a will is "obliteration" (*Ffinch* v. *Combe*, [1894] P. 191). Paper has been removed where it covered only the amount of a legacy (*Re Horsford*, L. R. 3 P. & M. 211); or to see whether what was written underneath amounted to revocation (*Re Gilbert*, [1893] P. 183). The word "apparent" applies to what is apparent on the face of the instrument itself. Where a testator completely obliterated several pages of his will, this was a complete revocation of those parts (*Townley* v. *Watson*, 3 Curt, 761; see *Re Horsford*, L. R. 3 P. & M. 211).

Intention must accompany the acts mentioned in this section in the same way as those mentioned in the 20th section. Under the Statute of Frauds (*Bibb* v. *Thomas*, 2 W. Bl. 1044) and this Act, intention is indispensable. Under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done without an intention to revoke. Similar principles must be applied under the present statute (*Brooke* v. *Kent*, *Animus revocandi.*

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3 Moo. P. C. C. 349, 350). Where a testator intended to substitute a different sum to that originally given, and such substituted sum was not effectually given, the original legacy was not revoked (*Brooke* v. *Kent*, 3 Moo. P. C. C. 334; *Re Horsford*, L. R. 3. P. & M. 211).

Attestation of alteration.

The initials of the testator and witnesses placed opposite an alteration are sufficient to render it valid (*Re Blewitt*, 5 P. D. 116); but not the initials of the witnesses only (*Re Shearn*, 43 L. T. 736; see *Re Dewell*, 17 Jur. 1130). As to whether the attestation gives validity to more than one alteration, see *Re Wilkinson* (6 P. D. 100); *Re Treeby* (L. R. 3 P. & M. 242).

As to when the signature to a will is to be deemed valid, see Wills Act Amendment Act, 1852, s. 1, and note thereto, *post*, p. 538.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

22. No will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Codicil must show an intention to revive.

Before the Act, the mere execution of a codicil to a will was sufficient to revive the will by implication (*Re Steele* L. R. 1 P. & M. 575, 578). Since this statute a will cannot be revived by mere implication. To revive a will, a codicil must show an "intention to revive"; and the intention must appear on the face of the codicil either by a disposition of the testator's property inconsistent with any other intention, or by some expression conveying the intention with reasonable certainty (*ibid*). The word "confirm" in a codicil has the operation of "revive" used in the statute (*M'Leod* v. *M'Nab*, [1891] A. C. 476). As to republication, see *Re Smith*, *Bilke* v. *Roper* (45 Ch. D. 632, *post*, p. 537). Mere references in codicils to revoked wills by their dates were insufficient to revive them (*Re Steele*, *supra*; *Re Dennis*, [1891] P. 326; see *Re Snowden*, 75 L. T. 279). Unless it can be explained by the special circumstances of the case, *Payne* v. *Trappes* (1 Rob. 583) seems inconsistent with the above authorities; see also *Re Reynolds* (L. R. 3 P. & M. 35); *Re Ince* (2 P. D. 111); *Re Gordon*, ([1892] P. 228). A codicil has been held by its language to revive a revoked will, although the reference to such revoked will by its date was inserted by mistake (*Re Stedham*, 6 P. D. 205; *Re Dyke*, *ibid.*, 207; *Re Chilcott*, [1897] P. 223; *Re Carleton*, [1915] 2 I. R. 9; but see *Jane* v. *J.*, 33 Times L. R. 389). As to the revival of codicils, see *Green* v. *Tribe* (9 Ch. D. 232); *Burton* v. *Newbery* (1 Ch. D. 234; *ante*, p. 516). Where a testator revoked a first will by a second will, and by a subsequent codicil confirmed his last will, the first will was revived (*Re Van Cutsem*, 63 L. T. 252, see the words of confirmation; see also *Re Turner*, 64 L. T. 805).

Reference to revoked will by date.

Destruction of revoking instrument.

Where a testatrix executed second and third wills, both revoking all former wills, and afterwards destroyed the two latter wills, the first will was not thereby revived, and parol evidence was not admissible to show an intention to revive (*Major* v. *Williams*, 3 Curt. 432; *Powell* v. *Powell*, 1 P. & M. 209; *James* v. *Shrimpton*, 1 P. D. 431; *Re Hodgkinson*, [1893] P. 339).

Where a testator directed that in a certain event a former will which had been revoked by marriage should be revived, the former will was included in the probate (*Re Bangham*, 1 P. D. 429); but where a testatrix purported by a codicil to revive a will not only revoked but destroyed, the Court refused to grant probate of the draft (*Hale* v. *Tokelove*, 2 Robert. 318; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; see *Re Steele*, L. R. 1 P. & M. 577; *Re Chilcott* [1897] P. 223; *Re Reade*, [1902] P. 75). 1 Vict. c. 26, s. 22. Will to be revived must be in existence.

Where a testator gave £100 to his executor, and by a subsequent codicil gave him £500 in substitution, and then revoked the second gift, the first gift was not set up again (*Boulcott* v. *B.*, 2 Drew. 25). Revocation of a substituted legacy.

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. A devise not to be rendered inoperative by any subsequent conveyance or act.

This section applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower; but it does not apply to cases where the thing meant to be given is gone (*Moor* v. *Raisbeck*, 12 Sim. 139; *Blake* v. *B.*, 15 Ch. D. 487). Those cases in which a will was revoked by an alteration of the estate of the testator are put an end to by this section (*Ford* v. *De Pontes*, 30 Beav. 593). As to revocation by alteration of estate, see, further, *Plowden* v. *Hyde* (2 D. M. & G. 684; *Jacob* v. *J.* (82 L. T. 270); 1 Jarm. Wills, 128 *et seq.*); and as to the bearing of this section upon wills prior to 1838, see *Langford* v. *Little* (2 J. & Lat. 613); *Walker* v. *Armstrong* (21 Beav. 284).

A testatrix having devised a real estate, afterwards sold it. The purchase was not completed until after her death. It was held that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix (*Farrar* v. *Winterton*, 5 Beav. 1). A similar decision was given where the estate devised had been conveyed to a purchaser who had remortgaged to the testatrix as a security for the purchase-money (*Moor* v. *Raisbeck*, 12 Sim. 139; *Re Clowes*, [1893] 1 Ch. 214; compare *Re Carter, Dodds* v. *Pearson*, [1900] 1 Ch. 801; *Re Bick, Edwards* v. *Bush*, [1920] 1 Ch. 488). And where the owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company, and died before completion, his executors, and not the devisee, were entitled to the purchase-money (*Re Manchester Ry. Co.*, 19 Beav. 365; *Ex parte Hawkins*, 13 Sim. 569). The rents, however, until completion will in such a case pass to the devisee (*Watts* v. *W.*, 17 Eq. 217). Compare with the above cases the similar result arrived at where the owner of an estate granted an option of purchase which was exercised after his death (*Lawes* v. *Bennett*, 1 Cox, 167; *Re Isaacs, I.* v. *Reginall*, [1894] 3 Ch. 506). Devise of lands and subsequent contract to sell.

On the other hand where the owner of freeholds granted a lease of them with an option of purchase to the lessee, and on the same day executed a codicil confirming a specific devise of these freeholds in a previous will, and the lessee exercised the option after the testator's death, the specific devisee took the purchase-money (*Re*

1 Vict. c. 26, s. 23.

Pyle, P. v. *P.*, [1895] 1 Ch. 724; see *Drant* v. *Vanse*, 1 Y. & C. Ch 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722).

As to the effect of a devise upon lands contracted to be sold, see, further, 1 Jarm. Wills, 51 *et seq.* And as to the effect, under the old law, of a contract to sell lands upon a prior devise, see *Andrew* v. *A.* (8 D. M. G. 336; Sugd. R. P. Stat. 360—364).

Revocation of prior devise by contract under power of sale.

Where land was settled to such uses as A should by will appoint, with a power of sale in trustees exerciseable with A's consent, an appointment of the land by A under his general power did not carry the purchase-money of the property which before A's death had been sold with his consent, nor the land purchased with such money (*Gale* v. *G.*, 21 Beav. 349; *Blake* v. *B.*, 15 Ch. 481). There was a similar result in the case of a special power (*Beddington* v. *Bauman*, [1903] A. C. 13; *Re Dowsett, D.* v. *Meakin*, [1901] 1 Ch. 398).

Bequest of leaseholds and subsequent purchase of fee.

Where a testator bequeathed leaseholds for the residue of the terms for which the same should be held by him at his death, and afterwards acquired the fee, the fee passed (*Struthers* v. *S.*, 5 W. R. 809; see *Cox* v. *Bennett*, 6 Eq. 422; *Saxton* v. *S.*, 13 Ch. D. 359; *Re Knight, K.* v. *Burgess*, 34 Ch. D. 518). So with respect to an increased share in a partnership business (*Re Russell, R.* v. *Chell*, 19 Ch. D. 432). A devise, however, of a mortgaged estate was adeemed by a subsequent acquisition of the equity of redemption (*Yardley* v. *Holland*, 20 Eq. 428).

Where the effect of a testamentary appointment was in question this section was held to cover the case of the creation of a new power by the testatrix herself after the date of her will (*Airey* v. *Bower*, 12 App. Cas. 263).

A will shall be construed to speak from the death of the testator.

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Rule as to wills prior to 1838.

In a will prior to 1838 a gift of a testator's real and personal estate was read as a gift of the real estate belonging to the testator at the date of the will, and of the personal estate belonging to him at the date of his death (1 Jarm. Wills, 5th ed. 290; see Hawk. Wills, 14; *Hance* v. *Truwhitt*, 2 J. & H. 216).

Cases under section.

In wills since 1837 descriptions of real or personal estate *prima facie* refer to the property answering to the description at the testator's death (*Re Slater, S.* v. *S.*, [1906] 2 Ch. 484; *Higgins* v. *Dawson*, [1902] A. C. 7; and see *Re Kuypers, K.* v. *K.*, [1925] Ch. 244). Thus a bequest of shares in company A carried shares of the nature existing at the death, not as they existed at the date of the will (*Re Gillins, Inglis* v. *G.*, [1909] 1 Ch. 345). And where a testator bequeathed money invested in company A and at his death his previous investment in company A was represented by stock of company B which under statute had been issued in respect of investments in company A as compensation therefor, the bequest failed (*Re Slater, S.* v. *S.*, [1907] 1 Ch. 665). The section precluded the reception of extrinsic evidence as to the amount of a testator's assets at the date of his will tendered as bearing on its construction (*Higgins* v. *Dawson*, [1902] A. C. 11).

In wills since 1837, if the words of a specific gift describe a particular property which the testator had at the date of his will, that, and that alone, will pass. But where the specific gift is generic (as "all my lands in the Parish of Dale"), it will now pass all the testator's lands in that parish at his death (*Re Bridger, Brompton*

v. *Lewis*, [1894] 1 Ch. 302; *Re Jameson, King* v. *Winn*, [1908] 2 Ch. 116). The bequest remains specific in its nature (*Bothamly* v. *Sherson*, 20 Eq. 313). In the case of general legacies the language is to be applied to the state of things at the death; even though the result may be to alter the effect of the general legacy as against the residuary gifts (*Re Gillins, Inglis* v. *G.*, [1909] 1 Ch. 352). But in general the section leaves open the question whether a particular property passes by the specific or residuary devise (*Re Portal and Lamb*, 30 Ch. D. 50). It is doubtful whether the section applies to the construction of an exception (*Hughes* v. *Jones*, 1 H. & M. 765). 1 Vict. c. 26, s. 24.

Contrary intention.

The "contrary intention" must be found in the will itself (see *Boyes* v. *Cook*, 14 Ch. D. 57), but need not be expressed in so many words (*Cole* v. *Scott*, 1 Mac. & G. 518). The date may show a contrary intention (*Re Wells, Hardisty* v. *W.*, 42 Ch. D. 646). Again, a contrary intention may appear from a particular description of the subject of the gift; which may accordingly be held to pass some particular thing as it existed at the date of the will (*Re Evans, E.* v. *Powell*, [1909] 1 Ch. 784). Thus, where a testator devised his freehold estate, which he purchased of C.; but a plot purchased with the estate by the testator of C., and held with it, was leasehold, and the testator subsequently purchased the fee of that plot: the devise did not pass the after-acquired fee (*Emuss* v. *Smith*, 2 De G. & Sm. 722). See *Pierce* v. *Att.-Gen.* (3 W. R. 612), where a subsequently-acquired freehold was held not to pass under a gift of leaseholds and all other estate and effects. A devise of freeholds was limited, so as to exclude after-acquired property, by the words "which I have lately purchased" (*Cave* v. *Harris*, 57 L. T. 768). Where, however, a testator has bequeathed particular leaseholds, describing them as such, and has subsequently acquired the fee, the fee has been held to pass (*Struthers* v. *S.*, 5 W. R. 809; *Miles* v. *M.*, 1 Eq. 462; *Cox* v. *Bennett*, 6 Eq. 422; *Wedgwood* v. *Denton*, 12 Eq. 290; *Saxton* v. *S.*, 13 Ch. D. 359; *Hallett* v. *H.*, 14 Times L. R. 420; and see *Re Horton, Lloyd* v. *Hatchett*, [1920] 2 Ch. 1, where after-acquired copyholds were held to pass; and *Re Davies, Scourfield* v. *D.*, [1925] Ch. 642, where proceeds of sales made after the will passed). Particular description of subject of gift. Leaseholds.

Where a testatrix devised "all my Q. estates in Essex," other estates in the same locality, acquired after the date of her will, did not pass. The term was an arbitrary designation which had acquired a certain meaning in the mind of the testatrix, and could not be extended (*Webb* v. *Byng*, 1 K. & J. 580). But where a testator devised his estate called C, property acquired after the date of the will, and treated by the testator as additions to C, passed (*Castle* v. *Fox*, 11 Eq. 542; *Strevens* v. *Bailey*, 8 Ir. C. L. R. 410). So where a testator had two adjoining properties, a devise by name of one of them which he occupied passed a portion which he also occupied of the other (*Re Potter, Stevens* v. *P.*, 83 L. T. 405; see *Re Midland Ry.*, 34 Beav. 525). As to the effect of the words "heretofore mentioned," &c., occurring in the description of the property, see *Jepson* v. *Key* (2 H. & C. 873). Devises have been held to pass after-acquired real estate, notwithstanding provisions which seemed to refer to personal estate only (*Stokes* v. *Salomons*, 9 Hare, 75; *O'Toole* v. *Browne*, 3 El. & Bl. 572; *Lloyd* v. *Lloyd*, 7 Eq. 458). Arbitrary designations of real estate. "Heretofore mentioned."

A gift of "all my stock" would pass all stock to which the testator was entitled at his death. But "all my stock which I have purchased," would be enough on the face of the will to show that the property which he intended to give was property then in his possession (*Douglas* v. *D.*, Kay, 405; see *Re Gray, Dresser* v. *G.*, 36 Ch. D. 207). "When I refer to a particular thing, such as a Descriptions of money, stock, etc.

1 Vict. c. 26, s. 24.

ring or a horse, and I bequeath it as 'my ring' or 'my horse,' there might be considerable difficulty in saying that the 'contrary intention' does not appear; but when a bequest is of that which is generic—which may be increased or diminished, then the Act requires more on the face of the will, indicating such 'contrary intention,' than the circumstance that the subject of the bequest is designated by the pronoun 'my'" (*Goodlad* v. *Burnett*, 1 K. & J. 348).

"My."

A bequest of "*My* New Three-and-a-quarter per Cent. Annuities" carried the annuities possessed by the testatrix at her death (*Goodlad* v. *Burnett*, 1 K. & J. 341; *Trinder* v. *T.*, 1 Eq. 695; *Bothamley* v. *Sherson*, 20 Eq. 312) and one of all the testatrix's H. stock passed all her own H. stock as well as H. stock over which she had a general power (*Re Doherty-Waterhouse*, [1918] 2 Ch. 269). See and distinguish the cases where bequests of "my shares" or "my debentures" have been held to fail on the ground of ademption (*Re Gibson*, 2 Eq. 669; *Re Lane, Luard* v. *Lane*, 14 Ch. D. 856). A bequest "of my stock in trade and debts accruing therefrom" passed the testator's stock in trade and trade debts existing at the time of his death (*Ferguson* v. *F.*, I. R. 6 Eq. 199; *Moore* v. *Madden*, I. R. 2 Eq. 511). Where a testator, after reciting his title to one-third of a business, bequeathed "all my share in the business," and after the date of the will acquired the whole business, the will operated upon the testator's interest at his death (*Re Russell, R.* v. *Chell*, 19 Ch. D. 432).

Effect of words referring to present time.

"Now."

Again, a contrary intention may appear from the words of the gift referring to the present time. Thus, where a testator devised the house "wherein I *now* reside," and afterwards devised "all such trust estates as are *now* vested in me, or as to the leasehold premises as shall be vested in me at the time of my death": freehold estates purchased between the date of his will and his death, did not pass (*Cole* v. *Scott*, 1 Mac. & G. 518; but see *Re Horton, Lloyd* v. *Hatchett*, [1920] 2 Ch. 1): The word "now" received the same construction in *Hutchinson* v. *Barrow* (6 H. & N. 533); "a gift of the house I now live in" was held to refer to the house as occupied by the testatrix at the date of the will (*Williams* v. *Owen*, 9 L. T. 200; *Re Edwards, Rowland* v. *E.*, 63 L. T. 481). On the other hand, where a testator devised a messuage wherein A "now resides, with the stables or appurtenances thereto belonging and therewith occupied"; a garden acquired by the testator after the date of his will, passed (*Re Midland Ry. Co.*, 34 Beav. 525; see *Re Champion, Dudley* v. *C.*, [1893] 1 Ch. 101). Under a gift of "any other property that I may now possess," personalty acquired after the date of the will passed (*Wagstaff* v. *W.*, 8 Eq. 229; *Hepburn* v. *Skirving*, 4 Jur. (N.S.) 651). A testator bequeathed leaseholds to A charged with "the annuity of £9 now charged thereon in favour of my sister"; held, that leaseholds acquired after the date of the will were included in the bequest (*Re Ord, Dickinson* v. *D.*, 12 Ch. D. 22). As to the effect of the words "in their present state," see *Re Portal and Lamb* (30 Ch. D. 50). And as to a reference to lands "lately purchased," see *Cave* v. *Harris* (57 L. T. 768).

Lands "of which I am seised."

Under a devise of lands "of which I am seised" at a particular place, lands acquired after the date of the will have been held to pass (*Doe* v. *Walker*, 12 M. & W. 591; *Langdale* v. *Briggs*, 3 Sm. & Giff. 246; *Lilford* v. *Keck*, 30 Beav. 300).

Codicil.

As to the effect on this question of a codicil confirming the will, see *Re Champion, Dudley* v. *C.* ([1893] 1 Ch. 101); compare *Re Blackburn, Smiles* v. *B.* (43 Ch. D. 75); *Re Taylor, Whitby* v. *Highton* (58 L. T. 842).

Releases.

A release of all moneys due from A was construed as a release of moneys due at death, although the will contained a recital as to

the sums in which A was "now indebted" (*Everett* v. *E.*, 7 Ch. D. 428). But where a testator exonerated A from "all claims in respect of moneys laid out by me in improvements of the estate in Scotland, and which money has, according to the laws of Scotland, been charged thereon;" the exoneration only applied to moneys so charged at the date of the will (*Douglas* v. *D.*, Kay, 400). A release of interest was confined by a recital in the will to interest on a debt due to the testator at the date of the will (*Sidney* v. *S.*, 17 Eq. 65). A direction to forgive a tenant all rents "due and owing" at the testator's death was held to relate to rent not up to the death but up to the last rent day before the death (*Re Lucas, Parish* v. *Hudson*, 54 L. T. 30). 1 Vict. c. 26, s. 24.

A gift of "such part of my residue which may by law be given" to charity took effect having regard to the law not at the date of the will, but at the date of the testator's death (*Re Bridger, Brompton* v. *Lewis*, [1894] 1 Ch. 297; see *Re Hume, Forbes* v. *H.*, [1895] 1 Ch. 422; *Re Harris, H.* v. *H.*, [1912] 2 Ch. 241). There was a similar decision where a will made prior to the Finance Acts, 1894 and 1896, contained a bequest of legacies "free from duty" and the testator died after those Acts (*Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 732). See *Re Tinckler*, [1917] 1 Ch. 242. Reference to existing law.

A residuary devise of real estate was held to be specific before the Wills Act (*Mirehouse* v. *Scaife*, 2 M. & Cr. 695). And such a devise remains specific, notwithstanding the Wills Act (*Hensman* v. *Fryer*, 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq. 371; *Phillips* v. *Low*, [1892] 1 Ch. 50). Accordingly, lands specifically devised, lands comprised in a residuary devise, and personal estate specifically bequeathed, are to be applied rateably in payment of debts (*Eddels* v. *Johnson*, 1 Giff. 22; *Pearmain* v. *Twiss*, 2 Giff. 130; *Clark* v. *C.*, 4 Giff. 702; *Lancefield* v. *Iggulden*, 10 Ch. 136). And a pecuniary legatee, unless the legacy was charged on the residuary real estate, had no right to call upon a residuary devisee to contribute to the payment of debts (*Farquharson* v. *Floyer*, 3 Ch. D. 109; *Re Bawden, National Bank* v. *Cresswell*, [1894] 1 Ch. 693; see *ante*, p. 485). Residuary devise remains specific notwithstanding this statute.

By sect. 3 of the M. W. P. Act, 1893 (*ante*, p. 395), this section applies to the wills of married women. See the note to sect. 8 of the present Act (*ante*, p. 497). Married women.

For the bearing of this section on wills in execution of powers, see the note to sect. 27 (*post*, p. 528). Powers.

After the date of his will a testator was duly declared lunatic, and so remained until his death. During his lunacy changes were made by the Court in the state of his property. It was held that his will must be read as speaking from its date and not from the death of the testator (*Wheeler* v. *Thomas*, 4 L. T. 173; compare *Re James, Hole* v. *Bethune*, [1910] 1 Ch. 157). Lunatics.

This section of the Act does not apply to the objects of the testator's bounty. Thus a bequest to the testator's son's "wife" refers *prima facie* to the wife existing at the date of the will (*Re Coley, Hollinshead* v. *Coley*, [1903] 2 Ch. 102). See further *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Gibson* v. *G.*, 1 Drew. 62; *Radford* v. *Willis*, 7 Ch. 7; Jarm. Wills, 6th ed. 398; but see *Re Daniels, London, &c. Co.* v. *D.*, 87 L. J. Ch. 661 (gift to the Lord Mayor for the time being). Section does not apply to the objects of gift.

25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the A residuary devise shall include estates comprised in

1 Vict. c. 26, s. 25.

death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

lapsed and void devises.

Rule as to wills prior to 1838.

In wills prior to 1838, a residuary devise does not include specific devises which lapse (Hawk. Wills, 44), or which are void (*Smith* v. *Lomas*, 12 W. R. 949). But a residuary bequest does include lapsed and void legacies (Hawk. Wills, 40; see 1 Jarm. Wills, 6th ed. 1047). This section is to be construed upon the principle of assimilating a residuary devise of real estate to a similar bequest of personalty (*Carter* v. *Haswell*, 26 L. J. Ch. 576; 5 W. R. 308; see *Blight* v. *Hartnoll*, 23 Ch. D. 218).

Residuary devises within this section.

A testatrix devised estate E. to A absolutely, and "all my freeholds, &c. not hereinbefore devised" to &c. for life, with remainders over; A died before the testatrix: held, that estate E. passed under the residuary devise (*Green* v. *Dunn*, 20 Beav. 6). A testator devised specific real estate to M., and devised and bequeathed "*All other real and personal estate of which he might die possessed*" to M. and others of his children. M. died in his lifetime: it was held, that the devise expressed by the words "all other, &c." was a residuary devise within the section, and included the real estate devised to M. (*Cogswell* v. *Armstrong*, 2 K. & J. 227; and see *Culsha* v. *Cheese*, 7 Hare, 236; *Hickson* v. *Wolfe*, 9 Ir. Ch. R. 452).

It was held that a residuary devise operating as an appointment under a special power is within this section; Jessel, M.R., laying down that the word "devise" in the Act includes in general a devise by way of appointment under a power, whether special or general (*Freme* v. *Clements*, 18 Ch. D. 499). This principle, however, has been disapproved by the C. A., who have held that it does not apply to sect. 33 (*Holyland* v. *Lewin*, 26 Ch. D. 266).

Gift of particular residue.

The section applies only where there is a universal residuary devise, and does not apply to a gift of a particular residue. Thus where a testatrix devised to A certain lands in the parish of H., which devise was held void, and to the plaintiff the rest of her hereditaments in the same parish, the plaintiff did not take the lands comprised in the void devise (*Springett* v. *Jennings*, 6 Ch. 333; *Re Brown*, 1 K. & J. 521). But a residuary gift of freeholds only may be a residuary devise within the section (*Re Mason, Ogden* v. *M.*, [1903] A. C. 1).

Compare *M'Kay* v. *M.*, [1900] 1 Ir. R. 213, where lapsed legacies were held to fall into a particular residue; and *Johns* v. *Wilson*, [1900] 1 Ir. R. 342, where there were two residuary gifts.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

1 Vict. c. 26, s. 26.

In wills prior to 1838, "if a man has lands in fee and lands for years and devises all his lands . . . the fee simple lands pass only and not the lands for years: but if he has no fee simple the lease for years passes" (*Rose* v. *Bartlett*, Cro. Car. 293). This rule was in substance overruled by the first portion of the above section (*Butler* v. *B.*, 28 Ch. D. 72). The Act throughout proceeds on the footing that leasehold property is not real but personal estate (see sect. 1); so that sect. 26 was wanted to include leaseholds under "lands" (*Re Grassi, Stubberfield* v. *G.*, [1905] 1 Ch. 590). But *Rose* v. *Bartlett* (*supra*) applies to a devise of real estate where the testator has leaseholds only (*Re Holt, H.* v. *H.*, [1921] 2 Ch. 17).

Law before the Act.

Cases on the section.

Devise of land.

Both the reversion in fee and also a derivative leasehold interest in the same land were held to pass under a devise of "freehold land" at a certain place (*Matthews* v. *M.*, 4 Eq. 278; see *Re Guyton and Rosenberg*, [1901] 2 Ch. 593).

Devise of real estates.

Where a testator gave his "real estates" upon certain trusts and his personal estates upon other trusts, it was argued that the gift of real estates was a "general devise," and included leaseholds; but the leaseholds were held to pass with the personal estate (*Butler* v. *B.*, 28 Ch. D. 66). Where a testator having bequeathed the residue of his personal estate to A, devised all his lands, &c., at W. in the county of Durham, and at B. in the county of York, and all other his real estates in the counties of Durham and York, and all his estate and interest therein to trustees; it was held, by Sir J. Romilly, following the opinion of the Courts of Exchequer (5 Exch. 752) and Queen's Bench (18 Q. B. 474); but contrary to the opinion of Lord Langdale (11 Beav. 237), that the testator's leaseholds in Durham passed to the trustees (*Wilson* v. *Eden*, 16 Beav. 153). A gift of real estate situate at a particular place has been held to include leaseholds (*Moase* v. *White*, 3 Ch. D. 163; *Best* v. *Standeven* (1872), W. N. 44; *Re Davison, Greenwell* v. *D.*, 58 L. T. 304).

Where a testator who had no freeholds, but had leaseholds which he believed to be freeholds, gave his real estate upon trust to make a payment; the leaseholds were charged with the payment (*Gully* v. *Davis*, 10 Eq. 562).

Contrary intention.

The fact of limitations of a will being applicable in their entirety to freehold land only is not by itself sufficient to show a contrary intention within the section (*Wilson* v. *Eden*, 16 Beav. 153; *contra*, *S. C.*, 11 Beav. 238). But this has great weight when combined with other indications in the will (*Prescott* v. *Barker*, 9 Ch. 174, where *Wilson* v. *Eden* was criticised). Where, in addition to a general devise of real estate, the will contained an express bequest of leaseholds, this showed a contrary intention (*Re Guyton and Rosenberg*, [1901] 2 Ch. 593).

A general gift shall include estates over which the testator has a general power of appointment.

27. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal

1 Vict. c. 26, s. 27.

estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Rule as to wills prior to 1838.

As to wills prior to 1838 "a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate; and as to both realty and personalty, if the Court is satisfied by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power" (*Lake* v. *Currie*, 2 D. M. & G. 547; see Hawk. Wills, 22—26; 1 Jarm. Wills, 6th ed. 813 *et seq.*; *Re Comber*, 14 W. R. 172; *Re Bringloe*, 26 L. T. 58). In the case of a married woman donee where the will would be ineffectual unless construed as an executor of the power, that construction prevailed, but not if there was any other subject upon which her will might operate (1 Jarman, 6th ed. 807); *Att.-Gen.* v. *Wilkinson*, 2 Eq. 816). Under the new law it is necessary to show a contrary intention in order to exclude the execution of the power; while under the old law it was necessary to show the intention to exercise the power (*Lake* v. *Currie*, 2 D. M. & G. 548).

New law.

Foreign wills.

The section is a rule of construction applicable to documents as to which an English or Irish Court is the Court of construction (*Re D'Este, Poulter* v. *D'Este*, [1903] 1 Ch. 903). As to wills executed by persons domiciled abroad in exercise of powers, see the note to sect. 10, *ante*, p. 505. *Re Strong*, [1925] W. N. 176.

What powers are within this section.

This section is confined to general powers, and does not extend to a special or limited power (*Re Williams, Foulkes* v. *W.*, 42 Ch. D. 93). Thus a power to appoint amongst children in such manner as the appointor shall think proper, is not within this section (*Cloves* v. *Awdry*, 12 Beav. 604; *Russell* v. *R.*, 12 Ir. Ch. R. (N.S.) 377). Nor is a power to appoint among relations or friends (*Re Caplin*, 2 Dr. & Sm. 527). Nor is a power to appoint to anyone except A (*Re Byron, Williams* v. *Mitchell*, [1891] 3 Ch. 474), but such a power would seem to be within the section after the death of A (*ibid.*). A power to appoint to all and every "person or persons, child or children," was within this section (*Cofield* v. *Pollard*, 5 W. R. 774). A power of appointment by will only is within this section (*Re Powell*, 18 W. R. 228). A power to appoint by "will expressly referring to the power" was exercised by a general gift of property "over which I shall have any power of disposition by will" (*Re Lane, Belli* v. *L.*, [1908] 2 Ch. 581; *Re Rolt, R.* v. *Burdett*, [1908] W. N. 76; *Re Waterhouse, W.* v. *Ryley*, 98 L. T. 30), but not by a general gift of personal estate (*Phillips* v. *Cayley*, 43 Ch. D. 222; *Re Davis, D.* v. *D.*, [1892] 3 Ch. 63). A power to charge real estate with money by will was not exercised by a general gift of personalty (*Re Salvin, Marshall* v. *Wolseley*, [1906] 2 Ch. 459; but see *Re Wilkinson, Thomas* v. *W.*, [1910] 2 Ch. 216).

Special powers.

Special powers not being within sect. 27, there must be a reference to the power or to the property, or an intention otherwise expressed in the will to exercise the power (*Re Weston, Neeves* v. *W.*, [1906] 2 Ch. 624; *Wrigley* v. *Lowndes*, [1908] P. 352; *Re Ackerley*, [1913] 1 Ch. 510, 514; see Farwell 3rd ed., p. 202). As regards real estate, it had been held that where the testator had no real estate at the date of his will, a general devise to an object would exercise the power (*Standen* v. *S.*, 2 Ves. jun. 589); but having regard to sect. 24

of the Act this reason no longer applies (*Re Mills, M.* v. *M.*, 34 Ch. D. 186; *Re Williams, Foulkes* v. *W.*, 42 Ch. D. 93). **1 Vict. c. 26, s. 27.**

Under this section a general residuary bequest operates as an exercise of a power to appoint sums of money up to a specified amount (*Re Jones, Greene* v. *Gordon*, 34 Ch. D. 65); and also of a power to appoint as the donor thinks proper (*Re Spooner*, 2 Sim. (N.S.) 129; *Clifford* v. *C.*, 9 Hare, 675; *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782). A gift of "all stock which I possess or to which I am entitled" exercised a general power to the extent to which the property subject thereto consisted of stocks (*Re Jacob, Mortimer* v. *M.*, [1907] 1 Ch. 450; and see *Re Doherty-Waterhouse*, [1918] 2 Ch. 269). General powers exercised by general residuary bequest;

General pecuniary legacies are bequests of personal property described in a general manner; and where the proper assets are inadequate the gift must so far as necessary be satisfied out of personal estate, subject to a general power (*Hawthorn* v. *Shedden*, 3 Sm. & Giff. 293; *Re Wilkinson*, 4 Ch. 587; see *Williams* v. *W.*, *infra*; and *Re Seabrook, Gray* v. *Baddeley*, [1911] 1 Ch. 151, where the rule was extended to debts). So a power of appointment over a reversionary fund was exercised by a pecuniary legacy in the will of a married woman who had no property apart from the power (*Ludlam* v. *L.*, 63 L. T. 330). Where a testator having a general power directs payment of his debts without more, and appoints an executor, the appointed fund is liable for his debts, if his own estate is insufficient (*Re Davies*, 13 Eq. 166; *Wilday* v. *Barnett*, 6 Eq. 193; see *Laing* v. *Cowan*, 24 Beav. 112; *Re Hodgson, Darley* v. *H.*, [1899] 1 Ch. 666). It seems that the same rule would apply, though no executor were appointed; but that an appointment of an executor without more would not make the fund assets (*Re Davies*, 13 Eq. 166; *Re Thurston, T.* v. *Evans*, 32 Ch. D. 508; *Re Power, Acworth* v *Stone*, [1901] 2 Ch. 665). by general pecuniary legacies. Direction for payment of debts. Appointment of executor.

The statute, it was said in one case, makes the fund which is subject to the general power part of the testator's personal estate; and for the purpose of paying debts and legacies it went in the same way as the other personal estate (*Williams* v. *W.*, [1900] 1 Ch. 159; see, however, *Re Davies*, 13 Eq. 167; *Fleming* v. *Buchanan*, 3 D. M. G. 979).

Where a general power of appointing personal estate is exercised, and an executor appointed, a good receipt can be given either by an executor (*Re Hadley, Johnson* v. *H.*, [1909] 1 Ch. 30) or an administrator with the will annexed (*Re Peacock, Kelcey* v. *Harrison*, [1902] 1 Ch. 552). Estate duty in such a case is a charge on the appointed fund, and so not payable out of the testator's personal estate (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231, overruling *Re Hadley, Johnson* v. *H.*, [1909] 1 Ch. 20).

A general power of appointment over real estate (which was represented by stock liable to re-investment) was not exercised by a bequest of "all moneys that I die possessed of," there being a tenant for life who, after the death of the testator, had a right to call for re-investment (*Re Greaves*, 23 Ch. D. 313). But where there was no such person, the power was exercised by a bequest of "the residue of my personal estate," regard being had to the interpretation of "personal estate" in sect. 1 of this Act (*Chandler* v. *Pocock*, 15 Ch. D. 498; 16 Ch. D. 648); in which last case the testatrix had procured the stock to be transferred into her own name before her death (see *Re Harman, Lloyd* v. *Tardy*, [1894] 3 Ch. 607). Stock liable to re-investment in land.

Where under a general testamentary power money is appointed in discharge of a moral obligation, the gift enures to the appointee's estate if he predeceases the testator (*Stevens* v. *King*, [1904] 2 Ch. 30). Where there is no moral obligation, and the appointee Appointee predeceasing the testator.

1 Vict. c. 26, s. 27.

predeceases the testator, the question whether the property appointed passes as in default of appointment or devolves as the property of the appointor, "is one of intention, viz., whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*Re de Lusi*, 3 Ir. L. Rep. 232; adopted *Re Pinede*, 12 Ch. D. 672; *Willoughby-Osborn* v. *Holyoake*, 22 Ch. D. 240). In the case of general powers of appointment over real estate where the donee of the power devised her real estate to trustees in trust for A, who predeceased her, there was a resulting trust for the heir of the testatrix (*Re Van Hagan, Sperling* v. *Rochfort*, 16 Ch. D. 18). And the heir also took in the case of a direct appointment to A (*Willoughby-Osborn* v. *Holyoake*, 22 Ch. D. 238; *Re Horton, H.* v. *Perks*, 51 L. T. 420; *Coxen* v. *Rowland*, [1894] 1 Ch. 406). In the case of general powers of appointment over personal estate where the will of the donee contained a direct gift of residue to A, who predeceased the testator, the appointed property passed to the next-of-kin of the appointor (*Re Ickeringill, Hinsley* v. *I.*, 17 Ch. D. 151; *Re Pinede*, 12 Ch. D. 667; see *Re Marten, Shaw* v. *M.*, [1902] 1 Ch. 314). The last cases were decided on the construction of particular wills. In other cases the property was held to pass as in default of appointment (*Re Davies*, 13 Eq. 163; *Re Thurston, T.* v. *Evans*, 32 Ch. D. 508, where the appointment directed that the property the subject of the power should continue to be held by the trustee of the instrument creating the power; *Re Boyd, Kelly* v. *B.*, [1897] 2 Ch. 232).

Real estate.

Personal estate.

Where the will of the donee of the power contained an express appointment to A, who predeceased him, and also a residuary gift, the residuary legatee took the property the subject of the power (*Re Spooner*, 2 Sim. (N.S.) 129; *Re Elen, Thomas* v. *McKecknie*, [1893] W. N. 90; *Gale* v. *G.*, 21 Beav. 349, which was approved in *Beddington* v. *Baumann*, [1903] A. C. 13; and see *Re Andrews, Public Trustee* v. *Vincent*, 66 S. J. 284). See Farwell, Powers, 246. 249, 3rd ed.; *Bush* v. *Cowan*, 32 Beav. 228. In one case (see the terms of the residuary clause) the next-of-kin of the appointor were held to take (*Wilkinson* v. *Schneider*, 9 Eq. 423).

Contrary intention.

The "contrary intention" referred to in the section must be looked for in the will alone (*Boyes* v. *Cook*, 14 Ch. D. 57; *Re Gibbes, White* v. *Randolf*, 37 Ch. D. 146; *Re Marsh, Mason* v. *Thorne*, 59 L. T. 595). The rule is to inquire whether there is anything in the will inconsistent with the notion that the gift is meant to operate as an execution of the power (*Scriven* v. *Sandon*, 2 J. & H. 743; see *Re Stokes, Public Trustee* v. *Brooks*, [1922] 2 Ch. 406). And for the purpose of ascertaining this contrary intention, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger (*Re Clark, Maddick* v. *Marks*, 14 Ch. D. 422). The contrary intention has been found in the fact that the bequest is of personal estate "not otherwise effectually disposed of" (*Moss* v. *Harter*, 2 Sm. & G. 458); also on the comparison of the words of two successive wills (*Pettinger* v. *Ambler*, 1 Eq. 510); also in the fact that the will referred to a power different from the one possessed by the testatrix at her death (*Thompson* v. *Simpson*, 44 L. T. 710). It has not been found in a confirmation of the settlement creating the power (*Hutchins* v. *Osborn*, 8 De G. & J. 142; *Lake* v. *Currie*, 2 D. M. & G. 536); or by a reference to property "which I possess or to which I am entitled" (*Re Jacob, Mortimer* v. *M.*, [1907] 1 Ch. 450).

Effect of sects. 24 and 27.

Coupling sections 24 and 27 together, the true construction of this statute is, that a will may operate as an execution of all general

powers vested in the testator immediately before his death (*Thomas* v. *Jones*, 2 J. & H. 482). General powers have been held to have been executed by wills dated prior to the instrument creating the power (*Patch* v. *Shore*, 2 Dr. & Sm. 589; *Hodsdon* v. *Dancer*, 16 W. R. 1101); even where the power has been created by the testator himself subsequently to the will (*Boyes* v. *Cook*, 14 Ch. D. 53; *Re Hernando, H.* v. *Sawtell*, 27 Ch. D. 284; *Airey* v. *Bower*, 12 App. Cas. 263). The circumstances under which a testator has executed the subsequent instrument cannot be looked at to ascertain a contrary intention (*Boyes* v. *Cook*, *supra*, disapproving of *Re Ruding*, 14 Eq. 266; see *Thompson* v. *Simpson*, 44 L. T. 710; *Airey* v. *Bower*, *supra*; *Re Wells, Hardisty* v. *W.*, 42 Ch. D. 646). Where A bequeathed her residue to such persons as B should by deed or will appoint, and in default over, and B. died before A, B's will did not operate as an execution of the power by anticipation (*Jones* v. *Southall*, 32 Beav. 31).

1 Vict. c. 26, s. 27.

General powers executed by wills of prior.

Sect. 24 does not apply to a will made in exercise of a special power (*Re Hayes, Turnbull* v. *H.*, [1901] 2 Ch. 529; *Re Moses, Beddington* v. *B.*, [1902] 1 Ch. 100; *Doyle* v. *Coyle*, [1895] 1 I. R. 205; see *Re Wells, Hardisty* v. *W.*, 42 Ch. D. 657; and see *Stillman* v. *Weedon*, 16 Sim. 26, where a special power was executed by will of prior date, which referred to the property which was the subject of the power).

Special power.

A general power given to the survivor of two persons may, under sect. 24, be exercised by the will of the ultimate survivor executed during the joint lives (*Thomas* v. *Jones*, 1 D. J. & S. 63). A special power cannot be so exercised, *Re Moir*, 46 L. T. 723; see Sugd. Powers, 124, 8th ed.; *Cronin* v. *Roche* (8 Ir. Ch. R. 103); *Cooper* v. *Martin* (3 Ch. 47). Where a power to appoint among children is to be exercised by the survivor of the husband and wife "after the decease of the other": a will made during their joint lives by the one who survived does not operate as an execution (*Cave* v. *C.*, 8 D. M. & G. 131); but does so operate if confirmed by codicil after the death of the other (*Re Blackburn, Smiles* v. *B.*, 43 Ch. D. 75). A will made during coverture by a woman who died discovert was a good execution of a power "during coverture by will" to appoint (*Re Illingworth, Bevir* v. *Armstrong*, [1909] 2 Ch. 297; *Re Safford's Settlement, Davies* v. *Burgess*, [1915] 2 Ch. 211).

Powers given to survivor of several.

Sect. 27 applies to the wills of married women (*Bernard* v. *Minshull*, Johns. 276; see the note to sect. 8, *ante*, p. 497). As to a fund subject to a general power of appointment exercisable and exercised by a married woman's will being liable for her debts, see the note to sect. 4 of the M. W. P. Act, 1882, *ante*, p. 380.

Married women.

With regard to the exercise by will of powers of revocation and new appointments in deeds, a general devise by will subsequent in date to the deed reserving the power does not *per se* amount by virtue of this section to an exercise of such power (*Re Brace, Welch* v. *Colt*, [1891] 2 Ch. 671; *Charles* v. *Burke*, 43 Ch. D. 223, n.; *Re Goulding, Dobell* v. *D.*, 48 W. R. 183). In a case decided apart from this section, it was said that the intention to revoke must be shown; but might either appear by the express terms, or might be inferred from the circumstance that the will would otherwise be ineffectual (*Pomfret* v. *Perring*, 5 D. M. & G. 775; *Palmer* v. *Newell*, 20 Beav. 38; see *Re Thursby, Grant* v. *Littledale*, [1910] 2 Ch. 181). *Pomfret* v. *Perring* (*supra*) was the case of a special power of appointment, but the reasoning applied to general powers (*Re Brace, Welch* v. *Colt*, [1891] 2 Ch. 677). In another case a power of revocation reserved by deed was not exercised by a will dated before the deed, the date amounting to a contrary intention within sect. 24 (*Re Wells, Hardisty* v. *W.*, 42 Ch. D. 646). Where

Powers of revocation in deeds.

1 Vict. c. 26, s. 27.

the original power was to appoint by deed, a revocation by will of an appointment by deed was invalid (*Re Gore Booth*, [1908] 1 Ir. 387).

Revocation of testamentary appointments.

As regards appointments by will; a general clause of revocation in a later will revokes an appointment by an earlier will, unless it be entirely unreasonable that it should have that effect. So held in the case of general powers (*Sotheran* v. *Dening*, 20 Ch. D. 99; *Harvey* v. *H.*, 32 L. T. 141; *Re Eustace*, L. R. 3 P. & M. 183). The old rule as to this was different (*Re Merritt*, 1 Sw. & Tr. 112; *Re Joys*, 4 Sw. & Tr. 214). Again, where the donee of a general power executes a later testamentary appointment containing no express revocation, but which makes dispositions inconsistent with an earlier testamentary appointment, the latter may revoke the former (*Re Gibbes*, *White* v. *Randolf*, 37 Ch. D. 143; see *Re Tenney*, 45 L. T. R. 78; *Cadell* v. *Willcocks*, [1898] P. 27). But a revocation by codicil of an express exercise by will of a general power does not prevent a general gift of residue in the will from operating as an exercise (*Re Jarrett*, *Bird* v. *Green*, [1919] 1 Ch. 366). In the case of special powers; where an appointment by will was revoked by a general revocatory clause in a later will which did not, however, exercise the power, the revocation was effectual (*Re Kingdon*, *Wilkins* v. *Pryer*, 32 Ch. D. 604). So also where the later document purported invalidly to exercise the power, the express revocation was effectual, the doctrine of dependent relative revocation not applying (*Quinn* v. *Butler*, 6 Eq. 225; see *Re Gentry*, L. R. 3 P. & M. 80; *Re Bernard's Settlement; B.* v. *Jones*, [1916] 1 Ch. 552). But that doctrine applied where the signature of a will exercising a special power was cut off under an erroneous belief (*Stamford* v. *White*, [1901] P. 46). Further, in the absence of express revocation a later will which disposed of the property subject to the power in a manner entirely inconsistent with an earlier will revoked the latter by implication. So held where the later will contained the word "appoint" (*Kent* v. *K.*, [1902] P. 108), or referred to "everything which I have power to will" (*Wrigley* v. *Lowndes*, [1908] P. 348). Where the dispositions of the later will were only partly inconsistent with the earlier will, there was only a revocation *pro tanto* (*Re Walker*, *MacColl* v. *Bruce*, [1908] 1 Ch. 560). And where the appointment by the later will was altogether invalid, there was no revocation at all (*Duguid* v. *Fraser*, 31 Ch. D. 449).

Words in a codicil revoking all bequests in a will in favour of A revoked a special power given to A by the will (*Re Brough*, *Currey* v. *B.*, 38 Ch. D. 456).

A devise without any words of limitation shall be construed to pass the fee.

28. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

Rule as to wills prior to 1838.

In wills prior to 1838, a devise of lands to a person without any words of limitation confers an estate for life only (Hawk. Wills, 130). The various cases in which such indefinite devises are enlarged to a fee simple are considered (Jarm. Wills, 5th ed. 1131; Hawk. Wills, 131; Tudor, L. C. Conv. 166 *et seq.*; and see *Lloyd* v. *Jackson*, L. R. 2 Q. B. 269; *Bolton* v. *B.*, L. R. 5 Ex. 145; *Pickwell* v. *Spencer*, L. R. 7 Ex. 105; *Re Harrison*, 5 Ch. 408; *Lander* v. *Elsmore*, 27 L. T. 603; *Re De La Hunt and Pennington*, 57 L. T. 874; *Yarrow* v. *Knightley*, 8 Ch. D. 736; *Hill* v. *Brown*, [1894] A. C. 125). The

mere fact of a devise, otherwise conferring an estate for life only, being to several persons to be divided equally among them, did not enlarge the interest to a fee (*Gatenby* v. *Morgan*, 1 Q. B. D. 685); and see *Re Jones, Last* v. *Dobson*, [1915] 1 Ch. 246. 1 Vict. c. 26, s. 28.

Where a testator devised his real estate to a devisee in fee charged with annuities, the annuitants took the annuities for life; it was said that this section of the Act only applies to real estate vested in or in the power of the testator, and not to estates or interests created *de novo* by his will (*Nicholls* v. *Hawkes*, 10 Hare, 342). Cases under this section.

A devise, before 1838, of "rents and profits" to A without words of limitation passes an estate for life: such a devise, since 1837, passes the fee (Hawk. Wills, 120; *Re Martin, M.* v. *M.*, [1892] W. N. 120). And a devise of the "income" of land also passes the fee (*Mannox* v. *Greener*, 14 Eq. 456; *Johnson* v. *J.*, 35 Ch. D. 348). Where A, seised in fee of freeholds, devised them to B, "to be kept in trust for C, that is, B is to let the premises, and give the rent to my son C for his support"; C took the absolute interest (*Malcolmson* v. *M.*, 17 L. T. (o.s.) 44). Where a testator gave to his niece the house she lived in, and grass for a cow in Gill Field, she took an estate in fee simple in the house, and the right of pasture of a cow during her pleasure (*Reay* v. *Rawlinson*, 29 Beav. 88; conf. *Pym* v. *Harrison*, 32 L. T. 817, a case under the old law).

Lord St. Leonards considered that cases where, after the devise without any words of limitation, there are gifts over also without words of limitation, were not within the purview of the Act, and that it would be dangerous to extend it to them (R. P. Stat. 382). Under a gift since the Act to named persons "or their heirs" the latter words were given a substitutionary meaning (*Re Whitehead, W.* v. *Hemsley*, [1920] 1 Ch. 298). As to conveyances without words of limitation see sect. 60 of L. P. Act, 1925, *post*.

A "contrary intention" does not appear from the fact that in other parts of the will words of inheritance have been used (*Wisden* v. *W.*, 2 Sm. & Giff. 396); nor from the fact of a power of appointment in favour of children and a husband being given to a married woman in a devise in her favour of copyholds to be her separate property (*Brook* v. *B.*, 3 Sm. & G. 280). So, the fact that in a devise to two persons, power was given to the devisees to sell their property for their life, followed by a direction that the survivor of the devisees should take the property given to the other, was no indication that such survivor should take a life interest only (*Chellew* v. *Martin*, 21 W. R. 671). Contrary intention.

A contrary intention, however, may be found from the whole will (*Crumpe* v. *C.*, [1900] A. C. 127; and see *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34, 45, where the words were held to create an estate in special tail male); and was collected from the circumstance, that by the same will an estate was subsequently given which could not come into existence unless the first devise was construed to be a life estate (*Gravenor* v. *Watkins*, L. R. 6 C. P. 500). And where a testator devised freeholds to several as joint tenants and to the survivor of them, his heirs and assigns, the latter words indicated a contrary intention, so that the devisees took as joint tenants for life with a contingent remainder in fee to the survivor (*Quarm* v. *Q.*, [1892] 1 Q. B. 184).

29. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person The words "die without issue," or "die without leaving

1 Vict. c. 26, s. 29.

in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

issue," shall be construed to mean die without issue living at the death.

Old rules of construction as to wills prior to 1838.

In wills prior to 1838, the words "die without issue" and "die without having issue," in gifts both of real and personal estate, are construed to mean the death of the person spoken of and failure of his issue at the time of his death or at any time afterwards; unless the context shows the meaning to be confined to a failure of issue at the time of his death. The words "die without leaving issue" in devises of real estate are construed in the same way as the words "die without issue;" but in bequests of personalty they import a failure of issue at the death of the person spoken of (Hawk. Wills, 205, 213).

The various cases in which the words "die without issue," &c., occurring in wills prior to 1838 are restrained by the context to mean a failure of issue at the death of the person are considered in Hawk. Wills, 207; Jarm. Wills, 5th ed. 1320 *et seq.* As to the effect of similar limitations occurring in a deed, see *Morgan* v. *M.* (10 Eq. 99); *Olivant* v. *Wright* (9 Ch. D. 646).

Cases under new law.

The object of this section is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words having acquired a legal meaning different from the popular meaning (*Greenway* v. *G.*, 1 Giff. 138). In wills since 1837, words importing failure of issue have been held to mean failure of issue at the death (*Re Mid Kent Co.*, 11 W. R. 417; *Jarman* v. *Vye*, 2 Eq. 784; *Dowling* v. *D.*, 1 Ch. 612; *Dunn* v. *Morgan*, 84 L. J. Ch. 812; see *Re Allen*, 3 Drew. 382).

The section applies to a gift over on death without "male issue" (*Re Edwards, E.* v. *E.*, [1894] 3 Ch. 644; *Upton* v. *Hardman*, I. R. 9 Eq. 157). But the section does not touch the question whether any particular form of words shall import want or failure of issue during the life of the person spoken of, or a want or failure of issue at the time of his death; the only construction excluded by the section being an indefinite failure of issue. In some cases, to which this section has no application, gifts over upon death without leaving issue have been read as gifts over upon death without having had issue (*Treharne* v. *Layton*, L. R. 10 Q. B. 459; see *Re Ball, Slattery* v. *Ball*, 40 Ch. D. 11; *Barkworth* v. *B.*, 75 L. J. Ch. 754). As to "die without children," see *Mathews* v. *Gardiner*, 19 Beav. 254; *Re Booth, Pickard* v. *B.*, [1900] 1 Ch. 768.

Words importing failure of issue.

As this section is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body" (*Re Sallery*, 11 Ir. Ch. R. 236; *Dawson* v. *Small*, 9 Ch. 651; *Harris* v. *Davis*, 1 Coll. 416, and the remarks on that

case, Jarm. 6th ed. 1856; see also *Re Conboy*, [1916] 1 I. R. 51; see *contra*, *Dodds* v. *D.*, 10 Ir. Ch. R. 476). 1 Vict. c. 26, s. 29.

This section of the Act has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one"; which additional words, upon the authority of decided cases, modify their meaning (*Morris* v. *M.*, 17 Beav. 198).

Contrary intention was inferred from the context in *Neville* v. *Thacker*, 23 L. R. Ir. 344. It was doubted whether the words "unless a contrary intention shall appear by the will by reason of such person having a prior estate tail" applied to a gift of personalty, or are to be confined to a gift of real estate in which alone, properly speaking, there can be an estate tail (*Greenway* v. *G.*, 2 D. F. & J. 137). The words had been previously applied to a gift of personalty (*Green* v. *G.*, 3 De G. & Sm. 480; see also *Green* v. *Giles*, 5 Ir. Ch. 25; *Re O'Beirne*, 1 J. & Lat. 352). A reference to failure of issue after the death was found in *Re Thomas*, [1921] 1 Ch. 306, where the question whether the section applies only to an entire failure of issue was raised, but not decided. Contrary intention.

The operation of the section is limited by the final proviso. For a case within this proviso, see *Re Bence*, *Smith* v. *B.*, [1891] 3 Ch. 242, 249; and see *Re Chinnery*, 1 L. R. Ir. 296. The cases in which words importing a failure of issue refer to the objects of a preceding gift are discussed Jarm. Wills, 6th ed. 1965 *et seq.* Final proviso.

In the case of a will coming into operation after December 31, 1882, which contains an executory limitation over of land on failure of issue, regard should be had, in ascertaining the effect, to sect. 10 of the Conv. Act, 1882 (see *Re Booth*, *Pickard* v. *B.*, [1900] 1 Ch. 768; and now to sect. 134 of L. P. Act, 1925, *post*, replacing that section).

30. Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

See note to sect. 31.

31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied. Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

In wills prior to 1838, where a testator devised lands to his executors for payment of his debts, or until his debts were paid, the

1 Vict. c. 26, s. 31.

executors only took an estate for so many years as were necessary to raise the sum required (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509). It was the same where an estate was devised till such time as a particular sum should be raised out of the rents and profits (*Cordell's Case*, Cro. Eliz. 316; 1 P. Wms. 118; Co. Litt. 45 b; Com. Dig. Biens (A. 1)).

According to the old law, trustees under a devise to them and their heirs *prima facie* took a fee; and that estate could not be cut down unless it could be pointed out on the face of the will what less estate they took (*Collier* v. *Walters*, 17 Eq. 261, 263; see also *Baker* v. *White*, 20 Eq. 174). The cases are collected, Theobald, 7th ed. 430.

In wills since 1837 the result of the present Act "is, that trustees whose estate is not expressly defined by the will must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee" Jarman, 6th ed. 1842). (An estate in fee absolute in possession is now the only legal estate subsisting, except a term of years absolute (L. P. Act, 1925, s. 1, sub-s. 1, *post*).

In wills since 1837 trustees have been held to take an estate in fee from having a power of leasing (*Re Eddel*, 11 Eq. 559), and a power of maintenance (*Berry* v. *B.*, 7 Ch. D. 657), and from being directed to pay debts (*Marshall* v. *Gingell*, 21 Ch. D. 790; *Re Brooke, B.* v. *B.*, [1894] 1 Ch. 43). Cf. *Re Stamford*, [1912] 1 Ch. 343.

Devises of estates tail shall not lapse.

32. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

As to the doctrine of lapse, see Jarman, 6th ed. 423 *et seq.*; *Elliot* v. *Davenport*, Tudor, L. C. Conv. 4th ed. 475.

Date of death of devisee or legatee.

The words "shall die" in this section refer to the period at which the Act came into operation. Thus lapse was prevented by this section where the devisee or legatee died before the date of the will, but after the Act came into operation (*Winter* v. *W.*, 5 Hare, 306; *Mower* v. *Orr*, 7 Hare, 473; *Wisden* v. *W.*, 2 Sm. & G. 396; and see *Loxley* v. *Heath*, 27 Beav. 535); *secus*, where he died before the Act came into operation (*Wild* v. *Reynolds*, 5 Not. Cas. 1; *Barkworth* v. *Young*, 4 Drew. 21).

1 Vict. c. 26, s. 33.

This section was held to extend to a case where the issue of the legatee, who was alive at the death of the testator, was not the same issue as was in existence when the legatee died (*Re Parker*, 1 Sw. & Tr. 523; but see Sugd. R. P. Stat. 393).

Effect of section.

This section does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee. Therefore he can dispose of it by his will, notwithstanding his death in the lifetime of the original testator (*Johnson* v. *J.*, 3 Hare, 157; *Re Mason*, 34 Beav. 494; see *Pickersgill* v. *Rodgers*, 5 Ch. D. 163, where a case of election was raised against the estate of the predeceased legatee as if he had survived the testatrix). And if he dies intestate it passes to his representatives as part of his estate (*Re Peerless, P.* v. *Smith*, [1901] W. N. 151). Probate duty was held to be payable in the same manner as if the legatee had survived the testator (*Perry* v. *Reg.*, L. R. 4 Exch. 28; distinguish *Att.-Gen.* v. *Loyd*, [1895] 1 Q. B. 496). Estate duty is payable in the same way (*Re Scott*, [1900] 1 Q. B. 372).

The fictitious survivorship created by this section will not be extended beyond the limits necessary to carry out the purpose of the Act. Therefore, where a married woman in whose settlement there was a covenant to settle property coming to her during the coverture, and to whom a legacy was left by her father's will, predeceased him, but by reason of her having issue the legacy did not lapse, the legacy was not within the covenant (*Pearce* v. *Graham*, 32 L. J. Ch. 359). Where, however, after a bequest to a daughter, a testator directed that "in case she survived him" the legacy should be subject to the trusts of the daughter's settlement; and the daughter predeceased the testator, leaving issue; the legacy was ordered to be paid to the settlement trustees (*Re Hone*, 22 Ch. D. 663).

The gift is to take effect as if the beneficiary had died immediately after the testator. Accordingly, where a married woman to whom a legacy was left by her father's will died in his lifetime leaving her husband surviving, who also died before the father, administration to the married woman's estate was granted as if she had died immediately after her father (*Re Councell*, L. R. 2 P. & M. 314; *Re Allen*, [1909] W. N. 181). And where a married woman to whom freeholds were devised in fee by her father's will, died in his lifetime leaving her husband surviving, and also issue of her marriage, the husband was held entitled to an estate by the curtesy (*Eager* v. *Furnivall*, 17 Ch. D. 118). A child who was held to take under this section having devised to his father, the testator, the devise lapsed (*Re Hensler, Jones* v. *Hensler*, 19 Ch. D. 612). A testator cannot apply the section to the case of legatees other than issue (*Re Gresley, Willoughby* v. *Drummond*, [1911] 1 Ch. 358). A child *en ventre sa mere* was held to be "living at the time of the death of the testator" (*Re Griffiths; G.* v. *Waghorne*, [1911] 1 Ch. 246).

This section obliges a testator intending that a legacy given to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will (*Re More*, 10 Hare, 178). Where a testator gave a legacy to his daughter, with a gift over, in the event of her dying unmarried, to his other children as she should appoint, and in default equally; and the daughter died in the testator's lifetime, unmarried, and without having appointed; the other children took (*Kellett* v. *K.*, I. R. 5 Eq. 298). See also *Re Morris, Corfield* v. *Waller*, 86 L. J. Ch. 456; *Re Wilson, Lothian* v. *W.*, 89 L. J. Ch. 216.

The section applies wherever the words of the will amount to

1 Vict. c. 26, s. 33.

a gift to children as *personæ designatæ* (*Stansfield* v. *S.*, 15 Ch. D. 84). As to a gift to "my surviving children," see *Fullford* v. *F.* (16 Beav. 565). The intention of the legislature was to provide against lapse merely, and not to alter the construction to be put on any will. On arriving at the conclusion that there would have been a lapse, then the statute applies, not otherwise. This section does not apply to the case of a gift to a class, for according to the rule before the Act, under a gift to children as a class, the share to which a surviving child would have been entitled did not lapse in consequence of his death in the testator's lifetime (*Olney* v. *Bates*, 3 Drew. 323; *Browne* v. *Hammond*, Johns. 215; *Re Jackson*, *Shiers* v. *Ashworth*, 25 Ch. D. 164) It is immaterial that the class consists of only one person (*Re Harvey*, *Harvey* v. *Gillow*, [1893] 1 Ch. 567). Nor does the section apply to a joint legacy (*Re Butler*, *Joyce* v. *Brew*, [1918] 1 I. R. 394; Jarman, 6th ed. p. 449).

Section does not apply to gifts to a class.

Gifts in exercise of powers.

This section applies to a testamentary appointment made under a general power (*Eccles* v. *Cheyne*, 2 K. & J. 676), but not under a special power (*Griffiths* v. *Gale*, 12 Sim. 354; *Freeland* v. *Pearson*, 3 Eq. 663; *Holyland* v. *Lewin*, 26 Ch. D. 266). A belief on a testator's part that gifts had lapsed, and his making no further disposition of them, showed a "contrary intention" (*Re Meredith*, *Davis* v. *D.*, [1924] 2 Ch. 552).

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

34. This Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Revocation of wills prior to 1838 by Acts since 1837.

With respect to wills prior to 1838, acts of revocation done subsequently to 1837 must be considered with reference to the statute (*Hobbs* v. *Knight*, 1 Curt. 768; *Benson* v. *B.*, L. R. 2 P. & M. 172).

Republication.

Formerly wills of personalty might be republished by parol acts or declarations of the testator; and republication made a will speak from the date at which it was republished (1 Wms. Exors. 10th ed. 140, 147). But since this statute nothing short of a re-execution of a will itself, or the formal execution under the Act of some document which directly or impliedly affirms it, can confer further testamentary validity upon it beyond that which it derived from its original execution (*Noble* v. *Phelps*, L. R. 2 P. & M. 282; and see *Rolfe* v. *Perry*, 3 D. J. & S. 481). As to the effect of republication by codicil before the Act, see *Mountcashel* v. *More-Smyth*, [1895] 1 I. R. 346; [1896] A. C. 158

Will republished by codicil.

Under this section the effect of the confirmation of a will by a codicil is the same as if the testator had at the date of the codicil made a will in the words of the will so re-executed (*Winter* v. *W.*, 5 Hare, 306; *Anderson* v. *A.*, 13 Eq. 381; *Re Rayer*, *R.* v. *R.*, [1903] 1 Ch. 688). A codicil had the effect of bringing a bequest in the will to a deceased daughter under the 33rd section of this Act (*Skinner* v. *Ogle*, 1 Rob. 363); and of bringing within the operation of the will lands acquired subsequently to the date of the codicil (*Langdale* v. *Briggs*, 3 Sm. & G. 246; *Doe* v. *Walker*, 12 M. & W. 591), and of making a will operate as an execution of a special power (*Re Blackburn*, *Smiles* v. *B.*, 43 Ch. D. 75). The confirma-

tion, however, of a will by codicil does not revive a legacy adeemed in the interval between the will and the codicil (*Montague* v. *M.*, 15 Beav. 565; see *Sidney* v. *S.*, 17 Eq. 65); nor bring the will within the Married Women's Reversionary Interests Act, 1857 (*ante*, p. 362); *Re Elcom, Layborn* v. *Grover Wright*, [1894] 1 Ch. 303). 1 Vict. c. 26, s. 34.

Where a codicil contains a confirmation of the will as altered by prior codicils, the result is to effect the same disposition of the testator's estate as if at that date he had made a new will containing the same dispositions as the original will, and with the alterations introduced by the various codicils (*Re Fraser, Lowther* v. *F.*, [1904] 1 Ch. 734; *Re Taylor, Dale* v. *D.*, [1909] W. N. 59, see *Re Champion, Dudley* v. *C.*, [1893] 1 Ch. 101; *Re Pyle, P.* v. *P.*, [1895] 1 Ch. 724). A subsequent testamentary instrument which did not refer to a will did not amount to republication (*Re Smith, Bilke* v. *Roper*, 45 Ch. D. 632). A codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil (*Burton* v. *Newbery*, 1 Ch. D. 234; see *McLeod* v. *McNab*, [1891] A. C. 471; *French* v. *Hoey*, [1899] 2 I. R. 472).

For the effect of a confirmatory codicil as regards the incorporation of unattested papers, see note to sect. 9, *ante*, p. 504; and as regards unattested alterations in a will, see the note to sect. 21, *ante*, p. 516.

35. This Act shall not extend to Scotland. Act not to extend to Scotland.

As to the adoption of this Act in the colonies, see 4 Davidson, Conv. 350, n.; Hayes & Jarm. Wills, 59, 7th ed.

II.—The Wills Act Amendment Act, 1852.

15 & 16 Vict. c. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills."

[17th June, 1852.]

Whereas the laws with respect to the execution of wills require further amendment: be it therefore enacted as follows:

1. Where by an Act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction (*r*): every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside or 15 & 16 Vict. c. 24, s. 1.

1 Vict. c. 26.

When signature to a will shall be deemed valid.

15 & 16 Vict. c. 24, s. 1.

opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*s*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*t*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*u*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*x*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made (*y*).

(*r*) The Wills Act, 1837, s. 9, *ante*, p. 499; where see note.

Signature placed on paper wafered to will.

A will was held to be duly executed where the signatures of the testator and the attesting witnesses were written on a separate piece of paper, which had been previously wafered to the foot of the will (*Cook* v. *Lambert*, 11 W. R. 401; *Re Horsford*, L. R. 3 P. & M. 211). But there must be evidence that the paper was so attached at the time of signature (*Re West*, 12 W. R. 89).

(*s*) Where the signature was at the end of a notarial minute, which immediately followed the will, it was held that such a signature was a compliance with this statute (*Page* v. *Donovan*, 3 Jur. (N.S.) 220). Signatures placed beside or opposite to the end of the will have been held good (*Re Wright*, 4 Sw. & Tr. 35; *Re Jones*, 13 W. R. 414; *Re Williams*, L. R. 1 P. & M. 4; *Re Coombs*, *ibid.* 302; *Re Stokes*, 31 L. T. 552; see *Royle* v. *Harris*, [1895] P. 163).

Where a testator signed the first five sheets of a will, but omitted to sign the sixth, which was the last, and the attesting witnesses signed all six sheets, no part of the will was admitted to probate (*Sweetland* v. *S.*, 13 W. R. 504; *Re Dilkes*, L. R. 3 P. & M. 164; see *Re Garnett*, [1894] P. 90). So where the testator's mark was placed in the middle of the writing (*Margary* v. *Robinson*, 12 P. D. 8).

Blanks.

(*t*) Wills have been held duly executed where blank spaces were left after the concluding words (*Hunt* v. *H.*, L. R. 1 P. & M. 209; *Re Archer*, L. R. 2 P. & M. 252). So where the will was on the

first page, and the signatures were on the fourth page of an otherwise blank sheet of foolscap (*Re Fuller*, [1892] P. 377). As to the effect of "blanks" in charitable gifts, see *Re White*, [1893] 2 Ch. 41; *Re Macduff*, [1896] 2 Ch. 451.

Signature in attestation clause.

(*u*) A wrote his will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation, and requested that they would sign their names, which they did; the execution was valid (*Re Walker*, 2 Sw. & Tr. 354; see *Smith* v. *S.*, L. R. 1 P. & M. 143; *Re Casmore*, *ibid.* 653; *Re Harris*, 23 W. R. 734; *Re Pearn*, 1 P. D. 70).

(*x*) Probate was granted in a case in which the signature of the testator occurred beneath that of the witnesses (*Re Jones* (1877), W. N. 10; *Byles* v. *Cox*, 74 L. T. 222).

Words following signature,

(*y*) Words written underneath and following the signature of the testator have been included in the probate (*Re Brompton*, 33 L. J. Prob. 153; *Re Woodley*, *ibid.* 154; *Re Powell*, 13 W. R. 696; *Re Ainsworth*, L. R. 2 P. & M. 151; *Re Birt*, *ibid.* 214), but a clause written underneath the signature, although before execution, has been excluded (*Re Greator*, 2 Jur. (N.S.) 1172; *Re Dallow*, L. R. 1 P. & M. 189; *Re Dearle*, 39 L. T. 93; *Re White*, [1896] 1 I. R. 269; see *Re Anstie*, [1893] P. 283; *Re Gee*, 78 L. T. 843). As also a clause added by testator after signing his name (*Re Arthur*, L. R. 2 P. & M. 273). In one case the first side of a sheet of paper, where the signature occurred, was held to be the last side (*Re Wotton*, L. R. 3 P. & M. 159; *Re Gilbert*, 78 L. T. 762; see *Royle* v. *Harris*, [1895] P. 163).

inserted after signing.

Act to extend to certain wills already made.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

Interpretation of "will."

3. The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of her Majesty Queen Victoria.

Wills Act, 1837, s. 1, *ante*, p. 490.

Short title of Act.

4. This Act may be cited as "The Wills Act Amendment Act, 1852."

24 & 25 Vict. c. 114, s. 1.

III.—The Wills Act, 1861.

24 & 25 Vict. c. 114.

An Act to Amend the Law with respect to Wills of Personal Estate made by British Subjects. [6th August, 1861]

Be it enacted by, &c., as follows:

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Wills disposing of leaseholds.

The present Act (which is known as Lord Kingsdown's Act) amends "the law with respect to wills of personal estate made by British subjects" (see Title). This law was contained in the Wills Act, 1837 (*Re Grassi, Stubberfield* v. *G.*, [1905] 1 Ch. 591); and in the last-mentioned Act personal estate extends to leaseholds (see sect. 1, *ante*, p. 490). The provisions of the present Act (which deal with the formalities of execution) have accordingly been applied to a will of English leaseholds made by a British subject in Italian form (*Re Grassi, supra*), or in Scotch form (*Re Watson, Carlton* v. *C.* (1887), W. N. 142). The wills, however, of English or Irish leaseholds made by foreigners who are not within sects 1 and 2 of the present Act must comply with the formalities of execution required by the Wills Act, 1837. Such leaseholds passed under a will which complied with these formalities (*De Fogassieras* v. *Duport*, 11 L. R. Ir. 123); but not under a will which did not comply with them (*Pepin* v. *Bruyere*, [1902] 1 Ch. 24). The beneficial succession to these leaseholds on the death, whether of a British subject or a foreigner, including questions as to the validity of gifts in a will, is governed by the lex situs (Dicey's Conflict of Laws, 2nd ed., p. 505; *Freke* v. *Carbery*, 16 Eq. 461; *Re Moscs, M.* v. *Valentine*, [1908] 2 Ch. 235; see *Duncan* v. *Lawson*, 41 Ch. D. 394; *Re Gentili*, I. R. 9 Eq. 541).

British subjects.

As to personalty other than leaseholds see the note *ante*, p. 492; and as to a will in foreign form of an Englishman domiciled abroad passing real estate in England, see *Re Nicholls, Hunter* v. *N.*, [1921] 2 Ch. 11.

Although the title of the Act refers to "British subjects," sect. 3 has been applied to the will of a foreigner (*Re Groos*, [1904] P. 269). To be within sects. 1 and 2, which also refer to "British subjects," the will must be the will of a person who at the time of making it was a British subject (*Bloxam* v. *Favre*, 8 P. D. 105; 9 P. D. 130; *Re Buseck*, 6 P. D. 211). The will of an alien is not within the sections, even where his domicil of origin was English (*ibid.*). As

regards naturalized British subjects, the certificate of naturalization formerly granted under 7 and 8 Vict. c. 66 excepted from the rights thereby conferred any rights of a natural born subject out of the British dominions. This exception did not prevent sect. 2 of the present Act from applying to the will made in England of a British subject so naturalized (*Re Gally*, 1 P. D. 438); but did prevent sect. 1 from applying to his will made out of England (*Re Gatti*, 39 L. T. 639; *secus*, *Re Lacroix*, 2 P. D. 94). In *Re Grassi, Stubberfield* v. *G.*, [1905] 1 Ch. 591, sect. 1 was applied to the will made out of England of a naturalized British subject. The form of the naturalization certificate is not stated; but if the form was similar to that in *Re Gatti*, qu. did not that decision apply; see Naturalization Act, 1870, s. 7. (See now British Nationality and Status of Aliens Act, 1914 (which repeals that Act), sections 2 *et seq.*, under which Naturalization Regulations, dated October 23, 1918, were issued).

24 & 25 Vict. c. 114, s. 1.

Naturalized British subjects.

Under the first condition in the section a will may be admitted to probate if made according to the law of the place of execution, although such law prescribes no specific forms (*Stokes* v. *S.*, 67 L. J. P. 55). Under the same condition probate will be granted of a will in English form made in France by a British subject which is well executed according to French law (*Re Lacroix*, 2 P. D. 94; see *Milnes* v. *Foden*, 15 P. D. 105). In determining what papers are testamentary the law of one country only will be regarded (*Pechall* v. *Hilderley*, L. R. 1 P. & M. 673).

Before this Act, a will must have been executed according to the law of the country where the testator was domiciled at the time of his death (Wms. Exors. 10th ed. 275). And a will so executed, though not falling within sect. 1, will still be good under sect. 4.

Probate is conclusive that an instrument is testamentary, but does not determine the validity of the dispositions contained in it (*Whicker* v. *Hume*, 7 H. L. C. 124). This Act leaves the extent of the power of testamentary disposition over personal property in England (other than leaseholds) to be determined by the law of the testator's domicile at his death, except in cases within sect. 3 (4 Davidson, Conv. 349, n.). An interest in the proceeds of sale of realty settled on an unexecuted trust for sale is personal estate within sect. 1 (*Re Lyne's Trusts, L.* v. *Gibbs*, [1919] 1 Ch. 80). As to the documents which an English Court will look at in construing a will in a foreign language, see *Re Cliffe*, [1892] 2 Ch. 229; *Di Sora* v. *Phillips*, 10 H. L. C. 639; Wms. Exors. 11th ed. 299.

See further as to this statute, Sugd. R. P. Stat. 398 *et seq.*; Hayes & Jarm. Wills, 539 *et seq.*, 7th ed. And as to probate of the wills of donees (domiciled abroad) of testamentary powers created by English instruments, see the note to sect. 10 of the Wills Act, 1837 (*ante*, p. 505).

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Wills made in the kingdom to be admitted if made according to local usage.

24 & 25 Vict. c. 114, s. 2.

See *Re Gally*, 1 P. D. 438; *Re Watson, Carlton* v. *C.* (1887), W. N. 142; quoted in note to sect. 1. The case of a British subject dying abroad, to whose estate no administration has been granted by a foreign Court, is within this section (*Re Cocquerel*, [1918] P. 4). As to the sealing in England of Irish grants since the Government of Ireland Act, 1920, see *Re Gault*, [1922] P. 195; *Re Brogan, ibid.* 276; and Jud. Act, 1925, s. 169. See sect. 168 as to Scotch confirmations.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Probate was granted of a will made by a domiciled Scotchman who subsequently acquired an English domicile (*Re Reid*, L. R. 1 P. & M. 74). Where a foreigner domiciled in a country where marriage did not revoke a will, made a will valid according to the law of the domicile and subsequently married, and then acquired an English domicile, the section applied notwithstanding the title of the Act, and the will was held valid (*Re Groos*, [1904] P. 269).

Nothing in this Act to invalidate wills otherwise made.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

Extent of Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

IV.—The Domicil Act, 1861.

24 & 25 Vict, c. 121.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions. [6th August, 1861.]

24 & 25 Vict. c. 121, s. 1.

Whereas by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by, &c., as follows:

No British subject dying in a foreign

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the

enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

It is believed that no such convention has yet been agreed to. See further, as to the probable operation of the Act, Hayes & Jarm. Wills, 540, 7th ed.; Sugd. R. P. Stat. 398.

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

3. This Act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

Who this Act shall not apply to.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive

When subjects of foreign states shall die in

24 & 25 Vict. c. 121, s. 4.

her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent, shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit.

As to administration of property in England belonging to a person domiciled out of this country, see Wms. Exors., 11th ed. 263 *et seq.; Re Dost Aly Khan* (6 P. D. 6), and the cases quoted *ante*, pp. 441, 492.

ENACTMENTS RELATIVE TO JUDGMENTS AFFECTING REAL AND PERSONAL PROPERTY.

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I.—The Judgments Act, 1838.

1 & 2 Vict. c. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16th August, 1838.]

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1 & 2 Vict. c. 110, s. 11.

Sheriff empowered to deliver execution of lands to judgment creditor.

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law: be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to take and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person

1 & 2 Vict. c. 110, s. 11.

against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render, in case such execution had not issued: and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: [*provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this Act had not passed*].

Proviso as to copyhold lands.

Proviso as to purchasers, mortgagees and creditors.

The words in italics have been repealed by the Stat. Law Rev. Act, 1874.

Before this Act the writ of elegit (which was founded on 13 Edw. 1, c. 18, the Statute of Westminster) affected only one moiety of the judgment debtor's lands. This section, however, has extended the remedy of the judgment creditor to the *whole* of the debtor's lands. The section expressly included (1) copyholds, which were not subject to execution under the old law, but which were abolished as from 1st January, 1926, by L. P. Act, 1922, Part V. (2) Rectories and tithes, which however are not ecclesiastical but lay (*Hawkins* v. *Gathercole*, 6 D. M. & G. 24; *Bates* v. *Brothers*, 2 Sm. & G. 509; *Sweeny* v. *Fleming*, 14 Ir. Ch. R. 23). (3) Land over which the debtor has a disposing power. A judgment against a husband and wife payable so far as she was concerned out of her separate estate only was not enforceable by elegit against land subject to a general power of appointment (not exercised) vested jointly in the husband and wife (*Goatly* v. *Jones*, [1909] 1 Ch. 557).

What may be taken under an elegit.

1 & 2 Vict. c. 110, s. 11.

See, further, the note to sect. 13 (*post*, p. 555). (4) Land held in trust for the debtor (as to this see before the Act the Statute of Frauds, s. 10; *Hunt* v. *Coles*, 1 Comyns, 226; *Steele* v. *Phillips*, Beatty, 193; *Hickson* v. *Aylward*, 3 Molloy, 25). The present section did not change the nature of the trust estates which might be taken under an elegit, and the old authorities apply (*Re Newcastle*, 8 Eq. 705; *Digby* v. *Irvine*, 6 Ir. Eq. R. 155). According to these authorities it was held that the trust must be a clear and simple trust for the debtor only (*Doe* v. *Greenhill*, 4 B. & Ald. 684; *Forth* v. *Norfolk*, 4 Madd. 503; *Harris* v. *Booker*, 4 Bing. 96). A term held on trust to attend the inheritance might be taken (*Doe* v. *Evans*, 1 C. & M. 450); but with regard to a particular equitable interest in leaseholds it was said that it could not be taken (*Re Newcastle*, 8 Eq. 706). An equity of redemption cannot be taken either in freeholds (*Beckett* v. *Buckley*, 17 Eq. 435; *Wells* v. *Kilpin*, 18 Eq. 298; *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 282; *Plunket* v *Penson*, 2 Atk. 290; see *Thornton* v. *Finch*, 4 Giff. 515), or in leaseholds (*Salt* v. *Cooper*, 16 Ch. D. 544). But see *Ashburton* v. *Nocton*, [1915] 1 Ch. 274, quoted p. 556, *post*.

The following interests in land may, according to decided cases, be taken under an elegit:—An estate tail (*Ashburnham* v. *St. John*, Cro. Jac. 85; Gilb. Exec. 106; see *Lewis* v. *Duncombe*, 20 Beav. 398; *Re Anthony, A.* v. *A.*, [1893] 3 Ch. 498). An estate for life, including an equitable estate for life for the separate use of a married woman (*Goatly* v. *Jones*, [1909] 1 Ch. 557), and a life estate in land excluded from a power of leasing (*Davis* v. *Marlborough*, 2 Swans. 121). The estate of a joint tenant (*Lord Abergavenny's Case*, 6 Rep. 78 b; 2 Cru. Dig. 376), or of a tenant in common or a coparcener (2 Cru. Dig. 54). A reversion expectant on a lease for years or lives (*Bishop of Bristol*, 3 Leon. 113; *R.* v. *Lane*, 6 M. & W. 489; *Re South*, 9 Ch. 373). In the last-mentioned case the creditor to whom the land has been delivered cannot eject the tenants (*Doe* v. *Wharton*, 8 T. R. 2); but may sue (*Hatton* v. *Haywood*, 9 Ch. 236; *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565), or distrain (*Lloyd* v. *Davies*, 2 Ex. 103), for rent falling due after the inquisition (*Sharp* v. *Key*, 8 M. & W. 379); and this without attornment by the tenants (*Lloyd* v. *Davies, supra; Rogers* v. *Pitcher*, 6 Taunt. 207). As to a reversion expectant on a mortgage for a term of years, see *Poole* v. *Whitt* (15 M. & W. 571); *Plunket* v. *Penson* (2 Atk. 293); *Johns* v. *Pink* ([1900] 1 Ch. 296). Leaseholds may be taken (*Re Hobson*, 33 Ch. D. 493; *Carter* v. *Hughes*, 2 H. & N. 714; *Fleetwood's Case*, 8 Rep. 171), notwithstanding the Bankruptcy Act, 1883, s. 146 (*Richardson* v. *Webb*, 1 Morrell, 40), including the interest of a lessee who had mortgaged but remained in possession (*Johns* v. *Pink, supra*). Land in ancient demesne (*Cox* v. *Barnsley*, Hob. 47; *Martin* v. *Wilks*, Moore, 211). A rent-charge (Moore, 32; see *Wooton* v. *Shirt*, Cro. Eliz. 742). Land belonging to a railway company; whether surplus (*Re Hull & Barnsley Ry. Co.*, 40 Ch. D. 119), or that on which the line, &c., is built (*Re Cowbridge Ry. Co.*, 5 Eq. 413). Land held by a public body for a public purpose (*Worrall Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719; see, however, *Jersey* v. *Uxbridge Authority*, [1891] 3 Ch. 183). Land of which a receiver has been appointed (*Gooch* v. *Haworth*, 3 Beav. 428); but the leave of the Court must be obtained (*Bowen* v. *Brecon Ry. Co.*, 3 Eq. 541). Land subject to an equitable mortgage (*Whitworth* v. *Gaugain*, 1 Phil. 728; *Brunton* v. *Neale*, 14 L. J. Ch. 8).

What may not be taken.

The following interests in land cannot be taken under an elegit:—An equity of redemption either in freeholds or leaseholds comprised in a legal mortgage (*Beckett* v. *Buckley* and other cases quoted,

1 & 2 Vict. c. 110, s. 11.

supra). Land of which the debtor was mortgagee, but which has become vested by conveyance in a purchaser or mortgagee for valuable consideration, the vendor's mortgage being paid off then or previously (the Judgments Act, 1855, s. 11; see *Avison* v. *Holmes*, 1 J. & H. 544; *Greaves* v. *Wilson*, 25 Beav. 434). An interest in remainder (*Re South*, 9 Ch. 369; *Re Hamilton*, 31 Ch. D. 294; see *Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620). Land comprised in a prior voluntary conveyance (*Beavan* v. *Oxford*, 6 D. M. & G. 529). The interest of a debtor in land which has already been taken under an elegit (*Carter* v. *Hughes*, 2 H. & N. 714). A rent-seck (*Walsall* v. *Heath*, Cro. Eliz. 656). An inalienable office (*Anon.*, Dyer, 7). Glebe or a churchyard (*Arbuckle* v. *Cowtan*, 3 Bos. & P. 327; *Parry* v. *Jones*, 1 C. B. (N.S.) 345). As to an advowson, see *Robinson* v. *Tongue* (3 P. Wms. 401).

The goods and chattels personal of a debtor cannot now be taken under an elegit (Bankruptcy Act, 1883, ss. 146 (not repealed by Bankruptcy Act, 1914), 168). Nor an equitable reversionary interest in the proceeds of sale of real estate (*Tyrrell* v. *Painton*, [1895] 1 Q. B. 205).

Nature of interest of tenant by elegit.

Where the land delivered is freehold, the judgment creditor acquires a chattel interest (see *ante*, p. 136) measured by the satisfaction of the debt; while the judgment debtor has remaining in him an interest in the nature of a reversion. Where the land is leasehold, the judgment creditor acquires the whole term, subject to a legal title in the nature of an executory interest in the judgment debtor (*Johns* v. *Pink*, [1900] 1 Ch. 304) (which would seem now to be equitable, see L. P. Act, 1925, s. 1 (2), *post*). As to a tenant by elegit taking a conveyance of parts of the lands extended, see *Hele* v. *Bexley*, 17 Beav. 14.

Inquisition.

In an inquisition on an *elegit* it is sufficient to describe the land in such a manner as would be sufficient to identify it in a conveyance (*Doe* v. *Parry*, 13 M. & W. 356).

Beneficed clerk.

Where the judgment debtor is a beneficed clerk, and has no lay fee in the bailiwick of the sheriff to whom the writ was directed, the creditor may, as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R.S.C. Ord. 43, rr. 3, 4, 5).

Sheriff's poundage.

As to a sheriff's poundage, see 29 Eliz. c. 4, s. 1; the Estreats Act, 1716, s. 16; 8 Geo. 1, c. 25, s. 5; 1 Vict. c. 55; and the Sheriffs Act, 1887, ss. 20, 29; *Nash* v. *Allen*, 4 Q. B. 784; *Pilkington* v. *Cooke*, 16 M. & W. 615; *Marshall* v. *Hicks*, 10 Q. B. 15; *Lee* v. *Dangar*, [1892] 1 Q. B. 231; [1892] W. N. 71; *Shoppee* v. *Nathan*, [1892] 1 Q. B. 245; *Woolford* v. *Levy*, *ibid.*, p. 772; *Montague* v. *Davies*, [1911] 2 K. B. 595; *Union Bank* v. *Grundy*, [1924] 1 K. B. 833.

As to the present form of the writ of elegit, see R. S. C. App. H., No. 3. The writ and inquisition should be filed by the sheriff in the Central Office (*Johns* v. *Pink*, [1900] 1 Ch. 296).

As to other modes of satisfying a judgment by means of the land of the judgment debtor, see *post*, p. 558.

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditors, and

12. By virtue of any writ of fieri facias to be sued out of any superior or inferior Court, [*after the time appointed for the commencement of this Act,*] or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers),

and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

1 & 2 Vict. c. 110, s. 12.

to sue for amount secured by bills of exchange and other securities.

Proviso as to indemnity of sheriff.

The words in *italics* have been repealed by the S. L. Rev. Act, 1874.

Effect of section.

This section places bank notes and money seized under a *fi. fa.* upon the same footing as goods; therefore they are not the property of the execution creditor until handed over by the sheriff to him (*Collingridge* v. *Paxton*, 11 C. B. 683); and are not available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person (*ibid.*). The section creates no lien in favour of the execution creditor before seizure by the sheriff (*Johnson* v. *Pickering*, [1908] 1 K. B. 8).

1 & 2 Vict. c. 110, s. 12.

And the sheriff's power of seizure is limited to money, &c., belonging to a living person. It cannot be exercised after the death of the judgment debtor (*ibid.*).

Cases under this section.

This section does not extend to a debt owing to the judgment debtor (*Helmore* v. *Smith*, 35 Ch. D. 447; *Harrison* v. *Paynter*, 6 M. & W. 387; *Alleyn* v. *Darcy*, 5 Ir. Ch. R. 56); or to money in the hands of a third party in trust for him (*Robinson* v. *Peace*, 7 Dowl. P. C. 93: *Fieldhouse* v. *Croft*, 4 East, 510), as in the hands of a sheriff (*Collingridge* v. *Paxton*, 11 C. B. 683; see *Harrison* v. *Paynter*, 6 M. & W. 387; *Masters* v. *Stanley*, 8 Dowl. P. C. 169), unless the sheriff has appropriated it for the debtor (*Wood* v. *W.*, 4 Q. B. 397). A charging order has, however, been made on cash in Court to assist an execution on a *fi. fa.* (*Brereton* v. *Edwards*, 21 Q. B. D. 488; but see *France* v. *Campbell*, 9 Dowl. P. C. 914); and leave has been given to seize a cheque drawn in favour of the debtor by the Accountant-General, but not delivered to him (*Watts* v. *Jeffreys*, 3 Mac. & G. 422; see *Courtoy* v. *Vincent*, 15 Beav. 486). It has been said that this section applies only to securities of a similar nature to those expressly mentioned (*Rollason* v. *R.*, 34 Ch. D. 496). Policies of assurance, however, have been held within it (*Stokoe* v. *Cowan*, 29 Beav. 637; see *contra*, *Re Sargent*, 7 L. R. Ir. 66), also the covenant to pay in a mortgage (*Avison* v. *Holmes*, 1 J. & H. 530).

Fieri facias generally.

What may be taken.

Independently of this section, the sheriff can, under a *fi. fa.*, seize all goods and chattels belonging to the debtor, including, in particular, the following: (1) Terms of years and leaseholds (*Fleetwood's Case*, 8 Rep. 171; *Doe* v. *Smith*, 1 M. & R. 137; *Taylor* v. *Cole*, 3 T. R. 292; *Doe* v. *Donston*, 1 B. & Ald. 230; see *Doherty* v. *Nelson*, [1895] 2 Ir. R. 90); which may be sold without seizing or taking possession of either the indenture of lease or the property (*Coleman* v. *Rawlinson*, 1 F. & F. 330). The term remains in the debtor until assignment by the sheriff (*Playfair* v. *Musgrove*, 14 M. & W. 239; *Giles* v. *Grover*, 9 Bing. 128; *Doe* v. *Jones*, 9 M. & W. 372), which must be by deed (L. P. Act, 1925, s. 52, *post*, replacing 8 & 9 Vict. c. 106, s. 3); and the tenants in possession cannot be turned out by the sheriff (*R.* v. *Deane*, 2 Show. 85; see *Taylor* v. *Cole*, 3 T. R. 292; *Burden* v. *Kennedy*, 3 Atk. 739; *Doe* v. *Brawn*, 5 B. & Ald. 243). (2) A rent charge (*York* v. *Twiner*, Cro. Jac. 78). (3) Growing crops (*Re Woodham*, 20 Q. B. D. 40; *Gwilliam* v. *Barker*, 1 Price, 274; see the Landlord and Tenant Act, 1851, s. 2). (4) Fixtures which the debtor can remove as against his landlord (*Place* v. *Flagg*, 4 M. & R. 277; *Winn* v. *Ingleby*, 5 B. & Ald. 625; *Pitt* v. *Shew*, 4 B. & Ald. 206; *Evans* v. *Roberts*, 5 B. & C. 841; see *Dumergue* v. *Rumsey*, 2 H. & C. 777). (5) Ships or shares in ships (*Harley* v. *Harley*, 11 Ir. Ch. R. 451; *Dickinson* v. *Kitchen*, 8 El. & Bl. 789). (6) The interest of a pawnbroker in a pledge (*Rollason* v. *R.*, 34 Ch. D. 495; see *Squire* v. *Huetson*, 1 Q. B. 308). (7) Goods let to the debtor (*Lancashire Co.* v. *Fitzhugh*, 6 H. & N. 502). (8) The property of a partnership where judgment has been recovered against the firm (Partnership Act, 1890, s. 23; for the case where a partner is an infant, see *Lovell* v. *Beauchamp*, [1894] A. C. 607), but not when it has been recovered against an individual partner (Partnership Act, 1890, s. 23; see *Brown Janson* v. *Hutchinson*, [1895] 1 Q. B. 737; [1895] 2 Q. B. 126). For the old practice, see *Helmore* v. *Smith*, 35 Ch. D. 436. As regards goods, the writ of *fi. fa.* binds them as from the delivery of the writ to the sheriff, but without prejudice to a title acquired in good faith for valuable consideration and without notice (Sale of Goods Act, 1893, sects. 26,

62, sub-sect. 1; see *Murgatroyd* v. *Wright*, [1907] 2 K. B. 333; *Birstall* v. *Daniels*, [1908] 2 K. B. 254). 1 & 2 Vict. c. 110, s. 12.

What may not be taken.

The following cannot be seized under a *fi. fa.*:—Clothes, bedding, and tools, to the value of £5 (Small Debts Act, 1845, s. 8); certain farm produce (Sale of Farming Stock Act, 1816). An equitable interest in leaseholds (*Re Newcastle*, 8 Eq. 700; *Scott* v. *Scholey*, 8 East, 467), or an equity of redemption of leaseholds (*Lyster* v. *Dolland*, 1 Ves. 431). As to equitable interests in chattels, see *Stevens* v. *Hince*, 110 L. T. 935. Fixtures annexed to the debtor's freehold (*Winn* v. *Ingleby*, 5 B. & Ald. 625). Rolling stock, plant and buildings of a railway which is open for traffic (Rail. Cos. Act, 1867, s. 4; see *Re East India Dock Co.*, 38 Ch. D. 576; *Midland Co.* v. *Potteries Ry. Co.*, 6 Q. B. D. 36; *Re Knott End Ry. Act*, 1898; [1901] 2 Ch. 8). Stock or shares (*Brereton* v. *Edwards*, 21 Q. B. D. 499; see sect. 14, *post*); or an equitable interest in stock (*Horn* v. *H.*, Amb. 78). Goods pawned by the debtor (*Young* v. *Lambert*, L. R. 3 P. C. 142). Goods over which the debtor has a lien (*Legg* v. *Evans*, 6 M. & W. 36). Goods of the debtor over which another has a lien (*Rogers* v. *Kennay*, 9 Q. B. 592). The copyright of a newspaper (*Ex p. Foss*, 2 De G. & J. 230). Goods sold for valuable consideration, though with the intention of defeating an execution (*Wood* v. *Dixie*, 7 Q. B. 892); goods validly mortgaged (*Scarlett* v. *Hanson*, 12 Q. B. D. 213; *Re Opera, Lim*, [1891] 3 Ch. 260); unless in either of the last two cases the purchaser, or mortgagee, had notice of the writ being in the hands of the sheriff (19 & 20 Vict. c. 97, s. 1). Goods over which a receiver has been appointed, unless with leave of the Court (*Russell* v. *East Anglian Ry. Co.*, 3 Mac. & G. 104; see *Edwards* v. *E.*, 2 Ch. D. 291). Goods which the debtor holds solely as trustee (*Fenwick* v. *Laycock*, 2 Q. B. 108; *Re Morgan, Pillgrem* v. *P.*, 18 Ch. D. 93; see *Sykes* v. *S.*, L. R. 5 C. P. 113).

Lunatic debtor.

Goods of a lunatic not in the custody of the Court of Lunacy may be taken under a *fi. fa.* (*Re Clarke*, [1898] 1 Ch. 336); but goods in such custody cannot be seized, and can only be made available for the creditor after provision has been made for the maintenance of the lunatic and for costs (*Re Winkle*, [1894] 2 Ch. 519; see *Re Seager Hunt*, [1900] 2 Ch. 54; *Davies* v. *Thomas*, [1900] 2 Ch. 462).

Landlord's rent.

The sheriff is not bound or able to levy under a *fi. fa.* whatever the value of the goods may be, unless the execution creditor first satisfies the landlord's rent (*Cocker* v. *Musgrove*, 9 Q. B. 230; *Risley* v. *Ryle*, 11 M. & W. 16), to the extent of one year's arrears (8 Anne, c. 18, s. 1; see the Execution Act, 1844, s. 67), which is due at the time of taking possession under the writ (*Hoskins* v. *Knight*, 1 M. & S. 245; see *Wintle* v. *Freeman*, 11 Ad. & Ell. 539). As to the usual practice of the sheriff paying the landlord, see *Re Mackenzie*, [1899] 2 Q. B. 575, and as to repayment of an execution creditor who has paid the landlord, *Re Craig, Ex p. Hinchcliffe*, [1916] 2 K. B. 497. And as to the liability of the sheriff to the landlord, see *Thomas* v. *Mirehouse*, 19 Q. B. D. 563; Woodfall, 626, 21st ed. As to cases within the County Courts Act, 1888, s. 160, see *Hughes* v. *Smallwood*, 25 Q. B. D. 306. As to taxes, see Taxes Management Act, 1880, s. 88.

Taxes.

Sale.

Where the goods have been seized but not sold, the judgment creditor may, as soon as the return has been filed, sue out a writ of *venditioni exponas* (R. S. C., Ord. 43, rr. 2, 5; see D. C. P. 861; Chitty's Archbold, 865).

Beneficed clerk.

Where the judgment debtor is a beneficed clerk and has no goods in the bailiwick of the sheriff to whom the writ was directed, the creditor may as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R. S. C., Ord. 43, rr. 3, 4 and 5; see *Allen* v. *Williams*,

1 & 2 Vict. c. 110, s. 12.

2 Sm. & G. 455; Bankruptcy Act, 1914, s. 50 (1); D. C. P. 863; Chitty's Archbold, 1176).

Corporations and companies.

As to execution against corporations and companies, see R. S. C. Ord. 42, r. 31; Chitty's Archbold, 1052, 1070, 14th ed.; and as to execution against companies in liquidation, see Buckley, 10th ed. 336, 496.

Judgment to operate as a charge on real estate.

13. A judgment already entered up, or to be hereafter entered up, against any person in any of her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this Act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing, under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment; [*or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act,*] nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy; [*provided also, that as regards purchasers, mortgagees or creditors, who shall have become*

Charge not to be enforced until after expiration of a year.

Proviso as to purchasers.

such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if this Act had not passed:] provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice.

1 & 2 Vict. c. 110, s. 13.

The words *in italics* were repealed by S. L. R. Act, 1874. The whole section was repealed by L. P. Act, 1925, and the following section (sub-sects. 3 (i) and 4 of which re-enact sect. 2 of the Land Charges Act, 1900, omitting acceptance of office from or under the Crown) substituted. Sub-sect. 3 (iv) replaces part of Judgments Act, 1855, s. 11.

Law of Property Act, 1925.

Judgments, &c., affecting Land.

Equitable charges in right of judgment debt, etc.

195.—(1) Subject as hereinafter mentioned a judgment entered up in the Supreme Court (whether before or after the commencement of this Act) against any person (in this section called a "judgment debtor") shall operate as an equitable charge upon every estate or interest (whether legal or equitable) in all land to or over which the judgment debtor at the date of entry or at any time thereafter is or becomes—

(a) beneficially entitled; or

(b) entitled to exercise a power of disposition for his own benefit without the assent of any other person;

and the judgment shall bind—

(i) the judgment debtor; and

(ii) all persons deriving title under him subsequently to the entry of the judgment; and

(iii) all persons capable of being bound by a disposition by the judgment debtor made after the entry of the judgment, including the issue of his body and all other persons, if any, whom he might, without the assent of another person, have barred from any remainder, reversion or other interest, in the land.

(2) Every judgment creditor shall have the same remedies against the estate or interest in the land so charged or any part thereof as he would have been entitled to if the judgment debtor had power to charge the same, and had by writing, under his hand, agreed to charge the same, with the amount of the judgment debt and interest thereon.

(3) Provided that—

(i) A judgment, whether obtained (on behalf of the

1 & 2 Vict. c. 110, s. 13.

Crown or otherwise) before or after the commencement of this Act, shall not operate as a charge on any interest in land or on the unpaid purchase money for any land unless or until a writ or order, for the purpose of enforcing it, is registered in the register of writs and orders at the Land Registry;

(ii) No judgment creditor shall be entitled to take proceedings to obtain the benefit of his charge until after the expiration of one year from the time of entering up the judgment;

(iii) No such charge shall operate to give the judgment creditor any preference, in case of the bankruptcy of the judgment debtor, unless the judgment has been entered up one year at least before the bankruptcy;

(iv) A judgment against a mortgagee, who is paid off before or at the time of a conveyance of an estate or interest in land to a purchaser, shall not create a charge upon the estate or interest in the land vested in the purchaser by such conveyance.

(4) A recognisance, on behalf of the Crown or otherwise, whether entered into before or after the commencement of this Act, and an inquisition finding a debt due to the Crown, and any obligation or specialty made to or in favour of the Crown, whatever may have been its date, shall not operate as a charge on any interest in land, or on the unpaid purchase money for any land, unless or until a writ or order, for the purpose of enforcing it, is registered in the register of writs and orders at the Land Registry.

(5) In this section "judgment" includes any decree, order, or rule having the effect of a judgment.

(1) *Decisions on sect.* 13 *of the Judgments Act,* 1838...554.
(2) *Legislation as to the Registration of Judgments and Writs*...557.
(3) *Present Methods of enforcing Judgments against Land*..558.
(4) *Crown Debts*...559.
(5) *Priority of Judgments in Administration*...560.

(1) The following cases were decided on sect. 13 of the Judgments Act, 1838:—

Order of Probate Division.

Before the Judicature Acts an order of the Probate Court did not operate as a charge under this section (*Pratt* v. *Bull*, 1 De G. J. & S. 141; *Crispin* v. *Cumano*, L. R. 1 P. & M. 622; as to a decree of the Divorce Court for alimony, see *Ex p. Holden*, 13 C. B. (N.S.) 641; *Sidney* v. *S.* (1867), W. N. 248). Since the Judicature Acts a judgment of the Probate Division operates as a charge under the section (*Re Harrison and Bottomley*, [1899] 1 Ch. 469; see *Oliver* v. *Lowther*, 42 L. T. 47). As to orders of Courts of equity, see sect. 18, *post*, p. 568, and note.

1 & 2 Vict. c. 110, s. 13.

Lands in Middlesex and Yorkshire.

According to the decisions in the case of lands in Middlesex and Yorkshire, the charge under this section did not take effect until registration in the local registry (*Westbrook* v. *Blythe*, 3 El. & Bl. 737; *Johnson* v. *Holdsworth*, 1 Sim. (N.S.) 106; see *Hughes* v. *Lumley*, 4 El. & Bl. 274; *Cathrow* v. *Eade*, 1 Sm. & Giff. 423). By the Land Registry (Middlesex Deeds) Act, 1891, s. 6, it is provided that it shall not be necessary for the validity of any judgment, statute or recognisance, that it should be registered under the Middlesex Registry Act, 1708. The priority of judgments affecting lands in Yorkshire depends on local registration (*Neve* v. *Flood*, 33 Beav. 666; Yorkshire Registries Act, 1884, s. 4, 14). Notice of an earlier unregistered judgment was held immaterial (*Benham* v. *Keane*, 3 D. F. & J. 318; see as to mortgages, *Rolland* v. *Hart*, 6 Ch. 678).

What lands are affected by judgments under this section.

It has been said that sect. 13 included every possible interest in lands of every possible description, except, perhaps, land held in ancient demesne (*Harris* v. *Davison*, 15 Sim. 133). But where an intending purchaser was let into possession before completion, and a judgment creditor of the purchaser obtained a receiver of the purchaser's interest in the land, and subsequently on the vendor paying a sum of money to the purchaser the contract was rescinded and possession delivered up to the vendor, the judgment creditor had no charge under this section (*Ridout* v. *Fowler*, [1904] 2 Ch. 93). The following interests in land have been held to be within the section. Lands of which the debtor is tenant in tail (*Re Anthony, A.* v. *A.*, [1893] 3 Ch. 498; see *Lewis* v. *Duncombe* (*infra*). Leaseholds assigned to the judgment debtor to secure an annuity (*Harris* v. *Davison*, 15 Sim. 133). Land charged with money covenanted to be paid to the debtor (*Russell* v. *M'Cullock*, 1 K. & J. 313, see *Younghusband* v. *Gisborne*, 1 De G. & S. 209). The interest of a mortgagee (*Clare* v. *Wood*, 4 Hare, 81). The interest of a *cestui que trust* in a mortgage investment of a trust fund (*Avison* v. *Holmes*, 1 J. & H. 530). As to a legal estate in remainder, see *Re Harrison and Bottomley*, [1899] 1 Ch. 471. The words referring to land over which the debtor has a disposing power, extend only to the beneficial interest of the debtor therein, such as the interest of an heir subject to the debts of his ancestor (*Kinderley* v. *Jervis*, 22 Beav. 1); and do not include lands comprised in a prior voluntary conveyance (*Beavan* v. *Oxford*, 6 D. M. & G. 509). A tenant in tail in possession has, under these words, been ordered to execute a disentailing deed to give effect to the charge under this section (*Lewis* v. *Duncombe*, 20 Beav. 398; see *Re Anthony, A.* v. *A.*, [1893] 3 Ch. 502. See as to the present law sect. 195 of L. P. Act, 1925 (*supra*), and the definition of "land" in that Act (sect. 205, sub-sect. 1 (ix), *post*, p. 790). As to the effect of a judgment on the lands of a corporation, see *Arnold* v. *Gravesend*, 2 K. & J. 574.

What are not affected.

Sect. 13 did not extend to an ecclesiastical benefice (*Hawkins* v. *Gathercole*, 6 D. M. & G. 1; *Bates* v. *Brothers*, 2 Sm. & Giff. 509; *Long* v. *Storie*, 3 De G. & S. 308; *Metcalf* v. *York*, 1 M. & C. 547); or a share in the proceeds of land devised on an absolute trust for sale (*Thomas* v. *Cross*, 2 Dr. & Sm. 423); or land of which the debtor was mortgagee, but which had become vested by conveyance, in a purchaser or mortgagee for valuable consideration, and the debtor's mortgage paid off thereupon or previously (Judgments Act, 1855, s. 11; see *Greaves* v. *Wilson*, 25 Beav. 434, and p. 553, *ante*).

Nature of the charge created by this section.

It has been said that that which formerly, by force of the Statute of Westminster, 13 Edw. 1, st. 1, c. 18, was a general charge upon lands, by force of this section became a specific charge (*Rolleston* v. *Morton*, 1 Dru. & War. 171, 195; Sugd. V. & P. 663, 11th ed.). So judgment creditors of an insolvent plaintiff, whose estates were

1 & 2 Vict. c. 110, s. 13.

sold by order of Court, were necessary parties to the conveyance (*Hotham* v. *Somerville*, 9 Beav. 63). So also were judgment creditors of the heir of a devisee of land, which had been sold in a suit to administer the real estate of the testator (*Craddock* v. *Piper*, 14 Sim. 310). So also those of a prior purchaser who had entered into possession, but not paid in full, where the land was resold under an order of Court in an action by the vendor (*Greycoat Hospital* v. *Westminster Commrs.*, 1 De G. & J. 531). The charge arising under this section was within the Real Estate Charges Act, 1877 (see now Administration of Estates Act, 1925, s. 35, *ante*) (*Re Anthony, A.* v. *A.*, [1892] 1 Ch. 450). But it was an equitable charge; so it did not vest the rents in the creditor (*Seymour* v. *Lucas*, 1 Dr. & Sm. 177). "Equitable" is added in L. P. Act, s. 195, *supra* (cp. sect. 1, sub-sect. 2 of that Act, p. 598, *post*). So an equitable mortgagee had priority over a subsequent judgment creditor, although the latter might have acquired the legal seisin and possession of the land, under an *elegit*, without notice of the mortgage (*Whitworth* v. *Gaugain*, 1 Phil. 728; *Langton* v. *Horton*, 1 Hare, 561; see the cases as to charging orders quoted under sect. 14, *post*, p. 564). And it was held that a judgment was not such a charge on land as would, by means of registration in Middlesex, take precedence of an unregistered mortgage created before the Act (*Cathrow* v. *Eade*, 1 Sm. & Giff. 423).

Proceedings in equity to enforce judgments against land under this section.

Proceedings in equity to enforce the charge given by this section must be by the person to whom the money is payable under the judgment (*Crowther* v. *C.*, 4 W. R. 351). After a year from entering up his judgment, a creditor might enforce his equitable charge, although a year had not elapsed since registration of the judgment (*Derbyshire Ry. Co.* v. *Bainbrigge*, 15 Beav. 146); but he could not proceed before a year from the entering up of the judgment (*Smith* v. *Hurst*, 10 Hare, 30). And within the year the Court declined to appoint a receiver (*Smith* v. *Hurst*, 1 Coll. C. C. 705); even where fraud was alleged (*Smith* v. *Hurst*, 10 Hare, 30); except where the debtor was entitled to a life interest (*Yescombe* v. *Landor*, 28 Beav. 80; see *Partridge* v. *Foster*, 34 Beav. 1; *Tillett* v. *Pearson*, 22 W. R. 209). Upon a bill of foreclosure filed by a mortgagee after the bankruptcy of his mortgagor, a judgment creditor, who had entered up judgment against the mortgagor less than one year previously to the bankruptcy, was properly made a defendant (*Harrison* v. *Pennell*, 6 W. R. 712). Under sect. 195, sub-sect. 3 of L. P. Act, 1925 (*supra*), re-enacting sect. 2 of Land Charges Act, 1900, registration must now be effected, not of the judgment, but of the writ or order enforcing it. It has been held by the C. A. that on registration of a writ of *elegit* (sect. 11 and notes, *ante*), the judgment creditor obtains a charge on the land of the judgment debtor though the latter's interest is one not capable of being extended under a writ of *elegit* (*Ashburton* v. *Nocton*, [1915] 1 Ch. 274).

As regards the right method of enforcing the charge, the better opinion (arrived at after some conflict of authority: *Footner* v. *Sturgis*, 5 De G. & Sm. 736; *Bull* v. *Faulkner*, 1 De G. & Sm. 685; *Ford* v. *Wastell*, 2 Phil. C. C. 591; *Jones* v. *Bailey*, 17 Beav. 582; *Messer* v. *Boyle*, 21 Beav. 559) appears to be that the remedy is foreclosure, not sale (*Re Owen*, [1894] 3 Ch. 227; *Sadler* v. *Worley*, [1894] 2 Ch. 175). A judgment creditor, who has been in possession under an *elegit*, must account in the same manner as a mortgagee in possession (*Bull* v. *Faulkner*, 1 De G. & S. 685). Judgment creditors were not allowed successive periods of three months each to redeem, but one period of three months was given to them or any of them (*Radcliff* v. *Salmon*, 4 De G. & S. 526; *Stead* v. *Banks*,

5 De G. & S. 560; *Bates* v. *Hillcoat*, 16 Beav. 139). As to proceedings by a tenant by *elegit* to redeem a mortgage, see *post*, p. 559. As to contribution between various portions of the judgment debtor's real estate where some of them had been aliened for value after judgment see 3 Rep. 11 b; *Hartley* v. *O'Flaherty*, Beatty, 61; and see 16 & 17 Car. 2, c. 5; *Averall* v. *Wade*, Lloyd & G. 252; *Handcock* v. *H.*, 1 Ir. Ch. R. (N.S.) 444. **1 & 2 Vict. c. 110, s. 13.**

(2) Legislation as to registration of judgments and writs.

The words of sect. 195, sub-sects. 3 and 4 of L. P. Act, 1925 (*supra*), render it necessary to state in outline the legislation in relation to the registration of judgments and writs.

Dockets.

Prior to the Judgments Act, 1838, judgments, in order to affect lands as to *bona fide* purchasers, had to be docketed under 4 & 5 Will. & M., c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3. These dockets were closed, and judgments docketed directed to be registered under Judgments Act, 1838 (Judgments Act, 1839, ss. 1, 2; see *Bedford* v. *Forbes*, 1 Carr. & K. 33). 1692 to 1838.

By the Judgments Act, 1838, s. 11, the sheriff was empowered under a writ of *elegit* to deliver in execution to the judgment creditor the whole of the judgment debtor's lands. By sect. 13, judgments were made a charge on land. But, as against purchasers, mortgagees or creditors (see as to creditors, *Simpson* v. *Morley*, 2 K. & J. 71), no judgments could affect any land until registered as prescribed by sect. 19. It was necessary to repeat the registration every five years (Judgments Act, 1839, s. 4; Judgments Act, 1855, s. 6). Where these conditions were not complied with a purchaser was not bound even though he had notice (Judgments Act, 1840, s. 2; Judgments Act, 1855, ss. 4, 5). And even where judgments were duly registered, they did not affect purchasers and mortgagees without notice further than a judgment of one of the superior Courts would have done before the Judgments Act, 1838, where such judgment had been docketed according to the then law (Judgments Act, 1839, s. 5). See *Westbrook* v. *Blythe*, 3 E. & B. 737; *Robinson* v *Woodward*, 4 De G. & Sm. 562; *Hughes* v. *Lumley*, 4 E. & B. 274; *Benham* v. *Keane*, 1 J. & H. 685; 3 D. F. & J. 318. See further as to notice, Judgments Act, 1840, s. 2; Judgments Act, 1855, ss. 4, 5; *Nortcliffe* v. *Warburton*, 10 W. R. 635; *Lee* v. *Green*, 6 D. M. & G. 155; *Freer* v. *Hessey*, 22 L. J. Ch. 597. 1838 to 1860.

As to registration and re-registration under above Acts, see, further, *Beavan* v. *Oxford*, 3 Sm. & G. 11; 6 D. M. & G. 492; *Ex p. Ness*, 5 C. B. 155; *Shaw* v. *Neale*, 6 H. L. C. 581; *Re Kensington, Bacon* v. *Ford*, 29 Ch. D. 527.

As to entering satisfaction to registered judgments, see 23 & 24 Vict. c. 115, s. 2; R. S. C., Ord. 61, rr. 26, 27; Cent. Off. Practice Rules, 17; Daniell, Ch. Forms. And as to vacating registration, see *Wells* v. *Gibbs*, 3 Beav. 399; *Ex p. Holden*, 13 C. B. (N.S.) 641.

By the Law of Property Amendment Act, 1860, ss. 1 and 2, no judgments entered up after July 23, 1860, could, as against purchasers or mortgagees, whether with notice or not, affect land, unless (1) execution had been issued and registered in the name of the creditor, and unless (2) such execution had been put in force within three months from the registration (see *Appleton* v. *Sturgis*, 10 W. R. 312; *Wallis* v. *Morris*, 12 W. R. 997). 1860 to 1864.

By the Judgments Act, 1864, no judgment, statute or recognizance entered up after July 29, 1864, could affect land until such land had been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, statute or recognizance (sect. 1). Every writ or other process by virtue whereof any land should have been actually delivered in execution was to be registered in the name of the debtor instead of the creditor, and 1864 to 1888.

1 & 2 Vict. c. 110, s. 13.

no other or prior registration of such judgment, statute or recognizance was to be necessary for any purpose (sect. 3). A sale could be obtained under sect. 4 (*post*, p. 570) by a judgment creditor to whom land had been actually delivered in execution.

Under this statute it was held, that where land had been actually delivered in execution, it was unnecessary to register the judgment, writ, or other process, except to obtain a sale (*Re Pope*, 17 Q. B. D. 743).

1888 to 1900.

By the Land Charges Act, 1888, s. 6, writs and orders affecting land and every delivery in execution in pursuance thereof were made void as against purchasers for value (which included mortgagees), unless registered under that Act.

By sect. 5 of the Land Charges Act, 1900, the above-mentioned provisions as to judgments contained in sect. 19 of the Judgments Act, 1838, in the Judgments Acts, 1839, 1840, and 1855, in the Law of Property Amendment Act, 1860, and in sects. 1, 2 and 3 of the Judgments Act, 1864, were repealed. And by sects. 2 and 3 of the Land Charges Act, 1900, the provisions as to registration contained in sects. 5 and 6 of the Land Charges Act, 1888, were given a wider operation. The material statutory provisions now in force as to the effect of judgments in relation to land are contained in (1) sect. 11 of the Judgments Act, 1838, and sect. 195 of the L. P. Act, 1925 (*ante*, pp. 545, 553); (2) sect. 4 of the Judgments Act, 1864 (*post*, p. 570); and (3) sects. 6 and 7 of the Land Charges Act, 1925 (*post*, pp. 577, 578).

Present law.

(3) Present methods of enforcing judgments against land.

According to the present law, a judgment for payment of money can be enforced by the creditor against the land of the debtor in the following ways:—

(1) Out of the rents and profits; by seizure under a writ of *elegit* (sect. 11 of the Judgments Act, 1838, *ante*, p. 545); or by obtaining an order for a receiver (*Cadogan* v. *Lyric Theatre*, [1894] 3 Ch. 68; see note on Receivership orders under sect. 4 of the Judgments Act, 1864, *post*, p. 571); or, if the judgment is for payment within a limited time, by a writ of sequestration (R. S. C., Ord. 43, r. 6; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Re Rush*, 10 Eq. 442; as to the powers of sequestrators, see *Re Suarez* (*No.* 3), 88 L. J. Ch. 10). To protect his title as against a subsequent purchaser for value, the creditor must register the writ or order under sects. 6 and 7 of the Land Charges Act, 1925, or have registered it under an Act replaced by that Act (see Land Charges Act, 1925, s. 24 (a), *post*, p. 591). By sects. 4 and 14 of the Yorkshire Registries Act, 1884, he has, as to land in Yorkshire, to register the writ or order as an "assurance" in the county register. But by sect. 11 of L. P. Act, 1925, *post*, instruments not transferring or creating a legal estate or creating a charge by way of legal mortgage need not be registered in a local deeds registry. The charge created by a judgment is an equitable one (L. P. Act, 1925, s. 195 (1), p. 553, *ante*).

(2) When a writ or order for the purpose of enforcing the judgment has been obtained (and, *semble*, has been registered) and the land has been "actually delivered in execution," but not before, the creditor may obtain a sale under sect. 4 of the Judgments Act, 1864 (*post*, p. 570).

(3) When a writ or order for the purpose of enforcing the judgment has been obtained and registered, but not before, the charge created by sect. 13 of the Judgments Act, 1838 (now sect. 195 of L. P. Act, 1925), will arise, and may be enforced as above mentioned (see *ante*, p. 556). For this purpose actual delivery in execution is no longer necessary.

(4) Where owing to a prior *elegit* (*Re Cowbridge Ry. Co.*, 5

Eq. 413; see *Guest* v. *Cowbridge Ry. Co.*, 6 Eq. 619), or to a prior legal mortgage (*Beckett* v. *Buckley*, 17 Eq. 435), the land cannot be delivered, a judgment creditor who has issued an *elegit* may bring an action for redemption to remove the legal difficulty (*Thornton* v. *Finch*, 4 Giff. 515; see *Neate* v. *Marlborough*, 3 My. & Cr. 416; *Godfrey* v. *Tucker*, 33 Beav. 280; *Barnes* v. *Thrupp*, 6 W. R. 48; 3 Jur. (N.S.) 1242), and thus enable himself subsequently either to foreclose (*Beckett* v. *Buckley*, 17 Eq. 435), or (after obtaining actual delivery in execution) to sell under sect. 4 of the Judgments Act, 1864 (*ibid.*; *Re Cowbridge Ry. Co.*, 5 Eq. 417). In the redemption action he might possibly obtain a sale under sect. 91 of the L. P. Act, 1925. As to tacking against a judgment creditor who is redeeming, see *Champneys* v. *Burland* (19 W. R. 148). 1 & 2 Vict. c. 110, s. 13.

As to making judgment creditors of the mortgagor parties to a foreclosure action, see *Mildred* v. *Austin* (8 Eq. 220); *Re Bailey* (17 W. R. 393); *Cork* v. *Russell* (13 Eq. 210).

As to enforcing judgments generally, see R. S. C., Ord. 42.

(4) Crown debts.

By 33 Hen. 8, c. 39, and 13 Eliz. c. 4, certain liabilities in respect of Crown debts were imposed on the lands of Crown debtors.

Who are accountants to the Crown.

A recognizance by a guardian is not a debt due to the Crown (*Ex p. Usher*, 1 Rose, 366). The exact form of the bond under 33 Hen. 8, c. 39, was not material (*R.* v. *Ellis*, 4 Exch. 652). A bond entered into by the committee of a lunatic's estate has the same force as a bond under 33 Hen. 8, c. 39 (*R.* v. *Chambers*, 11 M. & W. 776; 2 Coop. temp. Cottenham, 69, n.). 33 Hen. 8, c. 39.

13 Eliz. c. 4.

The statute 13 Eliz. c. 4 enumerated a great many officers of the Crown and other persons. Money "imprest for the use of the Crown" under that statute was money advanced to be employed for the use of the Crown (6 Price, 424). The following persons have been held accountants to the Crown under that statute:—A deputy commissary-general to the forces abroad (*R.* v. *Rawlings*, 12 Price, 834; *R.* v. *Fernandez*, *ibid.*, 862). A commissioner directed by statute to pay money into the bank subject to the orders of the King (*Wilde* v. *Fort*, 4 Taunt. 334). An agent for a fire insurance office in respect of money received for duty (*R.* v. *Wrangham*, 1 Tyr. 383). A receiver of customs is not within the statute (6 Geo. 4, c. 105, s. 13; *ibid.* c. 106, s. 7). Nor is a collector of assessed taxes (*Casberd* v. *Ward*, 6 Price, 411). As to bonds by receivers of customs, see Customs Consolidation Act, 1876, ss. 165—167; and as to bonds by tax collectors, see Taxes Management Act, 1880, ss. 74—77, 118, 119. A clerk of the patents under 3 & 4 Will. 4, c. 84, was held accountable for moneys received by him (*Att.-Gen.* v. *Edmunds*, 6 Eq. 381). Any person receiving money of the Crown becomes an immediate debtor to the Crown (*Re West London Bank*, 38 Ch. D. 367); 13 Eliz. c. 4, was repealed by L. P. (Amdt.) Act, 1924.

When lien of Crown attaches.

Before this Act a bond under 33 Hen. 8, c. 39, bound all lands of the obligor over which he had a disposing power at the time he entered into the bond, even as against a subsequent purchaser for value (*Ellis* v. *R.*, 6 Exch. 921). As to its effect against estates tail, see *Anderson's Case* (7 Rep. 21); *Cecil's Case* (*ibid.* 19). The lien of the Crown under 13 Eliz. c. 4, attached from the time when the owner of the lands became an accountant, so that a sale after acceptance of office might be defeated by a subsequent debt to the Crown (*Nicholls* v. *Howe*, 2 Vern. 389; *R.* v. *Sarum*, Moore, 126; 25 Geo. 3, c. 35). And a purchaser without notice, could not use an attendant term as a protection against the Crown (*R.* v. *Smith*, Sugd. V. & P. 673, 778, 1098, 11th ed.; *How* v. *Nichol*, Pr. Ch. 125; see *R.* v. *St. John*, 2 Price, 317; *R.* v. *Hollier*, 2 Price, 394);

1 & 2 Vict. c. 110, s. 13.

except where the term never was held in trust for the Crown debtor (*R.* v. *Lamb*, 13 Price, 649; M'Clel. 402).

In the case of debtors to the Crown by simple contract the lien of the Crown as against purchasers for value only attached from the time of the debt being put on record (*Casberd* v. *Ward*, 6 Price, 411). So also in the case of a bond not within 33 Hen. 8, c. 39 (*Att.-Gen.* v. *Andrew*, Hard. 23).

What land may be taken under an extent.

The following among other interests in land may be taken under an extent:—Freeholds (*Hatton's Case*, 10 Rep. 55); leaseholds (*Fleetwood's Case*, 8 Rep. 171); rent-charges (*Lillingston's Case*, 7 Rep. 37); an equity of redemption (*R.* v. *Coombes*, 1 Price, 207; *Fector* v. *Philpot*, 12 Price, 197); lands held on trust for the debtor (*Att.-Gen.* v. *Sands*, Hard. 495; *Devonshire's Case*, 11 Rep. 92; 13 Eliz. c. 4, s. 5); lands *bona fide* settled before the lien of the Crown attached, but with a power of revocation (*Coke's Case*, Godb. 289). As to the liability of the heir of a Crown debtor, see Dyer, 67. Copyholds could not be taken under an extent (*R.* v. *Budd*, Parker, 190); nor property which had been *bona fide* assigned to other creditors prior to the time when the debt to the Crown was incurred (*Spears* v. *Lord Advocate*, 6 Cl. & Fin. 180, 189; see *Scott* v. *Scholey*, 8 East, 467; *R.* v. *Sanderson*, 1 Wight. 51; *R.* v. *Lee*, 6 Price, 369). As to the priority of the Crown under an extent, see *Att.-Gen.* v. *Leonard*, 38 Ch. D. 622.

As to how far possible Crown debts were an objection to title, see *Poole* v. *Shergold* (1 Cox, 160); *Wilde* v. *Forte* (4 Taunt. 334).

On the subject of Crown debts, see West on Extents, 8vo., 1817; Manning's Practice of the Court of Exchequer, 8vo., 1827; 5 Jarm. Convey. by Sweet, pp. 64 f, 79; Butl. Co. Litt. 209 a, 18th ed.; Fisher's Digest, tit. Extent.

Old mode of searching for Crown debts.

Before the Judgments Act, 1839, searches for Crown liabilities were made at the Exchequer Office, and amongst the bonds of the receiver-general at the Tax Office (2 Real Prop. Rep. 12). By the Judgments Act, 1839, s. 8, it was enacted as to Crown debts that no judgment, statute, recognizance, inquisition, obligation, or specialty, under 33 Hen. 8, c. 39, or acceptance of office, should affect land as to purchasers or mortgagees, unless registered in the Common Pleas. The Act also contained provisions for re-registration in the case of ordinary judgments.

22 & 23 Vict. c. 35, s. 22.

With respect to Crown judgments, &c. obtained on or before July 5, 1865, the provisions as to re-registration in the Judgments Act, 1839, as amended by the Judgments Act, 1855, were extended to every such judgment, statute, recognizances, inquisition, obligation, specialty or acceptance of office, as is by sect. 8 of the Judgments Act, 1839, required to be registered (Law of Prop. Amendt. Act, 1859, s. 22).

By 28 & 29 Vict. c. 104, ss. 48, 49, Crown Judgments, &c. did not affect land as to purchasers or mortgagees, unless some writ or process of execution in pursuance of such judgment, &c. had been registered before conveyance and payment of the purchase-money.

Satisfaction of Crown debts.

23 & 24 Vict. c. 115, s. 1, provided for the entry of satisfaction of all bonds and other securities given to the Crown. As regards the evidence of release of land from Crown debts, special provision was made by the Judgments Act, 1839, ss. 10, 11, and 23 & 24 Vict. c. 115. See now L. Charges Act, 1925, s. 6 (6), *post*.

Present law.

It will be observed that liabilities to the Crown are included in the provisions of sect. 195 of the L. P. Act, 1925.

(5) Priority of judgment debts in administration.

As regards the preference or priority of payment (in administration) of debts owing on judgments recovered against a deceased person, it was decided before the above-mentioned Act, 4 & 5 Will.

1 & 2 Vict. c. 110, s. 13.

& M. c. 20, that payment by an executor of a simple contract debt before a judgment debt of which he had no notice, was a devastavit (*Littleton* v. *Hibbens*, Cro. Eliz. 793). By 4 & 5 Will. & M. c. 20, judgments not docketed were not to have any preference. By the Judgments Acts, 1838 and 1839, the docket was closed and registration substituted, but no provision was made as to the preference of judgment debts in administration. After those Acts it was held that the old law was thereby revived, and that an administrator had committed a devastavit by paying a simple contract debt before a judgment debt, though he had no notice of the latter (*Fuller* v. *Redman* (No. 1), 26 Beav. 600). This decision led to the passing of sects. 3 and 4 of the Law of Property Amendment Act, 1860, which provided that without registration or re-registration no judgment should have any preference against heirs, executors, or administrators in their administration of estates. And under sect. 3 it was held that an unregistered judgment was not entitled to any priority over simple contract debts (*Van Gheluive* v. *Nerinckx*, 21 Ch. D. 189; *Re Turner, T.* v. *Waller*, 12 W. R. 337; 33 L. J. Ch. 232; *Kemp* v. *Waddingham*, L. R. 1 Q. B. 358; see *Evans* v. *Williams*, 2 Dr. & Sm. 224). Registration, however, was not necessary to give priority in the case of judgments against executors and administrators (*Jennings* v. *Rigby*, 33 Beav. 198; *Re Williams*, 15 Eq. 270).

By sect. 2, sub-sect. 3 of the Land Charges Act, 1900, no entry was to be made in the Register of Judgments kept under sect. 19 of the Judgments Act, 1838 (see R. S. C., Ord. 61, r. 1), except under an order of the Court; and by sect. 5 of the same Act (which is itself repealed by Land Charges Act, 1925, *post*), sects. 3 and 4 of the Law of Property Amendment Act, 1860, were repealed. In the result, it would seem that the old law was revived, and that payment by an executor or administrator out of legal assets of a simple contract debt before a judgment debt, even where he had no notice of the latter, may be a devastavit (see *Fuller* v. *Redman* (No. 1), 26 Beav. 600). Consider Interpretation Act, 1889, s. 38 (2) (a); which, however, does not seem to apply in the present case.

Stock and shares in public funds and public companies belonging to the debtor and standing in his own name to be charged by order of a judge.

14. If any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at Westminster, shall have any government stock, funds, or annuities (*a*), or any stock or shares of or in any public company in England (whether incorporated or not) (*b*) standing in his name in his own right, or in the name of any person in trust for him (*c*), it shall be lawful for a judge of one of the superior Courts (*d*), on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor (*e*); provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*f*).

1 & 2 Vict. c. 110, s. 14.

3 & 4 Vict. c. 82, s. 1.

Dividends, interest, &c.

Stock, &c., in Court.

The Judgments Act, 1840, s. 1, after reciting the above section, declares that the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares as aforesaid as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares: and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to, or out of any such stock, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any Judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities or shares or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

Judgment in respect of which charging order is made.

The judgment in respect of which a charging order is asked must be for an ascertained sum (*Wiggery* v. *Tepper*, 6 Ch. D. 364; *Chadwick* v. *Holt*, 8 D. M. & G. 584); but the sum may be a sum payable at a future date (*Bagnall* v. *Carlton*, 6 Ch. D. 130). A judgment for costs is not sufficient, until they have been taxed (*Wiggery* v. *Tepper, supra; Jones* v. *Williams*, 8 M. & W. 349; *contra, Burns* v. *Irving*, 3 Ch. D. 291). As to an order for payment of money to the credit of a cause, see *Ward* v. *Shakeshaft* (1 Dr. & Sm. 272). On the recission of a receiving order a judgment creditor can obtain a charging order on the balance of funds in the hands of the Official Receiver (*Re Prior*, [1921] 3 K. B. 333). A charging order cannot be made against an executor in respect of judgment recovered against his testator (*Stewart* v. *Rhodes*, [1900] 1 Ch. 386), and leave to issue execution against the executor does not enable such an order to be made (*ibid.*). An order under sect. 109 of the Lunacy Act, 1890, charging costs is not within this section and Ord. 46, r. 1 (*Re Cathcart*, [1893] 1 Ch. 466).

What can be charged.

Annuities.

(*a*) Arrears of a government annuity are not chargeable (*Taylor* v. *Turnbull*, 4 H. & N. 495). Nor is a pension granted by the East India Co. (*Morris* v. *Manesty*, 7 Q. B. 674). As to a charging order on an annuity "payable out of the suitor's fund" by order of the Lord Chancellor, in pursuance of 46 Geo. 3, c. 128, see *Withan* v. *Lynch* (1 Exch. 391).

Public companies within this section.

(*b*) A banking co-partnership, which made returns to the Stamp Office pursuant to the Country Bankers Act, 1826, was within this section (*Macintyre* v. *Connell*, 1 Sim. (N.S.) 225; see *Graham* v. *Connell*, 19 L. J. Ex. 361). It is doubtful whether a mining company on the cost-book principle is within the section (*Nicholls*

v. *Rosewarne*, 6 C. B. (N.S.) 480). Debentures cannot be charged (*Sellar* v. *Charles Bright*, [1904] 2 K. B. 446). **1 & 2 Vict. c. 110, s. 14.**

(*c*) The following interests in stock, &c., can according to decided cases be charged under this section:—A contingent equitable interest in stock (*Baker* v. *Tynte*, 29 L. J. Q. B. 233; *Cragg* v. *Taylor* (2), L. R. 2 Ex. 131); a reversionary interest in stock (*South-Western Co.* v. *Robertson*, 8 Q. B. D. 17); an equity of redemption in stock (*Re Royal Bank of Australia*, 25 L. J. Ch. 649; see *Fuller* v. *Earle*, 7 Ex. 796); stock in Court to the credit of a lunatic debtor (*Horne* v. *Pountain*, 23 Q. B. D. 264; *Re Leavesley*, [1891] 2 Ch. 1; *Re Plenderleith*, [1893] 3 Ch. 332; *Re Brown, Llewellin* v. *Brown*, [1900] 1 Ch. 489); the interest of a legatee in stock standing in the name of the testator (*Errington* v. *Prior*, 10 I. L. R. 79); the interest of the debtor in stock held on trust for him and another (*South Western Co.* v. *Robertson*, 8 Q. B. D. 17; see *Fowler* v. *Churchill*, 11 M. & W. 57). In such last-mentioned case the order need not define the extent of the chargeable interest, the trustees being responsible for giving proper effect to the order (*South Western Co.* v. *Robertson, supra*, where there was a clause of forfeiture on alienation; see *White* v. *O'Grady*, 2 Ir. Ch. R. 333; *Hodgens* v. *H.*, I. R. 11 Eq. 439). Where stock is subject to an imperative trust for conversion at a definite time the interest of the judgment debtor in the proceeds cannot be charged (*Dixon* v. *Wrench*, L. R. 4 Ex. 154; but see *Ideal Bedding* v. *Holland*, [1907] 2 Ch. 168); *secus* where there is no imperative trust for conversion (*Bolland* v. *Young*, [1904] 2 K. B. 831; *Ideal Bedding* v. *Holland, supra*). What interest of judgment debtor can be charged.

The following cannot be charged under this section:—Stock of a deceased judgment debtor in the hands of his representative (*Finney* v. *Hinde*, 4 Q. B. D. 102; *Stewart* v. *Rhodes*, [1900] 1 Ch. 386; *Wallace* v. *M'Cann*, 4 Ir. Eq. R. 522). Stock to which the debtor is entitled as executor, though he is also beneficially interested as legatee (*Taylor* v. *Turnbull*, 4 H. & N. 495; see *Hodgens* v. *Hodgens*, I. R. 11 Eq. 439). Stock or shares of which the debtor is only trustee (*Re Blakeley Ordnance Co.*, 25 W. R. 111; 35 L. T. 617; *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 332; see as to the old practice, *Rogers* v. *Holloway*, 5 Man. & G. 292; *Fuller* v. *Earle*, 7 Ex. 796; *Cragg* v. *Taylor*, L. R. 1 Ex. 148); even where the shares were qualification shares standing in the name of a director, and which according to the articles of association of the company were to be held by him "in his own right" (*Cooper* v. *Griffin*, [1892] 1 Q. B. 740; *Howard* v. *Sadler*, [1893] 1 Q. B. 1; see *Sutton* v. *English Co.*, [1902] 2 Ch. 502). Property of a married woman which she is restrained from anticipating (*Stanley* v. *Stanley*, 7 Ch. D. 589; *Smith* v. *Whitlock*, 34 W. R. 414). Cash in Court to the credit of the judgment debtor (*Brereton* v. *Edwards*, 21 Q. B. D. 488); but such cash can be charged under the general jurisdiction of the Court (*ibid.*; see *Re Bell, Carter* v. *Stadden*, 54 L. T. 370; 34 W. R. 363). Cash in the hands of a trustee for the judgment debtor cannot be charged (*Robinson* v. *Pearce*, 7 Dowl. 93; see *Wallace* v. *M'Cann*, 4 Ir. Eq. R. 522). An order charging an equitable debt could not be obtained (*Horsley* v. *Cox*, 4 Ch. 92); but such a debt can be attached (*Wilson* v. *Dundas* (1875), W. N. 232). What cannot be charged.

(*d*) Charging orders may be made by any judge of the Supreme Court (R. S. C., Ord. 46, r. 1; see *Brereton* v. *Edwards*, 21 Q. B. D. 488); where a judge in chambers refuses an order on the ground that the shares are worthless, the Court will not review his decision (*Wicks* v. *Shanks*, 67 L. T. 609). In the King's Bench Division the order *nisi* may be made by a master, though it cannot be discharged by him (*Mitchell* v. *De Vesey*, 67 L. T. 53). But the order absolute Practice.

1 & 2 Vict. c. 110, s. 14.

must be made by a judge (R. S. C., Ord. 54, r. 12 (*l*)). The person to show cause against making the order absolute must be the person against whom the judgment was recovered. So an executor cannot show cause in the case of a judgment recovered against his testator (*Stewart* v. *Rhodes*, [1900] 1 Ch. 386). The writ in an action to enforce a charging order made under this section cannot be served out of the jurisdiction (*Mority* v. *Stephan*, 58 L. T. 850; 36 W. R. 779; see *Re Gethin*, I. R. 11 Eq. 512). See further as to the practice, Dan. Ch. Pr.; Chit. Arch. 919; *Brown* v. *Bamford* (9 M. & W. 42); *Graham* v. *Connell* (19 L. J. Ex. 361); *Robinson* v. *Burbidge* (9 C. B. 289).

Forms of order.

When the fund is large and the debt small an adequate part only of the fund should be charged (*Horne* v. *Pountain*, 23 Q. B. D. 267; see *Stanley* v. *Bond*, 8 Beav. 50). In the case of a lunatic debtor the order may provide that the charge should not be enforceable till the death of the lunatic or further order (*Re Leavesley*, [1891] 3 Ch. 1). For a form of order charging shares in a company, see *Re Connell* (35 L. J. Ch. 649); *Re Imperial Association* (1868, W. N. 80). For the case of a charging order against a corporation, see *Att.-Gen.* v. *Thetford*, (8 W. R. 467). See further as to forms of orders, Seton, 468 *et seq.*, 7th ed.

Charge operates from date of order *nisi*.

A charging order, when made absolute, operates from the making of the order *nisi* (*Haly* v. *Barry*, 3 Ch. 452; *Brereton* v. *Edwards*, 21 Q. B. D. 488; see *Warburton* v. *Hill*, Kay, 470). A decree for administration subsequent to the order *nisi* will not prevent its being made absolute (*Haly* v. *Barry*, *supra*; see *Stewart* v. *Rhodes*, [1900] 1 Ch. 386).

Effect of charging order.

(*e*) The effect of a charging order depends on the validity of the judgment, not on the capacity of the judgment debtor to give a valid charge (*Re Leavesley*, [1891] 2 Ch. 1). So a charging order founded on a valid judgment against a lunatic is good (*ibid.*; *Horne* v. *Pountain*, 23 Q. B. D. 264), and will be given effect to by the High Court in respect of funds in that Court (*Re Brown, Llewellin* v. *B.*, [1900] 1 Ch. 489). Such an order, however, does not deprive the Court in lunacy of its power to dispose for the benefit of the lunatic of the funds charged (*Re Plenderleith*, [1893] 3 Ch. 332); but when his maintenance is provided for, the creditor will be allowed his legal rights (*Re Seager Hunt*, [1900] 2 Ch. 54). A charging order founded on a judgment for money lent to the judgment debtor during his infancy will have no effect at all (*Re Onslow*, 20 Eq. 677). A charging order may or may not, according to the terms of the gift, determine an interest of the debtor determinable on alienation (*Montefiore* v. *Behrens*, 1 Eq. 171; *Roffey* v. *Bent*, 3 Eq. 759; *Re Kelly, West* v. *Turner*, 59 L. T. 494; see *South Western Co.* v. *Robertson*, 8 Q. B. D. 17). A charging order is not an execution within sect. 40 of the Bankruptcy Act, 1914 (*Re Hutchinson*, 16 Q. B. D. 515). Nor is it a "transaction" protected by sect. 45 of the same Act (*Re O'Shea, Courage* v. *O'S.*, [1895] 1 Ch. 325). After an order has been made charging stock standing in the names of trustees, the bank is still bound to pay the dividends to the trustees, who alone are responsible for the application thereof (*Bristed* v. *Wilkins*, 3 Hare, 235; *Fowler* v. *Churchill*, 11 M. & W. 57, 323; *South Western Co.* v. *Robertson*, 8 Q. B. D. 17).

Effect as against mortgagees.

A charging order only gives to the judgment creditor what the debtor can honestly give him (*Re Anglesey, Galve* v. *Gardner*, [1903] 2 Ch. 732). The order does not give a judgment creditor priority over a prior charge, legal or equitable, even if he has no notice of it (*Re Bell, Carter* v. *Stadden*, 54 L. T. 370; 34 W. R. 363; *Haly* v. *Barry*, 3 Ch. 452; *Brearcliff* v. *Dorrington*, 4 De

C. & S. 122; see *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 338); and even if the mortgage was made after the judgment (*Scott* v. *Hastings*, 4 K. & J. 633; *Dunster* v. *Glengall*, 3 Ir. Ch. R. 47; see *Gray* v. *Stone*, 69 L. T. 282); and (in the case of stock held on trust) even if no notice was given by the mortgagee to the trustees (*Beavan* v. *Oxford*, 6 D. M. & G. 524, 532; *Kinderley* v. *Jervis*, 22 Beav. 28; *Scott* v. *Hastings*, *supra*; see *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, *Id.* 264; overruling *Watts* v. *Porter*, 3 El. & Bl. 743). A surety who, under the Public Money Drainage Act, 1856, is entitled to be recouped for over contribution out of certain stock, has priority over a judgment creditor who has a charging order on such stock (*Silk* v. *Eyre*, I. R. 9 Eq. 393). **1 & 2 Vict. c. 110, s. 14.**

Where a fund in Court had been recovered by the exertions of a solicitor, he was held entitled (in respect of his lien for costs) to priority over a judgment creditor of his client, who had obtained both a charging order and a stop order (*Haymes* v. *Cooper*, 33 Beav. 431). Effect as against solicitor's lien.

(*f*) The proviso does not prevent the creditor from obtaining a stop order as regards dividends accruing within the six months (*Watts* v. *Jefferyes*, 3 Mac. & G. 372; see *Bristed* v. *Wilkins*, 3 Hare, 235), and during the six months a receiver may be appointed (*Re Kelly*, *West* v. *Turner*, 59 L. T. 498). Final proviso

The remedy of the judgment creditor who has obtained a charging order is sale, not foreclosure (*D'Auvergne* v. *Cooper*, [1899] W. N. 256; see *Ricketts* v. *Ricketts*, [1891] W. N. 29). Such a sale can only be ordered in a separate action brought for the purpose (*Leggott* v. *Western*, 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, [1903] 1 K. B. 534), which may be commenced by originating summons under R. S. C., Ord. 55, r. 5 a (*Cohen* v. *Beadell*, 92 L. T. Jo. 250). A charging order, after it has been made absolute, is not within the proviso in sect. 15 (*post*), and cannot be rescinded (*Jeffreys* v. *Reynolds*, 48 L. T. 358; *Drew* v. *Willis*, [1891] 1 Q. B. 450). A judgment creditor may, however, be restrained from proceeding on a charging order if improperly obtained (*Leese* v. *Martin*, 17 Eq. 224). Enforcement of order.

Where stock is in Court to the credit of the debtor, a charging order, made by any judge of the High Court and duly notified to the paymaster-general, will bind it without any stop order (*Brereton* v. *Edwards*, 21 Q. B. D. 488; S. C. Funds Rules, 99). A stop order may be obtained without any preliminary charging order having been made (*Hopewell* v. *Barnes*, 1 Ch. D. 630; *Shaw* v. *Hudson*, 48 L. J. Ch. 689). See further as to stop orders, R. S. C., Ord. 46, rr. 12 and 13, and the forms in Seton, 7th ed. 483 *et seq.* Stop orders.

In addition to powers contained in the above sections, charging orders may be made by way of equitable execution under the general equitable jurisdiction of the Court. Such orders have been made in the case of cash in Court (*Brereton* v. *Edwards*, 21 Q. B. D. 488), and in the case of the assets of a firm in the hands of a receiver (*Kewney* v. *Attrill*, 34 Ch. D. 345; *Re Cardus*, *Armstrong* v. *Paris* (1888), W. N. 17). Charging orders under other jurisdiction. Equitable execution.

In the case of a judgment against a partner the partnership assets cannot be taken in execution, but an order charging his interest in the partnership may be obtained (Partnership Act, 1890, s. 23). Such an order is not a transaction protected by sect. 45 of the Bankruptcy Act, 1914 (*Wild* v. *Southwood*, [1897] 1 Q. B. 317). The section applies in the case of foreign firms having a branch in England (*Brown*, *Janson & Co.* v. *Hutchinson*, [1895] 1 Q. B. 737). Partnership.

1 & 2 Vict. c. 110, s. 14.

Accounts should only be directed under this section under special circumstances (*S. C.*, [1895] 2 Q. B. 126). Such an order was enforced by sale in *Re Seager Hunt* ([1900] 2 Ch. 54). See generally, as to the practice, R. S. C. Ord. 46, rr. 1 a, 1 b.

Costs in Lunacy.

The costs of proceedings in lunacy may be charged on the property of the lunatic or alleged lunatic (Lunacy Act, 1890, s. 109; *Re Cathcart*, [1893] 1 Ch. 466).

Order of Judge to be made in the first instance ex parte, and on notice to the bank or company to operate as a distringas.

15. [*And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted that*] every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain [*the Governor and Company of*] the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and [*that*] if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and [*that*] no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, [*that*] unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.

See the note to preceding section. The words in italics have been repealed by the Stat. Law Rev. Act, 1874. For the notice which has now been substituted for the old writ of distringas, see R. S. C., Ord. 46, r. 3 *et seq.* 1 & 2 Vict. c. 110, s. 15.

[*Sect.* 16 *as to taking the body of a debtor was repealed by S. L. R. Act,* 1874.]

17. Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment [*or from the time of the commencement of this Act in cases of judgments then entered up and not carrying interest,*] until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. Judgment debts to carry interest.

The words in *italics* were repealed by the Civil Procedure Acts Repeal Act, 1879.

Formerly a judgment did not carry interest, but interest might be recovered in the shape of damages (*Gaunt* v. *Taylor*, 3 M. & K. 302).

A judgment given for securing an annuity carries interest under this section (*Knight* v. *Bowyer*, 4 De G. & J. 619). Where a judgment was entered by consent for a sum to be paid by half-yearly instalments, no interest was payable so long as the instalments were duly paid (*Caudery* v. *Finnerty*, 66 L. T. 684). A judgment of a county court does not carry interest (*R.* v. *Essex*, 18 Q. B. D. 704).

The interest payable under this section is a debt due from the judgment debtor (*Re Clagett*, 36 W. R. 653); and may be included in a bankruptcy notice on the judgment (*Re Lehmann*, 62 L. T. 941). On the recovery of judgment on a covenant the covenant is merged in the judgment (*Ex p. Fewings*, 25 Ch. D. 355). But a mortgagee may on the construction of his deed be entitled to retain his security until paid interest at a rate higher than 4 per cent. (*Economic Society* v. *Usborne*, [1902] A. C. 147; see cases quoted, *ante*, p. 238). The interest given by this section runs, if the judgment is pronounced in Court, from that date (R. S. C. Ord. 41, r. 3; Ord. 42, r. 16), otherwise from the date of the entering up (R. S. C. Ord. 41, rr. 3, 4; Ord. 42, r. 16).

The judgment carries interest until satisfaction. As to when a judgment at law is satisfied for the purpose of carrying interest, see *Sinclair* v. *G. E. Ry. Co.* (L. R. 5 C. P. 391).

Where execution is delayed by an appeal, interest is given under R. S. C. Ord. 58, r. 19. Interest where the judgment of a colonial court is reversed by the Privy Council is dealt with in *Rodger* v. *Comptoir d'Escompte* (L. R. 3 P. C. 465). Appeal.

This section applies to judgments as well for costs as for the subject-matter of the action (*Pitcher* v. *Roberts*, 12 L. J. Q. B. 178; see *Newton* v. *Conyngham*, 17 L. J. C. P. 288); interest running in the absence of special order, from the date of the judgment (*Pyman* v. *Burt* (1884), W. N. 100; *Landowners Co.* v. *Ashford*, 33 W. R. 41; *Re London Wharfing Co.*, 53 L. T. 112; 33 W. R. 836; *Boswell* v. *Coaks*, 57 L. T. 742; 36 W. R. 65; *Taylor* v. *Roe*, [1894] 1 Ch. 413). The section does not apply where the costs are directed to be paid out of an estate, as in an administration action (*Re Marsden, Withington* v. *Neumann*, 40 Ch. D. 475; *Att.-Gen.* v. *Nethercote*, 11 Sim. 529; see the Solicitors Act, Costs.

1 & 2 Vict. c. 110, s. 17.

1860, s. 27). Nor does the section apply to costs given in a foreclosure action (*Eardley* v. *Knight*, 41 Ch. D. 537); but where in such a case the costs are ordered to be added to the security, then, independently of this section, interest at 4 per cent. runs from the date of the taxing master's certificate (*ibid.*; *Lippard* v. *Ricketts*, 14 Eq. 291). Where upon the C. A. reversing an order the defendant paid costs to the plaintiff, and the original order was afterwards restored by the H. L. the defendant was entitled to be repaid those costs with interest (*Ashworth* v. *English Co.*, [1904] 1 Ch. 704). See further as to the payment of interest on costs on an appeal, *Edge* v. *Gallon* (1899, W. N. 137).

See also as to payment as between solicitor and client of interest on costs, Solicitors' Remuneration Act, 1881, Ord. 7; *Blair* v. *Cordner* (19 Q. B. D. 516).

See further the note as to interest generally, *ante*, p. 236.

Decrees and orders of Courts of equity, &c., to have effect of judgments.

18. All decrees or orders of courts of equity, and all rules of courts of common law, [*and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy,*] and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, [*and by the Lord Chancellor and the court of review in matters of bankruptcy,*] and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid.

The words in *italics* were repealed by the S. L. Rev. Act, 1874.

This section is extended to the equity court of Durham as to lands within its jurisdiction (Judgments Act, 1855, s. 2). As to enforcing a judgment of the Durham Court against land outside its jurisdiction, see Palatine Court of Durham Act, 1889, s. 3. As to the Lancaster Court, see the Court of Chancery of Lancaster Act, 1850, s. 24.

Cases under this section.

A decree ordering a defendant to pay a sum of money, interest and costs, when ascertained, was held to be within this section (*Beaufort* v. *Phillips*, 1 De G. & Sm. 321). Also a judgment entered up under the Solicitors Act, 1843, s. 43 (*Griffiths* v. *Hughes*, 16 M. & W. 809); and an interlocutory order for payment of costs by one person to another (*Taylor* v. *Roe*, [1894] 1 Ch. 413); but not a decree for an account and payment of what should be found due (*Chadwick* v. *Holt*, 8 D. M. & G. 584; *Garner* v. *Briggs*, 6 W. R. 378); nor an order for a foreclosure (*Burrows* v. *Holley*, 35 Ch. D. 123); nor the chief clerk's certificate finding money to be due to a party, though adopted by the judge (*Mansfield* v. *Ogle*, 4 De G. & J. 38); nor a decree directing payment to the credit of a cause

(*Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269; *Ward* v. *Docker*, 5 Jur. (N.S.) 1287; compare *Re Leeds Bank*, 1 Ch. 150; *Johnson* v. *Burgess*, 15 Eq. 398; see *Gibbs* v. *Pike*, 9 M. & W. 351; see *Ex p. Hammond Brown*, 67 L. T. 234). As to enforcing a decree in the last-mentioned form, see R. S. C. Ord. 42, r. 4; *Re Coney, Coney* v. *Bennett*, 29 Ch. D. 993; *Re Whiteley, W.* v. *Learoyd*, 56 L. T. 846; *De la Pole* v. *Dick*, 29 Ch. D. 351. A rule for taxation of costs, and an allocatur of the master, did not amount to a judgment within this section (*Shaw* v. *Neale*, 6 H. L. C. 581); nor a judge's order for payment of money obtained *ex p.* (*Richards* v. *Patterson*, 8 M. & W. 313; see *Neale* v. *Postlethwaite*, 8 Dowl. P. C. 100).

Present practice as to enforcement of judgments or orders.

By the Jud. Act, 1873 (see sect. 16), the jurisdiction of the Court of Chancery and of the Superior Courts of common law was transferred to the High Court. And under R. S. C. Ord. 42, r 3. a judgment of the High Court for the payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction was transferred by the Jud. Act, 1873, might have been enforced at the time of the passing thereof. Under R. S. C. Ord. 42, r. 24, every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect. Any person not a party to a cause or matter in whose favour any order is made may enforce such order by the same process as if he were a party, and a judgment or order may be enforced against him as if he were a party (R. S. C. Ord. 42, r. 26). By sects 93 and 94 of the Bankruptcy Act, 1883, the Court of Bankruptcy was united with the Supreme Court. And under the Bankruptcy Rules, 1915, No. 91, every order of the Court in bankruptcy may be enforced as if it were a judgment to the same effect (see also r. 126).

Orders in bankruptcy.

Execution.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, so soon as they are payable, be entitled to execution (R. S. C. Ord. 42, r. 17; see before this rule *Doe* v. *Barrell*, 10 Q. B. 531; *Doe* v. *Hampson*, 5 Dowl. & L. 484; *Wallis* v. *Sheffield*, 3 Jur. 1002; *Hill* v. *Brown*, 16 M. & W. 796). And where costs are given to be ascertained by taxation, a separate writ may be issued for them when taxed (R. S. C. Ord. 42, r. 18; *Harris* v. *Jewell* (1883), W. N. 216; see before this rule *Jones* v. *Williams*, 8 M. & W. 349; *Hodgson* v. *Patterson*, 5 Scott, N. R. 76; *Cetti* v. *Bartlett*, 9 M. & W. 840). As to a judgment on a condition, see R. S. C. Ord. 42, r. 9; *Gibbs* v. *Flight* (13 C. B. 803).

Awards.

Under the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein, has the same effect as if it had been made an order of Court (sect. 1), and an award may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect (sect. 12).

For the older cases as to enforcing awards under this section, see *Jones* v. *Williams* (11 Ad. & Ell. 175); *Dickenson* v. *Allsop* (13 M. & W. 722); *Fawcett* v. *E. C. Ry. Co.* (6 Dowl. & L. 54); *Mackenzie* v. *Sligo Ry. Co.* (9 C. B. 250); *Lambe* v. *Jones* (9 C. B. (N.S.) 478); *Lloyd* v. *Harris* (8 C. B. 63).

[*Sect.* 19, *providing for the registration of judgments, was repealed by the Land Charges Act*, 1900.

Sect. 20, *providing for new or altered writs to give effect to the Judgments Act*, 1838, *was repealed by the Civil Procedure Acts Repeal Act*, 1879. *See now R. S. C. Ord.* 42, *r.* 14.

1 & 2 Vict c. 110, s. 18.

Sect. 21 *extended the provisions of the Judgments Act*, 1838, *to the Common Law Courts of Lancaster and Durham, the jurisdiction of which was transferred to the High Court by the Judicature Act*, 1873, *s.* 16.

Sect. 22 *contains provisions for the removal of judgments of inferior courts into the High Court for the purpose of enforcement.*]

II.—The Judgments Act, 1864.

27 & 28 Vict. c. 112, ss. 4—7.

27 & 28 Vict. c. 112, s. 4.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

4. Every creditor (*g*) to whom any land of his debtor shall have been actually delivered in execution (*h*) by virtue of any such judgment (*i*), statute, or recognisance [*and whose writ or other process of execution shall be duly registered*], shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of the debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper (*k*); and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Land Charges Acts, 1900 and 1925.

(*g*) The Land Charges Act, 1900, repealed sects. 1—3 of the present Act and also the words in the above section printed in *italics*. By L. P. Act, 1925, s. 195 (3), *ante*, re-enacting sect. 2 of the Land Charges Act, 1900, no judgment can operate as a charge on land until a writ or order for enforcing it has been registered under sect. 6 of the Land Charges Act, 1925, *post*, re-enacting sect. 5 of the Land Charges Act, 1888. Having regard to this provision and to the unrepealed words of the present section "while the registry of such writ or process shall continue in force," it would seem that before a judgment creditor can obtain an order for sale under the section, he must still obtain and register a writ or order for enforcing his judgment.

Who is a creditor.

A plaintiff in an administration suit who had obtained an order for payment into Court, and issued sequestration, was not a creditor within this section (*Johnson* v. *Burgess*, 15 Eq. 398).

Actual delivery necessary.

(*h*) A sale has been refused where there had been no delivery (*Re Cowbridge Ry. Co.*, 5 Eq. 413; see *Guest* v. *Cowbridge Ry. Co.*, 6 Eq. 619; *Re Newcastle*, 8 Eq. 700; *Kidd* v. *Tallentire* (1877), W. N. 21).

(*i*) As regards the question, what amounts to actual delivery in execution within the present section, the decisions under (the repealed) sect. 1 of the Judgments Act, 1864, appear to apply. That section provided that no judgment, statute or recognizance should affect land until such land should have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance. And under that section the following were held to amount to actual delivery in execution, viz.:—The return of the sheriff to a writ of elegit, the land not having been entered on (*Champneys* v. *Burland*, 19 W. R. 148); delivery of the seisin before the return (*Re Hobson*, 55 L. T. 225); sequestration (*Re Rush*, 10 Eq. 442). But not (as regards freeholds) the mere issue of an elegit which cannot be executed, because the land is already taken under a prior elegit (*Re Cowbridge Ry. Co.*, 5 Eq. 413; *Hatton* v. *Haywood*, 9 Ch. 229), nor (as regards an equitable interest in leaseholds) the issue and registration of a *fi. fa.* (*Backhouse* v. *Siddle*, 38 L. T. 487). **27 & 28 Vict. c. 112, s. 4.** Actual delivery in execution.

Further, as regards a receivership order, it was held that this amounted to actual delivery of the land in execution within sect. 1 of the Judgments Act, 1864 (*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 293; *Ex p. Evans*, 13 Ch. D. 257; *Re Pope*, 17 Q. B. D. 751). See *Blackman* v. *Fysh*, [1892] 3 Ch. 209; and *Thompson* v. *Gill*, [1903] 1 K. B. 769, where the appointment of a receiver amounted to "execution" within sect. 4 of the Judgments Extension Act, 1868. But in the case of a legal estate in remainder the appointment of a receiver was not an actual delivery in execution (*Re Harrison and Bottomley*, [1899] 1 Ch. 465; see *Jones* v. *Barnett*, [1900] 1 Ch. 370). Receivership order.

It has been laid down generally, in a case where a judgment was sought to be enforced against land, that the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law (*Re Shephard, Atkins* v. *S.*, 43 Ch. D. 136; *Levasseur* v. *Mason*, [1891] 2 Q. B. 79). There is no jurisdiction to appoint a receiver merely because it would be more convenient than the usual mode of execution (*Harris* v. *Beauchamp*, [1894] 1 Q. B. 801; *Morgan* v. *Hart*, [1914] 2 K. B. 183; see *Manchester Co.* v. *Parkinson*, 22 Q. B. D. 173). A receiver has been appointed—(1) where legal delivery in execution of land was impossible owing to a legal impediment, such as a legal mortgage (*Anglo-Italian Bank* v. *Davies, supra; Smith* v. *Cowell*, 6 Q. B. D. 75; *Chatterton* v. *Watney*, 17 Ch. D. 261; *Cadogan* v. *Lyric Theatre*, [1894] 3 Ch. 338; see the cases where the legal estate was in trustees; *Wells* v. *Kilpin*, 18 Eq. 298; *Tillett* v. *Pearson*, 43 L. J. Ch. 93); (2) where the judgment debtor's interest in land was that of a purchaser who had not completed (*Ridout* v. *Fowler*, [1904] 1 Ch. 659); (3) of a legal remainder in real estate (*Re Harrison and Bottomley*, [1899] 1 Ch. 465; see *Re Hamilton*, 31 Ch. D. 294; *Cadman* v. *C.*, 33 Ch. D. 400; *Re Badger*, [1913] 1 Ch. 385, and compare the cases where a receiver has been appointed of reversionary interests in personalty, *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Macnicoll* v. *Parnell*, 35 W. R. 773; *Tyrrell* v. *Painton*, [1895] 1 Q. B. 202; *Flegg* v. *Prentiss*, [1892] 2 Ch. 428; *Beamish* v. *Stephan*, 18 L. R. Ir. 319; *Ideal Bedding* v. *Holland*, [1907] 2 Ch. 157). In the case of equitable interests in land a receiver may be appointed by a County Court (*R.* v. *Selfe*, [1908] 2 K. B. 121). Receivership orders as to land, generally.

A receivership order as regards land obtained by a judgment creditor made him a secured creditor in bankruptcy (*Ex p. Evans* 13 Ch. D. 252); *secus* as regards personal estate (*Re Anglesey, Galve* v. *Gardner*, [1903] 2 Ch. 730).

(*k*) An order was made under this section for the sale of lands

27 & 28 Vict. c. 112, s. 4.

of a railway company (*Re Bishop's Waltham Ry. Co.*, 14 W. R. 1008); on appeal, the Court expressed an opinion that the railway was not saleable, and directed inquiries as to the nature of the company's interest (*S. C.*, 2 Ch. 382). Superfluous lands belonging to a railway company have been ordered to be sold (*Re Calne Ry. Co.*, 9 Eq. 658; *Re Hull and Hornsea Ry. Co.*, 2 Eq. 262; *Ex p. Grissell*, 2 Ch. 385; *Re Ogilvie*, 7 Ch. 174; *Re Hull and Barnsley Ry. Co.*, 40 Ch. D. 119). Debenture holders have not under the Railway Cos. Act, 1867, s. 23, a charge on surplus land in priority to creditors selling under the present section (*Re Hull and Barnsley Ry. Co., supra*). As to schemes of arrangement by railway companies and the restraining of actions and executions in such a case, see Railway Cos. Act, 1867; *Re Cambrian Ry. Co.* (3 Ch. 278); *Re Potteries, &c. Ry. Co.* (5 Ch. 67).

Lands of a railway company.

Practice.

The application for a sale should be made by originating summons (R. S. C. Ord. 55, r. 9B). If made by petition, only the costs of a summons will be allowed (*Re Harrison and Bottomley*, [1899] 1 Ch. 465; *Re Martin and Varlow*, 43 W. R. 247). Where the land had been delivered in execution the Court refused to appoint a receiver until sale (*Re Nixon* (1886), W. N. 191).

Inquiries.

Inquiries were dispensed with where sufficient evidence was adduced at the hearing of the petition (*Re Bithray*, 61 L. T. 383; 38 W. R. 60; *Re Calne Ry. Co.*, 9 Eq. 658). For general form of order with inquiries, see Seton, 6th ed. 2062 *et seq.*; *Re Cowper* (60 L. T. 95; 37 W. R. 330); *Re Holder* (1890, W. N. 55); *Howson* v. *Trant* (21 W. R. 781). As to inquiries where an official liquidator petitioned for sale of the lands of a contributory, see *Re Kirby* (14 L. T. 615); and as to inquiries in other cases, see *Ex p. Clark* (6 N. R. 335).

As to service on other judgment creditors, see sect. 5, *infra*.

Where there are other creditors, notice of sale to be served upon them.

5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognisance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities.

The priorities of judgment creditors *inter se* are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff (*Guest* v. *Cowbridge Ry. Co.*, 6 Eq. 619).

Parties claiming interest through debtor bound by order for sale.

6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Extent of Act.

7. This Act shall not extend to Ireland.

III—The Land Charges Act, 1925.

15 Geo. 5, c. 22.

An Act to consolidate the enactments relating to the registration of pending actions, annuities, writs, orders, deeds of arrangement and land charges, and to searches. [9th April, 1925.]

Preliminary.

15 Geo. 5, c. 22, s. 1.

Registers at the land registry.

1.—(1) The registrar (*a*) shall, subject as provided in this Act in regard to the register of annuities, continue to keep at the registry (*a*) in the prescribed manner the following registers, namely—

(a) a register of pending actions;

(b) a register of annuities;

(c) a register of writs and orders affecting land;

(d) a register of deeds of arrangement affecting land; and

(e) a register of land charges.

(2) An alphabetical index, in the prescribed form, shall be kept at the registry of all entries made in any register kept at the registry pursuant to this Act.

(3) Every application to register shall be in the prescribed form and shall contain the prescribed particulars.

(*a*) *I.e.*, the Chief Land Registrar and His Majesty's Land Registry (sect. 20 (10), *post*). For the rules issued under the Act see p. 592, *post*, and as to the application of the Act to registered land, sect. 23, *post*, and as to priority notices p. 594, *post*.

Part I.

Pending Actions.

Register of pending actions.

2.—(1) A pending action, that is to say, any action, information or proceeding pending in court relating to land or any interest in or charge on land, and a petition in bankruptcy filed after the commencement of this Act, may be registered in the register of pending actions.

(2) Subject to general rules, every application to register a pending action shall contain particulars of—

(a) the name, address and description of the estate owner or other person whose estate or interest is intended to be affected thereby; and

(b) the court in which the action, information or proceeding was commenced or filed; and

(c) the title of the action, information or proceeding; and

(d) the day when the action, information or proceeding was commenced or filed.

15 Geo. 5, c. 22, s. 2.

(3) The registrar shall forthwith enter the particulars in the register, in the name of the estate owner or other person whose estate or interest is intended to be affected.

(4) In the case of a petition in bankruptcy filed against a firm, the application to register the pending action shall state the names and addresses of the partners, and the registration shall be effected against each partner as well as against the firm.

(5) No fee shall be charged for the registration of a petition in bankruptcy as a pending action if the application therefor is made by the registrar of the court in which the petition is filed.

(6) The court, if it thinks fit, may, upon the determination of the proceedings, or during the pendency thereof if satisfied that the proceedings are not prosecuted in good faith, make an order vacating the registration of the pending action, and direct the party on whose behalf the registration was made to pay all or any of the costs and expenses occasioned by the registration and vacating thereof.

(7) When an office copy of an order of discharge or an acknowledgment of satisfaction in the prescribed form is lodged with the registrar, he may enter discharge or satisfaction of the registered pending action to which it refers, and may issue a certificate in the prescribed form of such discharge or satisfaction.

(8) The registration of a pending action shall cease to have effect at the expiration of five years from the date of registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of renewal.

Protection of purchasers against unregistered pending actions.

3.—(1) A pending action shall not bind a purchaser without express notice thereof unless it is for the time being registered pursuant to this Part of this Act:

Provided that as respects a petition in bankruptcy, this subsection only applies in favour of a purchaser of a legal estate in good faith, for money or money's worth, without notice of an available act of bankruptcy.

(2) As respects any transfer or creation of a legal estate, a petition in bankruptcy filed after the commencement of this Act, which is not for the time being registered as a pending action, shall not be notice or evidence of any act of bankruptcy therein alleged.

(3) The title of a trustee in bankruptcy acquired after the commencement of this Act shall be void as against a purchaser of a legal estate in good faith for money or money's worth without notice of an available act of bankruptcy claiming under a conveyance made after the date of registration of the petition in bankruptcy as a pending

action, unless, at the date of the conveyance, either the registration of the pending action is in force, or the receiving order is registered pursuant to Part III. of this Act. **15 Geo. 5, c. 22, s. 3.**

Re-registration.

Sects. 2 and 3 re-enact sects. 4 and 7 of the Judgments Act, 1839, sect. 2 of the Crown Debts and Judgments Act, 1860, and sect. 2 of the Lis Pendens Act, 1867; the first-named being represented by sect. 2, sub-sects. 1, 2 and 8, and sect. 3, sub-sect. 1; the second by sect. 2, sub-sect. 7; and the third by sect. 2, sub-sect. 6. The provisions as to petitions in bankruptcy are new. As to sect. 4 of the Judgments Act, 1839, which provided that judgments after five years from entry on the register should be void unless re-entered, see *Beavan* v. *Oxford*, 6 D. M. & G. 492; *Shaw* v. *Neale*, 6 H. L. C. 581. It will be found set out at length in Shelf. R. P. S. 8th ed. 600. It applied since 1900 to *lis pendens* only.

Meaning of *lis pendens*.

Lis pendens affects a purchaser not because it amounts to notice, but because the law does not allow one party, *pendente lite*, to alienate the property in dispute so as to affect his opponent (*Bellamy* v. *Sabine*, 1 De G. & J. 578; *Price* v. *P.*, 35 Ch. D. 302). There should be no registration as a *lis pendens*, unless a claim is made in the proceeding against some specific property (*Ex p. Thornton*, 2 Ch. 178). As to the doctrine of *lis pendens* generally, see *Bellamy* v. *Sabine* (1 De G. & J. 566); *Kinsman* v. *K.* (1 R. & M. 617); *Wigram* v. *Buckley* ([1894] 3 Ch. 483). As to the protection afforded by registration, see *Beyfus* v. *Bullock* (7 Eq. 391). And as to negligence on the part of a solicitor for not registering a *lis pendens*, see *Plant* v. *Pearman* (20 W. R. 314).

What is *lis pendens*.

An order under sect. 7 of the S. L. Act, 1884 (see L. P. Act, 1925, s. 29, *post*) might be registered as a *lis pendens*. In the following cases the proceeding was held to be a *lis pendens*: a suit to establish a will (*Garth* v. *Ward*, 2 Atk. 174); a redemption action by a mortgagor (*ibid.*); a foreclosure action by a mortgagee (*Winchester* v. *Paine*, 11 Ves. 194); an action for specific performance (*Baxter* v. *Middleton*, [1898] 1 Ch. 313). A case where there are questions between co-defendants may be a *lis pendens*, as regards a purchaser from one of them (*Tyler* v. *Thomas*, 25 Beav. 47; see *Bellamy* v. *Sabine*, 1 De G. & J. 566). When debts were charged upon real estate, a creditor's action to administer real and personal estate, if registered as a *lis pendens*, would give the plaintiff priority over the assign of any defendant entitled to real estate under the will, except when such assign had a right to suppose that such defendant was selling to pay debts (*Price* v. *P.*, 35 Ch. D. 304). When debts were not charged, registration of such an action would give priority, when, and only when, the real estate sought to be charged was sufficiently indicated; the above exception, however, applying in this case also (*ibid.*, 305). The registration as a *lis pendens* of an English action affected lands in Scotland which were the subject-matter of the action (*Huntley* v. *Gaskell*, [1905] 2 Ch. 656). The present Act extends to England and Wales only (sect. 26, sub-sect. 3, *post*).

What is not *lis pendens*.

In the following cases the proceeding was held not to be a *lis pendens*. An action relating to money secured on the land (*Worsley* v. *Scarborough*, 2 Atk. 392; see, however, *Norris* v. *Stuart*, 16 Beav. 359). A partnership action, as against the real estate of one of the partners (*Ex p. Thornton*, 2 Ch. 176). A suit for a divorce is not a *lis pendens*, as regards the property included in the marriage settlements, until decree (*Wigney* v. *W.*, 7 P. D. 228). After decree and before execution there is no *lis pendens* (*Kinsman* v. *K.*, 1 R. & M. 617; *Worsley* v. *Scarborough*, 3 Atk. 392), unless the decree is only for an account, and is not final (*Worsley* v. *Scar-*

15 Geo. 5, c. 22, s. 3.

borough, supra). The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land (*Wigram* v. *Buckley*, [1894] 3 Ch. 483; see *Berry* v. *Gibbons*, 8 Ch. 747).

Vacating registration.

Registration was vacated under sect. 2 of the Lis Pendens Act, 1867, where plaintiff did not appear at trial (*Reilly* v. *Richardson*, 43 S. J. 457). An order under that section might be made upon separate motion (*Clutton* v. *Lee*, 7 Ch. D. 541, n.; *Pooley* v. *Bosanquet*, *ibid.*; *Jervis* v. *Berridge*, 23 W. R. 43), or might be included in the judgment dismissing the action (*Baxter* v. *Middleton*, [1893] 1 Ch. 313; where the order was made "unless an appeal is set down within a fortnight"). Registration against a person not party to the action may be vacated (*Schofield* v. *Solomon*, 52 L. T. 679; 54 L. J. Ch. 1101). See as to cancelling registration, L. P. Act, 1925, s. 43, *post*.

Palatine Courts.

With respect to land within the jurisdiction of a Palatine Court, no *lis pendens* bound purchasers unless registered in the Palatine Court (Judgments Act, 1855, s. 3; see Land Charges Act, 1900, s. 5 and schedule). These provisions are repealed by the present Act. The definition of "Court" (sect. 20, sub-sect. 2 (*post*)) includes the Palatine Courts of Lancaster and Durham where they have jurisdiction.

Purchasers.

For definition see sect. 20, sub-sect. 8 (*post*). Sect. 198 of the L. P. Act, 1925, *post*, p. 784, makes registration under the present Act, or any Act which it replaces, actual notice for all purposes. See, also, sect. 199 of that Act. Sect. 45 of the Bankruptcy Act, 1914 (replacing sect. 49 of that of 1883) protects *bona fide* transactions before the date of a receiving order without notice of an available act of bankruptcy. See, as to registration of receiving orders, sect. 6, *post*.

Particulars to be entered.

Sect. 7 of the Judgments Act, 1839, required the entry of "the name and the usual or last-known place of abode, and the title, trade or profession" of the person whose estate was to be affected. It was held that entry under initials was sufficient if the Christian names were not known, and that if there was no title, trade or profession the fact need not be stated (*Dunn* v. *Chapman*, [1920] 2 Ch. 474).

Part II.

Annuities.

Register of annuities.

4.—(1) No annuity shall be entered in the register of annuities after the commencement of this Act.

(2) An annuity registered before the commencement of this Act in the register of annuities may remain registered until the entry is vacated in the prescribed manner, on the prescribed evidence as to satisfaction, cesser or discharge being furnished.

(3) When an acknowledgment in the prescribed form of satisfaction, cesser or discharge is lodged with the registrar, he may enter satisfaction, cesser or discharge of the registered annuity to which it refers, and may issue a certificate in the prescribed form of such satisfaction, cesser or discharge.

(4) The register of annuities shall be closed when all the entries therein have been vacated, or the prescribed

evidence of the satisfaction, cesser or discharge of all the annuities has been furnished. 15 Geo. 5, c. 22, s. 4.

(5) In this Part of this Act the expression "annuity" means a rentcharge or an annuity for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives created after the twenty-fifth day of April, eighteen hundred and fifty-five, and before the commencement of this Act, and not being a rentcharge or an annuity created by a marriage settlement or will.

Protection of purchasers, &c. against unregistered annuities.

5. An annuity which before the commencement of this Act was capable of being registered in the register of annuities shall be void as against a creditor or a purchaser of any interest in the land charged therewith unless the annuity is for the time being registered in the register of annuities or in the register of land charges as hereinafter provided.

Sect. 4, sub-sect. 5, and sect. 5 re-enact the effect of sects. 12 and 14 of the Judgments Act, 1855, as to annuities registered before January 1, 1926, and sect. 4, sub-sect. 3 re-enacts the effect of sect. 2 of the Crown Debts and Judgments Act, 1860. See as to registration being notice, sects. 198 and 199 of L. P. Act, 1925, and notes, *post*, pp. 784, 785.

Part III.

Writs and Orders affecting Land.

Register of writs and orders affecting land.

6.—(1) There may be registered in the register of writs and orders—

(a) any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute or recognisance, whether obtained on behalf of the Crown or otherwise, or for the purpose of enforcing any inquisition finding a debt due to the Crown, or any obligation or specialty made to the Crown;

(b) any order appointing a receiver or sequestrator of land;

(c) any receiving order in bankruptcy made after the commencement of this Act, whether or not it is known to affect land.

(2) Every entry made pursuant to this section shall be made in the name of the estate owner or other person whose land, if any, is affected by the writ or order registered.

(3) The registration of a writ or order in the said register ceases to have effect at the expiration of five years from the date of registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of renewal.

(4) No fee shall be charged for the registration of a

15 Geo. 5, c. 22, s. 6.

receiving order in bankruptcy if the application therefor is made by an official receiver.

(5) The registration of a writ or order affecting land may be vacated pursuant to an order of the court or a judge thereof.

(6) When an office copy of an order for discharge, or an acknowledgment of satisfaction in the prescribed form, is lodged with the registrar, he may enter discharge or satisfaction of the registered writ or order to which it refers, and may issue a certificate in the prescribed form of such discharge or satisfaction.

Protection of purchasers against unregistered writs and orders.

7.—(1) Every such writ and order as is mentioned in the last preceding section, and every delivery in execution or other proceeding taken pursuant to any such writ or order, or in obedience thereto, shall be void as against a purchaser of the land unless the writ or order is for the time being registered pursuant to this Part of this Act:

Provided that as respects a receiving order in bankruptcy, this subsection only applies in favour of a purchaser of a legal estate in good faith, for money or money's worth, without notice of an available act of bankruptcy.

(2) The title of a trustee in bankruptcy acquired after the commencement of this Act shall be void as against a purchaser of a legal estate in good faith for money or money's worth without notice of an available act of bankruptcy, claiming under a conveyance made after the date of registration of the petition in bankruptcy as a pending action, unless, at the date of the conveyance, either the registration of the pending action is in force or the receiving order is registered pursuant to this Part of this Act.

The provisions in sects. 6 and 7 as to receiving orders and the title of a trustee in bankruptcy (sect. 7, sub-sect. 2) are new. Cf. sect. 2, *ante*, providing for the registration of a petition in bankruptcy as a pending action; and see as to the effect of registration under this Act as regards notice, sects. 198 and 199 of L. P. Act, 1925, *post*. Otherwise the two sections re-enact the effect of sects. 5 and 6 of the Land Charges Registration and Searches Act, 1888; sect. 3 of Land Charges Act, 1900; sect. 2 of the Crown Debts and Judgments Act, 1860 (providing for discharge or satisfaction of writs or orders), and sect. 19 of S. L. Act, 1890 (vacating registration). "Estate owner" (sect. 20, sub-sect. 4, *post*, and L. P. Act, 1925, s. 205 (1) (v)) means the owner of a legal estate, which an infant cannot be. For "purchaser," see sect. 20, sub-sect. 8, *post*.

Part IV.

Deeds of Arrangement.

Register of deeds of arrangement affecting land.

8.—(1) A deed of arrangement affecting land may be registered in the register of deeds of arrangement affecting land, in the name of the debtor.

(2) The registration may be made on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed. 15 Geo. 5, c. 22, s. 8.

(3) The registration may be vacated pursuant to an order of the court or a judge thereof.

(4) The registration of a deed of arrangement in the said register shall cease to have effect at the expiration of five years from the date of registration, but may be renewed from time to time, and if renewed shall have effect for five years from the date of renewal:

Provided that nothing in this sub-section shall affect any registration made under any enactment replaced by this Act until the expiration of one year from the commencement of this Act.

Protection of purchasers against unregistered deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this Act, shall be void as against a purchaser of any land comprised therein or affected thereby unless the deed is for the time being registered pursuant to this Part of this Act.

Sects 8 and 9 re-enact sects. 7—9 of the Land Charges Registration and Searches Act, 1888, adding the provision for renewal in sect. 8, sub-sect. 4. See, further, as to deeds of arrangement, the Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47).

Part V.

Land Charges.

Register of land charges.

10.—(1) The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges, namely:—

Class A:—A rent, or annuity, or principal money payable by instalments or otherwise, with or without interest, being a charge (otherwise than by deed) upon land created pursuant to the application of some person either before or after the commencement of this Act—

(i) under the provisions of any Act of Parliament, for securing to any person either the money spent by him or the costs, charges and expenses incurred by him under such Act, or the money advanced by him for repaying the money spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament; or

(ii) under section thirty-five of the Land Drainage Act, 1861; or 24 & 25 Vict. c. 133.

(iii) under section twenty or section forty-one of the Agricultural Holdings Act, 1923, or any previous similar enactment; or 13 & 14 Geo. 5, c. 9.

15 Geo. 5, c. 22, s. 10.

(iv) under section four or section six of the Tithe Act, 1918; or

8 & 9 Geo. 5, c. 54.

(v) under section one of the Tithe Annuities Apportionment Act, 1921; or

11 & 12 Geo. 5, c. 20.

(vi) under paragraph (6) of the Twelfth Schedule to the Law of Property Act, 1922.

12 & 13 Geo. 5, c. 16.

but not including a rate or scot.

Class B:—A charge on land (not being a local land charge) of any of the kinds described in Class A, created otherwise than pursuant to the application of any person, either before or after the commencement of this Act, but if created before such commencement only if acquired under a conveyance made after such commencement.

Class C:—A mortgage charge or obligation affecting land of any of the following kinds, created either before or after the commencement of this Act, but if created before such commencement only if acquired under a conveyance made after such commencement, namely:—

(i) Any legal mortgage not being a mortgage protected by a deposit of documents relating to the legal estate affected, and (where the whole of the land affected is within the jurisdiction of a local deeds registry) not being registered in the local deeds register (in this Act called a "puisne mortgage"); and

57 & 58 Vict. c. 30.

(ii) Any equitable charge acquired by a tenant for life or statutory owner under the Finance Act, 1894, or any other statute, by reason of the discharge by him of any death duties or other liabilities, and to which special priority is given by the statute (in this Act called "a limited owner's charge"); and

(iii) Any other equitable charge, which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect an interest arising under a trust for sale or a settlement and is not included in any other class of land charge (in this Act called "a general equitable charge"). Provided that a charge given by way of indemnity against rents equitably apportioned or charged exclusively on land in exoneration of other land and against the breach or non-observance of covenants or conditions, shall not be deemed to be a general equitable charge and shall not be registrable as a land charge under this Act; and

(iv) Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other

like right (in this Act referred to as "an estate contract"). 15 Geo. 5, c. 22, s. 10.

Class D:—A charge or obligation affecting land of any of the following kinds, namely:—

(i) Any charge acquired by the Commissioners of Inland Revenue under any statute passed or hereafter to be passed for death duties leviable or payable on any death which occurs after the commencement of this Act; and

(ii) A covenant or agreement (not being a covenant or agreement made between a lessor and lessee) restrictive of the user of land entered into after the commencement of this Act (in this Act referred to as a "restrictive covenant"); and

(iii) Any easement right or privilege over or affecting land created or arising after the commencement of this Act, and being merely an equitable interest (in this Act referred to as an "equitable easement").

Class E:—An annuity within the meaning of Part II. of this Act created before the commencement of this Act and not registered in the register of annuities.

(2) A land charge shall be registered in the name of the estate owner whose estate is intended to be affected except that, in the case of a land charge registered before the commencement of this Act, under any enactment replaced by this Act, in the name of a person not being the estate owner, it may remain so registered until it is registered in the name of the estate owner in the prescribed manner.

(3) Where a land charge is not created by an instrument, short particulars of the effect of the charge shall be furnished with the application to register the charge.

(4) Nothing in this section shall be deemed to authorise the Commissioners of Inland Revenue to register a land charge in respect of any claim for death duties unless the duty has become a charge on the land, and the application to register any such charge shall state the duties in respect of which the charge is claimed, and, so far as possible, shall define the land affected, and such particulars shall be entered or referred to in the register.

(5) In the case of a land charge for securing money, created by a company, registration under section ninety-three of the Companies (Consolidation) Act, 1908, shall be sufficient in place of registration under this Act, and shall have effect as if the land charge had been registered under this Act. 8 Edw. 7, c. 69.

15 Geo. 5, c. 22, s. 10.

(6) In the case of a general equitable charge, restrictive covenant, equitable easement or estate contract affecting land within any of the three ridings, and in the case of any other land charge (not being a local land charge) created by a document which shows on the face of it that the charge affects land within any of those ridings, registration shall be effected in the prescribed manner in the appropriate local deeds registry in place of the registry.

(7) A puisne mortgage created before the commencement of this Act may be registered as a land charge before any transfer of the mortgage is made.

(8) The registration of a land charge may be vacated pursuant to an order of the court or a judge thereof.

By L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *post*), the words from "Provided" to "under this Act" in Class C. (iii) of this section were added, and the wording of sub-sect. 6 was substituted for a provision that registration in the local deeds registry should be sufficient, and have effect as if the land charge had been registered under the L. Charges Act, 1925.

What land charges take effect as legal mortgages.

11. A land charge of Class A or Class B for securing money, created before or after the commencement of this Act, shall, when registered, take effect as if it had been created by a deed of charge by way of legal mortgage, but without prejudice to the priority of the charge.

Sects. 10 and 11 extend greatly the provisions of Land Charges Registration and Searches Act, 1888, which established the register of land charges. The definition of "land charge" in that Act (sect. 4) extended only to the kinds of charge specified in Class A, clauses (i) to (iii) of the present sect. 10, and omitted the words "created pursuant to the application of some person." The charge under paragraph 6 of Schedule 12 to L. P. Act, 1922, is a liability to construct, maintain, cleanse or repair dykes, &c., required for the protection or general benefit of land in a manor, or for abating nuisances therein. As to "local land charges," see sect. 15, *post*; as to charges by way of legal mortgage, L. P. Act, 1925, s. 87, *post*, p. 678; and as to the charge referred to in Class C, clause (ii), the Finance Act, 1894, s. 9 (6). As to the contracts referred to in Class C, clause (iv), see S. L. Act, 1925, ss. 11 and 51, *post*. For "statutory owner," see sect. 117, sub-sect. 1 (xxvi) of S. L. Act, 1925, *post*; and for "estate owner," see sect. 205, sub-sect. 1 (v) of L. P. Act, 1925, *post*; and for definition of "land," sect. 20, sub-sect. 6, *post*. That in sect. 4 of the Act of 1888 was "lands, messuages, tenements and hereditaments corporeal and incorporeal of any tenure." As to sub-sect. 6, see Yorkshire Registries Act, 1884, ss. 4, 14.

Expenses of registering land charges.

12.—(1) Except as in this section provided, the expenses incurred by the person entitled to a land charge created before or after the commencement of this Act in causing the charge to be registered in the appropriate register shall be deemed to form part of the land charge, and shall be recoverable by him accordingly on the day for payment of

any part of the land charge next after such expenses are incurred. 15 Geo. 5, c. 22, s. 12.

(2) This section does not apply to the expenses incurred in registering a land charge of Class E or in registering as a land charge a restrictive covenant, an equitable easement or an estate contract.

Sub-sect. 1 re-enacts Land Charges Registration and Searches Act, 1888, s. 11.

13.—(1) A land charge of Class A created after the thirty-first day of December, eighteen hundred and eighty-eight, shall be void as against a purchaser of the land charged therewith or of any interest in such land, unless the land charge is registered in the register of land charges before the completion of the purchase. Protection of purchasers against land charges created after certain dates.

For definition of "purchaser," see sect. 20, sub-sect. 8, *post*.

(2) A land charge of Class B, Class C or Class D, created or arising after the commencement of this Act, shall (except as hereinafter provided) be void as against a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase:

Provided that, as respects a land charge of Class D and an estate contract created or entered into after the commencement of this Act, this subsection only applies in favour of a purchaser of a legal estate for money or money's worth.

14.—(1) After the expiration of one year from the first conveyance, occurring on or after the first day of January, eighteen hundred and eighty-nine, of a land charge of Class A created before that date, the person entitled thereto shall not be able to recover the land charge or any part thereof as against a purchaser of the land charged therewith or of any interest in the land, unless the land charge is registered in the register of land charges before the completion of the purchase. Protection of purchasers against a land charge (Classes A, B or C) not registered within one year from assignment.

(2) After the expiration of one year from the first conveyance, occurring after the commencement of this Act, of a land charge of Class B or Class C created before such commencement, the person entitled thereto shall not be able to enforce or recover the land charge or any part thereof as against a purchaser of the land charged therewith, or of any interest in the land, unless the land charge is registered in the appropriate register before the completion of the purchase.

The Land Charges Registration and Searches Act, 1888, came into operation on January 1, 1889. Provisions similar to those of

15 Geo. 5, c. 22, s. 14.

sect. 13, sub-sect. 1 and sect. 14, sub-sect. 1 of the present Act were contained in sects. 12 and 13 of the Act of 1888. For definitions of "purchaser" and "conveyance," see sect. 20, sub-sects. 8 and 1, *post*. The definition of "purchaser for value" in sect. 4 of the Act of 1888 was the same. See as to the effect of registration as to notice, L. P. Act, 1925, ss. 198 and 199, *post*, pp. 784, 785.

Part VI.

Local Land Charges.

Registration of local land charges.

15.—(1) Any charge (hereinafter called "a local land charge") acquired either before or after the commencement of this Act by the council of any administrative county, metropolitan borough, or urban or rural district, or by the corporation of any municipal borough, or by any other local authority under the Public Health Acts, 1875 to 1907, the Metropolis Management Acts, 1855 to 1893, or the Private Street Works Act, 1892, or under any similar statute (public general or local or private) passed or hereafter to be passed, which takes effect by virtue of the statute, shall be registered in the prescribed manner by the proper officer of the local authority, and shall (except as hereinafter mentioned in regard to charges created or arising before the commencement of this Act) be void as against a purchaser for money or money's worth of a legal estate in the land affected thereby, unless registered in the appropriate register before the completion of the purchase. For the purposes of this section any sum which is recoverable by a local authority under any of the Acts aforesaid from successive owners or occupiers of the property in respect of which the sum is recoverable shall, whether such sum is expressed to be a charge on the property or not, be deemed to be a charge.

55 & 56 Vict. c. 57.

(2) Except as expressly provided by this section, the provisions of this Act relating to a land charge of Class B shall apply to a local land charge.

(3) As regards a local land charge, the registration by the proper officer shall (without prejudice to the right of the registrar also to register the charge if and when the prescribed application and information is made and furnished to him) take the place of registration by the registrar, and, in reference thereto, the proper officer of the local authority shall have all the powers and be subject to the same obligations as the registrar has or is subject to in regard to a land charge.

(4) Where a local authority has expended money for any purpose which, when the work is completed and any requisite resolution is passed or order is made, will confer a charge upon land, the proper officer of the local authority may in the meantime register a local land charge in his

register against the land generally, without specifying the amount, but the registration of any such general charge shall be cancelled within the prescribed time not being less than one year after the charge is ascertained and allotted, and thereupon the specific local land charges shall, unless previously discharged, be registered as of the date on which the general charge was registered. 15 Geo. 5, c. 22, s. 15.

(5) Nothing in this section operates to impose any obligation to register any local land charge created or arising before the commencement of this Act except after the expiration of one year from such commencement or to discharge a purchaser from liability in respect of any local land charge which is not for the time being required to be registered.

(6) Separate rules may be made under this Act in reference to local land charges for giving effect to the provisions of this section and in particular—

(a) for prescribing the mode of registration of a general or specific charge whether by reference to the estate owner or to the land affected or otherwise;

* * * * * *

(c) for prescribing the proper officer to act as local registrar, and making provision as to official certificates of search to be given by him in reference to subsisting entries in his register;

(d) for determining the effect of an official certificate of search in regard to the protection of a purchaser, solicitor, trustee or other person in a fiduciary position, and for prescribing the fees to be paid for any such certificate or for a search;

(e) for prescribing the fees, if any, to be paid for the cancellation of an entry in the register.

(7) The foregoing provisions of this section shall apply to—

(a) any town planning scheme made by, or any authority or resolution to prepare or adopt a town planning scheme given to or passed by, a local authority, whether made, given or passed before or after the commencement of this Act; and

(b) any prohibition of or restriction on the user or mode of user of land or buildings imposed by a local authority after the commencement of this Act by order, instrument, or resolution, or enforceable by a local authority under any covenant or agreement made with them after the commencement of this Act, or by virtue of any conditions attached to a consent, approval, or licence granted by a local authority after that date, being a prohibition or

15 Geo. 5, c. 22, s. 15.

restriction binding on successive owners of the land or buildings, and not being—

(i) a prohibition or restriction operating over the whole of the district of the authority or over the whole of any contributory place thereof; or

(ii) a prohibition or restriction which is, or which may become, enforceable by virtue of a town planning scheme; or

(iii) a prohibition or restriction imposed by a covenant or agreement made between a lessor and lessee;

as if the scheme, resolution, authority, prohibition, or restriction were a local land charge, and the same shall be registered by the proper officer as a local land charge accordingly.

(8) This section applies to local land charges affecting registered as well as unregistered land.

The provisions of this section (taken from L. P. Acts, 1922 and 1924) are new. The charge arising under sect. 257 of the Public Health Act, 1875, was not a "land charge" within the Land Charges Act, 1888 (*R.* v. *Land Registry*, 24 Q. B. D. 178). Similar charges may arise under sects 39 and 40 of the Public Health Acts Amendment Act, 1907, and sect. 13 of the Private Street Works Act, 1892. For land charges of Class B see sect. 10, sub-sect. 1, *ante*. As to town planning schemes, see the Town Planning Act, 1925, (15 Geo. 5, c. 16). For definition of "registered land" see Land Registration Act, 1925, s. 3 (xxiv), *post*. As to the effect of registration with regard to notice see L. P. Act, 1925, ss. 198, 199, *post*, pp. 784, 785. A circular (Circular 642) dated 23rd November, 1925, has been issued by the Ministry of Health calling the attention of local authorities to the provisions of this section and containing forms of registers, &c. See also the Local Land Charges Rules, 1925. By L. P. (Amdt.) Act, 1926, s. 7, the following changes were made in the provisions of sect. 15: The concluding clause of sub-sect. 1, from "For the purposes," and the concluding words of sub-sect. 6 (a), from "whether by reference," were added. Sub-sect. 6 (b), empowering a local authority to register a specific charge against the land affected only, was repealed. Sub-sect. 7 was substituted for a provision that any prohibition of or restriction on the user or mode of user of land or buildings enforceable by a local authority, and any resolution to prepare or adopt a town-planning scheme, should be deemed to be a restrictive covenant and be registered as a local land charge; prohibitions, &c., affecting an area or district being registrable generally against it. For sects. 7 and 8 of the L. P. (Amdt.) Act, 1926, see pp. 595-596, *post*.

Part VII.

Searches and Official Searches.

Power to make searches.

16. Any person may search in any register or index kept in pursuance of this Act on paying the prescribed fee.

15 Geo. 5, c. 22, s. 17.

Official certificates of search.

17.—(1) Where any person requires search to be made at the registry for entries of any matters or documents, whereof entries are required or allowed to be made in the registry by this Act, he may on payment of the prescribed fee lodge at the registry a requisition in that behalf.

(2) The registrar shall thereupon make the search required, and shall issue a certificate setting forth the result thereof.

(3) In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires a certificate of result of search, and other sufficient particulars.

(5) If any officer, clerk, or person employed in the registry commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate under this section, he shall be guilty of a misdemeanour and shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding twenty pounds, or to both such imprisonment and fine.

(6) Nothing in this section or in any rule made under this Act affects any right which any person may have independently of this section to make any search in the registry; and every such search may be made as if this section or any such rule had not been enacted or made.

(7) Where a solicitor obtains a certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(8) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(9) Where such persons obtain such a certificate without a solicitor, they shall also be protected in like manner.

Sects. 16 and 17 replace ss. 15—17 of L. Charges, &c. Act, 1888, and sect. 2 of Conv. Act, 1882, and the provisions of sects. 12 and 13 of the Judgments Act, 1855, as to searches for annuities. See generally as to searches, Elphinstone and Clark on Searches, and 1 Key and Elphinstone's Precedents, 11th ed., pp. 562 *et seq.*

15 Geo. 5, c. 22, s. 18.

Part VIII.

General.

7 Anne, c. 20, not to apply to certain instruments.

18. It is not necessary to register under the Middlesex Registry Act, 1708—

(a) any deed of arrangement, land charge of Class A or other instrument made or created on or after the thirtieth day of July, nineteen hundred; or

(b) any land charge (except a puisne mortgage) of Class B, Class C or Class D created or made after the commencement of this Act;

which is or was capable of registration under this Act, or any enactment replaced by this Act.

By sect. 4 of L. Charges Act, 1900, the Middlesex Registry Act, 1708, ceased to apply to any instrument made after July 30, 1900, and capable of registration under that Act or the L. Charges, &c. Act, 1888; and by sect. 6 of the Land Registry (Middlesex Deeds) Act, 1891, it was made unnecessary for the validity of any judgment, statute or recognisance that it should be registered under the Act of 1708. See as to the classes of charges mentioned in the present section, sect. 10, *ante*, and as to enactments replaced by this Act, sect. 24 and the schedule, *post*.

General rules.

19.—(1) The Lord Chancellor may, with the concurrence of the Treasury as to fees, make such general rules as may be required for carrying this Act into effect, and in particular—

(a) as to forms and contents of applications for registration, modes of identifying where practicable the land affected, requisitions for and certificates of official searches, and regulating the practice of the registry in connexion therewith;

(b) for providing for the mode of registration of a land charge (and in the case of a puisne mortgage, general equitable charge, estate contract, restrictive covenant or equitable easement by reference to the instrument imposing or creating the charge, interest or restriction, or an extract therefrom) and for the cancellation without an order of court of the registration of a land charge, on the cesser thereof, or with the consent of the person entitled thereto, or on sufficient evidence being furnished that the land charge has been overreached under the provisions of any statute or otherwise.

(2) As respects the registration and re-registration—

(a) of a petition in bankruptcy as a pending action; and

(b) of a receiving order in bankruptcy as an order affecting land;

rules may be made under and in the manner provided by section one hundred and thirty-two of the Bankruptcy Act, 1914, as if the registration and re-registration were required by that Act. 15 Geo. 5, c. 22, s. 19. 4 & 5 Geo. 5, c. 59.

For the rules made see pp. 592-594, *post*.

20. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:— Definitions.

(1) "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, release and every other assurance of property, or of an interest therein, by any instrument except a will, and "convey" has a corresponding meaning;

(2) "Court" means the High Court of Justice, also the Court of Chancery of the County Palatine of Lancaster or Durham, or the county court where those courts respectively have jurisdiction;

(3) "Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1914; 4 & 5 Geo. 5, c. 47.

(4) "Estate owner," "legal estate," "equitable interest," "trust for sale," "charge by way of legal mortgage," "will," and "death duty" have the same meanings as in the Law of Property Act, 1925; 15 Geo. 5, c. 20.

(5) "Judgment" includes any order, rule or decree having the effect of a judgment;

(6) "Land" includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments, also a manor, an advowson and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land, but not an undivided share in land, and "hereditament" means real property which, on an intestacy occurring before the commencement of this Act, might have devolved on an heir;

(7) "Land charge" means a land charge of every class and includes a local land charge;

(8) "Purchaser" means any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land; and "purchase" has a corresponding meaning;

(9) "Prescribed" means prescribed by rules made pursuant to this Act;

15 Geo. 5, c. 22, s. 20.

(10) "Registrar" means the Chief Land Registrar; "registry" means His Majesty's Land Registry; and "registered land" has the same meaning as in the Land Registration Act, 1925;

15 Geo. 5, c. 21.

(11) "Restrictive covenant" includes the conditions, stipulations and restrictions which the Commissioners of Works may, under any statutory power, impose on enfranchised land, after the commencement of this Act, for the protection of the amenities of royal parks, gardens, and palaces;

47 & 48 Vict. c. 54.

(12) "The three ridings" has the same meaning as in the Yorkshire Registries Act, 1884;

15 Geo. 5, c. 18.

(13) "Tenant for life," "statutory owner," "vesting instrument" and "settlement" have the same meanings as in the Settled Land Act, 1925.

Effect of registration under any Part of Act.

21. Where any charge or other matter is capable of registration under two or more Parts of this Act, it shall be sufficient if it is registered under any one Part, and if registered under such one Part the person entitled to the benefit thereof shall not be prejudicially affected by the provisions of another Part by reason only that it was not also registered under that other Part.

Saving of over-reaching powers.

22.—(1) The registration of any charge, annuity, or other interest under this Act shall not prevent the charge, annuity, or interest being overreached under any provision contained in any other statute, except where otherwise provided by that other statute.

See L. P. Act, 1925, s. 2 (3) (v), p. 601, *post*, and S. L. Act, 1925, ss. 21 (2) and 72 (2) (iii) (b) and (3), pp. 881, 929, *post*.

(2) The registration as a land charge of a puisne mortgage or charge shall not operate to prevent that mortgage or charge being overreached in favour of a prior mortgagee or a person deriving title under him where, by reason of a sale foreclosure or otherwise, the right of the puisne mortgagee or subsequent chargee to redeem is barred.

For definition of "puisne mortgage" see sect. 10 (1), Class C (i), *ante*.

Application to registered land.

23.—(1) As respects pending actions, writs, orders, deeds of arrangement and land charges (not including local land charges) required to be registered or re-registered after the commencement of this Act, this Act shall not apply thereto, if and so far as they affect registered land,

and can be protected under the Land Registration Act, 1925, by lodging or registering a creditor's notice, restriction, caution, inhibition or other notice. 15 Geo. 5, c. 22, s. 22.

(2) Nothing in this Act imposes on the registrar any obligation to ascertain whether or not a pending action, writ, order, deed of arrangement or land charge affects registered land.

As to the creditor's notice, &c., referred to in sub-sect. 1 see Land Registration Act, 1925, ss. 48—58, *post*. As to local land charges see sect. 15, *ante*.

24. The Acts mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule: Repeals.

Provided that, without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889:— 52 & 53 Vict. c. 63.

(a) Nothing in this repeal shall affect any entry in a register made under any enactment so repealed, but the registration shall have effect as if made under this Act;

(b) Nothing in this repeal shall affect any rules made under any enactment so repealed, but all such rules shall continue in force as if made under the corresponding enactment in this Act;

(c) References in any document to any enactment repealed by this Act shall be construed as references to this Act or to the corresponding enactment in this Act.

25. The provisions of this Act bind the Crown, but nothing in this Act shall be construed as rendering land owned by or occupied for the purposes of the Crown subject to any charge to which, independently of this Act, it would not be subject. Application to the Crown.

26.—(1) This Act may be cited as the Land Charges Act, 1925. Short title, commencement and extent.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only.

15 Geo. 5, c. 22, sched.

Section 24.

SCHEDULE.

Repeals.

Session and Chapter	Short Title.	Extent of Repeals.
2 & 3 Vict. c. 11	The Judgments Act, 1839.	Sections four, seven, ten and eleven.
13 & 14 Vict. c. 43.	The Court of Chancery Lancaster Act, 1850.	Section twenty-four (*a*).
18 & 19 Vict. c. 15.	The Judgments Act, 1855.	Sections three, twelve, thirteen and fourteen.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Section twenty-two.
23 & 24 Vict. c. 115.	The Crown Debts and Judgments Act, 1860.	Section two.
30 & 31 Vict. c. 47.	The Lis Pendens Act, 1867.	Section two.
45 & 46 Vict. c. 39.	The Conveyancing Act, 1882.	Section two.
51 & 52 Vict. c. 51.	The Land Charges Registration and Searches Act, 1888.	The whole Act.
57 & 58 Vict. c. 16.	The Supreme Court of Judicature (Procedure) Act, 1894.	The reference in the Schedule to the Lis Pendens Act, 1867.
63 & 64 Vict. c. 26.	The Land Charges Act, 1900.	The whole Act.
12 & 13 Geo. 5. c. 16.	The Law of Property Act, 1922.	Sections fourteen and sixteen, and the Seventh Schedule.
15 Geo. 5. c. 5.	The Law of Property (Amendment) Act, 1924.	Section six, and the Sixth Schedule.

(*a*) This section extended to the Court of Chancery of Lancaster provisions of the Judgments Acts, 1838, 1839 and 1840.

The following rules have been issued under the Act :—

General Rules.

Form and particulars in registers.

1. The several Registers directed by the Act to be continued to be kept at the Registry shall contain the particulars set out in these Rules affecting them respectively.

Register of pending actions.

2. The Register of Pending Actions shall contain :—

(a) The name, address and description of the estate owner, or other person, whose estate or interest is intended to be affected thereby.

(b) The Court in which the action, information, or proceeding was commenced or filed.

(c) The title of the action, information or proceeding.

(d) The day when the action, information or proceeding was commenced or filed.

(e) The date of registration, and of any renewal of registration.

(f) The name and address of the applicant making the application.

(g) Where practicable, the county and parish, or place, or district in which the land intended to be affected is situated.

Register of annuities.

3. Entries permitted by the Act to be made in the Register of Annuities shall be made in such manner, and on the production of such evidence, as the Registrar shall direct.

Register of writs and orders.

4. The Register of Writs and Orders shall contain :—

(a) The name, address, and description of the estate owner, or other person, whose land (if any) is affected.

(b) The date and nature of the writ or order, and the Court, and the action or matter, by and in which the writ or order was issued or made.
(c) The date of registration, and of any renewal of registration.
(d) The name and address of the applicant making the application.
(e) Where practicable, the county and parish, or place, or district in which the land intended to be affected is situated.

Register of deeds of arrangement.

5. The Register of Deeds of Arrangement shall contain :—
(a) The name, address, and description of the person whose land is affected.
(b) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three.
(c) The date of registration, and of any renewal of registration.
(d) The name and address of the applicant making the application.
(e) Where practicable, the county and parish, or place, or district in which the land intended to be affected is situated.

Register of land charges.

6. The Register of Land Charges shall contain :—
(a) The name, address and description of the estate owner whose estate is intended to be affected.
(b) The date of the Charge, the Class and kind of the Charge, and the Statute (if any) under which it is made.
(c) The date of registration.
(d) The name and address of the applicant making the application.
(e) The county or riding and parish, or township, or place, or district in which the land charged or affected is situated.

Statutory declaration.

7. Every application for registration shall, unless made by a practising Solicitor, be supported by a statutory declaration of the applicant, on Form L.C. 9 in the Schedule hereto, as to the truth of the particulars set forth in it.

Alphabetical index.

8. The alphabetical index shall be in form L.C. 15 in the Schedule hereto.

Form of applications.

9.—(1) Applications for registration, renewal of registration, searches (official and otherwise), office copies of, or extracts from, all books and documents in the Registry open to public inspection, and official certificates, shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the Schedule hereto, or on such other forms as the Registrar shall from time to time determine.

(2) (a) Applications shall not unless the Registrar otherwise directs be accompanied by the original deeds or instruments (if any) in respect of which they are made.

(b) In the case of a puisne mortgage, general equitable charge, estate contract, restrictive covenant, or equitable easement, an application may be accompanied by a copy of the original deed or instrument, or an extract therefrom, but such copy or extract shall only be made on form L.C. 4 supplemented (if necessary) by form L.C. 13 in the Schedule hereto.

Applications for entry of satisfaction, cesser, discharge, vacation or cancellation.

10.—(1) Applications for the entry of satisfaction, cesser, discharge, vacation or cancellation of a registration shall be made on, and shall furnish the particulars set forth in, the several forms for these purposes given in the Schedule hereto, or on such other forms as the Registrar shall from time to time determine.

(2) Such evidence in respect thereof as the Registrar shall think necessary shall also be furnished if required.

Delivery of applications.

11. Applications accompanied by the prescribed fee may be :—
(1) sent by prepaid post, envelopes being addressed to the Land Charges Superintendent, H.M. Land Registry, Lincoln's Inn Fields. London, W.C. 2, or
(2) delivered by the applicant or his Solicitor at the Land Charges Department of the Land Registry.

Separate form to be used for the name of each person to be entered on a register.

12.—(1) A separate form of application shall be used for the name of each person to be entered on any of the Registers, unless otherwise directed by the Registrar.

(2) Where more than one form of application is used under this Rule, it shall not be necessary to supply more than one copy, or extract of the same deed, or document, referred to thereon unless the Registrar otherwise directs.

15 Geo. 5, c. 22.

13. In any case of modification or rectification of entries on the Register such evidence in respect thereof as the Registrar shall from time to time think necessary, shall be furnished.

Modification of entries on the Register.

14.—(1) All forms except such as may from time to time be issued by direction of the Registrar free of charge shall be sold under arrangements to be made by H.M. Stationery Office, or otherwise as the Registrar may from time to time approve.

Sale of forms.

(2) No forms other than those so issued sold or approved shall be accepted for registration.

Registration of certain land charges in the Yorkshire deeds registries.

15. These Rules with the forms prescribed thereunder and the Land Charges Fees Order, 1925, shall, save, as in this rule hereinafter mentioned apply for the purpose of sub-section (6) of section ten of the Act.

(1) The "Registrar" shall mean the registrar of the local deeds registry and shall include any person authorised to act on his behalf.

(2) The name of the appropriate local deeds registry shall be substituted for the Registry.

(3) Rule 11 shall not apply and applications may be—

(a) sent by pre-paid post, envelopes being addressed to the Registrar of the appropriate deeds registry, and accompanied by the prescribed fee, and a stamped addressed cover for re-postage if required, or

(b) delivered by the applicant or by his solicitor at the appropriate deeds registry with the prescribed fee, and a stamped addressed cover for postage if required.

(4) The forms in the Schedule hereto where applicable shall, in each local deeds registry, contain such modifications or alterations as the Registrar shall from time to time determine.

Interpretation.

16. In these Rules "the Act" means the "Land Charges Act, 1925," and words or expressions, defined in the Act, have the same meaning in these Rules as in the Act.

Rescission of former rules.

17. The Land Charges Rules, 1889, and the Rules made under section two of the Conveyancing Act, 1882, are rescinded.

Short title and commencement.

18. These Rules may be cited as the Land Charges Rules, 1925, and shall come into operation on the first day of January, 1926.

Dated the 3rd day of November, 1925.

Cave, C.

For the schedule of forms and fees see W. N. 28 November, 1925.

Applications for registration of charges, &c., and priority notices.

The L. P. (Amdt.) Act, 1926, s. 4 (which came into operation on the passing of the Act, June 16, 1926, see sect. 8, sub-sect. 2, *infra*), provides as follows:—

Date of effective registration and priority notices.

4.—(1) Any person intending to make an application for the registration of any contemplated charge, instrument, or other matter in pursuance of the Land Charges Act, 1925, or any rule made thereunder, may give a priority notice in the prescribed form at least two days before the registration is to take effect, and where such a notice is given—

(a) the notice shall be entered in the register to which the intended application when made will relate;

(b) if the application is presented within fourteen days thereafter and refers in the prescribed manner to the notice, the registration shall take effect as if the registration had been made at the time when the charge, instrument or matter was created, entered

into, made, or arose, and the date at which the registration so takes effect shall be deemed to be the date of registration; and where any two charges, instruments, or matters are contemporaneous, and one (whether or not protected by a priority notice) is subject to or dependent on the other which is protected by a priority notice, the subsequent or dependent charge, instrument, or matter shall be deemed to have been created, entered into, or made, or to have arisen after the registration of the other.

(2) Where a purchaser has obtained an official certificate of the result of search, any entry which is made in the register after the date of the certificate and before the completion of the purchase, and is not made pursuant to a priority notice entered on the register before the certificate is issued, shall not, if the purchase is completed before the expiration of the second day after the date of the certificate, affect the purchaser.

(3) In reckoning the number of days under this section, Sundays and other days when the registry is not open to the public shall be excluded.

(4) Rules may be made under the said Act—

(a) for determining the date on which applications and notices shall be treated for the purposes of this section as having been made or given;

(b) for determining the times and order at and in which applications and priority notices are to be registered;

(c) for varying the number of days fixed by this section;

(d) for adapting the provisions of this section to local land charges.

(5) Where rules are made varying the number of days fixed by this section, this section shall have effect as if the number so varied were substituted for the number specified in this section.

As to local land charges, see L. Charges Act, 1925, s. 15, p. 584, *ante*, and for the rules made under the present section, p. 596, *post*. Sects. 7 and 8 of L. P. (Amdt.) Act, 1926, are as follows:—

Minor amendments.

7. The amendments specified in the second column of the Schedule to this Act, being amendments of a minor nature, shall be made in the enactments mentioned in the first column of that Schedule and shall have effect without prejudice to any title acquired by a purchaser, or any registration effected, before the passing of this Act.

Short title, construction and commencement.

8.—(1) This Act may be cited as the Law of Property (Amendment) Act, 1926, and so far as it amends any Act shall be construed as one with that Act.

15 Geo. 5, c. 22.

(2) The provisions of this Act except sections four and five shall be deemed to have come into operation on the first day of January, nineteen hundred and twenty-six.

The Act was passed on June 16, 1926. The amendments made by sects. 1—3 and 5—7 will be found in their respective places (see notes to sects. 10 and 15 of the L. Charges Act, 1925, *ante*, and the Table of Statutes).

The following rules as to applications and priority notices have been issued:—

General regulations.

1. Subject as hereinafter provided, the following general regulations shall have effect:

(1) Applications and priority notices delivered by post or under cover during the hours in which the office is open for registration shall be treated as having been made or given at the same time and immediately before the closing of the office for that day, and shall be numbered accordingly.

(2) Applications and priority notices delivered (whether by post or otherwise) between the hours of closing and of the next opening of the office for registration shall be treated as having been made or given at the same time and immediately after such opening and shall be numbered accordingly.

(3) Registrations shall be made at the times and in the order in which the applications or priority notices are delivered or are to be treated as having been made or given.

(4) To obtain the priority conferred by a priority notice every application in respect of which a priority notice has been given under subsection (1) of section four of the Law of Property (Amendment) Act, 1926, shall bear a statement at the head thereof as follows:

"Priority Notice in respect hereof on (*date*)."

(5) The day of registration to be noted on each registration shall be the actual day of registration notwithstanding that the registration is duly made pursuant to a priority notice given in respect thereof; and no reference (other than the application number if any) shall be made to the time when the application or priority notice was delivered.

(6) Save in the case of applications for the entry of satisfaction, cesser, discharge, vacation or cancellation of a registration, the Registrar shall not be concerned to inquire into or otherwise verify the accuracy or validity of any matter or thing stated or appearing in any notice given or application made to him.

(7) Applications for an official search shall be prepared and forwarded to the Registry in duplicate.

(8) An official certificate of the result of searches shall extend to registrations effected during the day of the date of the certificate and shall be issued only after the office is closed for registrations on that date.

(9) A priority notice shall be in form L.C. 16 in the Schedule hereto or in such other form as the Registrar shall from time to time determine.

Short title; construction.

2. These rules may be cited as the Land Charges Rules, 1926, and shall be read and construed with the Land Charges Rules, 1925.

Dated the 22nd day of June, 1926

Cave, C.

For the Forms see W. N., July 10, 1926.

CONVEYANCING AND LAW OF PROPERTY.

Law of Property Act, 1925.

15 Geo. 5, c. 20.

An Act to consolidate the enactments relating to conveyancing and the Law of Property in England and Wales. [9th April, 1925.]

§§ 1—15. *Legal and Equitable Estates and Interests*...598-611.
§§ 16—18. *Death Duties*...611-614.
§§ 19—22. *Infants and Lunatics*...614-615.
§§ 23—33. *Dispositions on Trust for Sale*...615-622.
§§ 34—38. *Undivided Shares and Joint Ownership*...622-626
§ 39. *Transitional Provisions*...626-627.
§§ 40—50. *Contracts*...627-647.
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§§ 76—84. *Covenants*...665-676.
§§ 85—120. *Mortgages*...676-711.
§§ 121—122. *Rentcharges*...711-714.
§§ 123—129. *Powers of Attorney*...714-717.
§§ 130—138. *Entailed and other equitable interests and things in action*...718-726.
§§ 139—154. *Leases and Tenancies*...726-750.
§§ 155—160. *Powers*...750-753.
§§ 161—163. *Perpetuities*...753-755.
§§ 164—166. *Accumulations*...755-759.
§§ 167—170. *Married Women*...759-763.
§ 171. *Property of Lunatics*...763-766.
§§ 172—174. *Fraudulent Conveyances*...766-768.
§§ 175—179. *Wills*...768-770.
§§ 180—189. *Miscellaneous*...770-775.
§§ 190—192. *Redemption and Apportionment of Rents, &c.*...775-780.
§§ 193—194. *Commons and Waste Lands*...780-783.
§§ 196—200. *Notices*...783-787.
§ 201. *Incorporeal Hereditaments*...787.
§ 202. *Copyholds and renewable Leaseholds*...787.
§ 203. *Payment into Court*...788.
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§ 205. *Definitions*...789-796.
§ 206. *Sufficiency of Forms*...796.
§ 207. *Repeal*...796.
§ 208. *Application to Crown*...796.
§ 209. *Short Title, Commencement and Extent*...797.
Schedules...797-843.

15 Geo. 5, c. 20, s. 1.

Part I.

General Principles as to Legal Estates, Equitable Interests and Powers.

Legal estates and equitable interests.

1.—(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—

(a) An estate in fee simple absolute in possession;

(b) A term of years absolute.

(2) The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—

(a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;

(b) A rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

(c) A charge by way of legal mortgage;

(d) Land tax, tithe rentcharge, and any other similar charge on land which is not created by an instrument;

(e) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.

(3) All other estates, interests, and charges in or over land take effect as equitable interests.

(4) The estates, interests, and charges which under this section are authorised to subsist or to be conveyed or created at law are (when subsisting or conveyed or created at law) in this Act referred to as "legal estates," and have the same incidents as legal estates subsisting at the commencement of this Act; and the owner of a legal estate is referred to as "an estate owner" and his legal estate is referred to as his estate.

(5) A legal estate may subsist concurrently with or subject to any other legal estate in the same land in like manner as it could have done before the commencement of this Act.

(6) A legal estate is not capable of subsisting or of being created in an undivided share in land or of being held by an infant.

(7) Every power of appointment over, or power to convey or charge land or any interest therein, whether created by a statute or other instrument or implied by law, and whether created before or after the commencement of this Act (not being a power vested in a legal mortgagee or an estate owner in right of his estate and exercisable by him

or by another person in his name and on his behalf), operates only in equity. 15 Geo. 5, c. 20, s. 1.

(8) Estates, interests, and charges in or over land which are not legal estates are in this Act referred to as "equitable interests," and powers which by this Act are to operate in equity only are in this Act referred to as "equitable powers."

(9) The provisions in any statute or other instrument requiring land to be conveyed to uses shall take effect as directions that the land shall (subject to creating or reserving thereout any legal estate authorised by this Act which may be required) be conveyed to a person of full age upon the requisite trusts.

(10) The repeal of the Statute of Uses (as amended) does not affect the operation thereof in regard to dealings taking effect before the commencement of this Act.

Sects. 1—3 repeat with alterations, especially in sect. 3, the new provisions as to estates and interests in land first enacted by L. P. Act, 1922, which Act (except as to the enfranchisement of copyholds and the conversion of perpetually renewable leaseholds) never came into force, and is repealed by the present Act and the other Property Acts passed in 1925. The cardinal change in the law is the restriction by sect. 1, sub-sect. 1 of legal estates in land to estates in fee simple absolute in possession and terms of years absolute, with the corresponding provisions of sub-sect. 2 as to legal interests in and charges over land and the relegation by sub-sect. 3 of all other estates, interests and charges in or over land to the category of equitable interests. The main scheme and purpose of the changes enacted by this Act and the Settled Land Act, 1925 (*post*), is to facilitate dealings with the legal estate in land by an absolute owner of that estate, all other interests being as far as possible overreached by such dealings. As to the interests overreached by a conveyance of the legal estate see sect. 2, and as to the modes in which equitable interests and powers are enforceable against the owner of the legal estate see sect. 3, *post*. An "estate owner" is the owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*). As to undivided shares see sect. 34, *post*, as to infants sects. 19—21, *post*, as to mortgages sects. 85 *et seq.*, *post*, and as to rentcharges sects. 190—192, *post*. The Act came into operation on January 1, 1926 (sect. 209, sub-sect 2, *post*). The Statute of Uses is repealed by it. By sect. 39 and Sched. I., *post*, the estates, &c., subsisting or capable of taking effect at law immediately before January 1, 1926, but which the Act renders incapable of taking effect as legal estates, were as from that date converted into equitable interests. By sect. 205, sub-sect. 2, *post*, references to the creation of an interest or power include references to equitable interests in or powers over property arising by statute or operation of law. A legal term may still be created to take effect in reversion expectant on a longer term (sect. 149, sub-sect. 5, *post*).

Conveyances overreaching certain equitable interests and powers.

2.—(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if—

(i) the conveyance is made under the powers conferred

15 Geo. 5, c. 20, s. 2.

15 Geo. 5, c. 18.

by the Settled Land Act, 1925, or any additional powers conferred by a settlement, and the equitable interest or power is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money arising under the settlement are complied with;

(ii) the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of sub-section (2) of this section or independently of that subsection, and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with;

(iii) the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, and the equitable interest or power is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representative;

(iv) the conveyance is made under an order of the court and the equitable interest or power is bound by such order, and any capital money arising from the transaction is paid into, or in accordance with the order of, the court.

(2) Where the legal estate affected is subject to a trust for sale, then if at the date of a conveyance made after the commencement of this Act under the trust for sale or the powers conferred on the trustees for sale, the trustees (whether original or substituted) are either—

(a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed; or

(b) a trust corporation,

any equitable interest or power having priority to the trust for sale shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale.

(3) The following equitable interests and powers are excepted from the operation of subsection (2) of this section, namely—

(i) Any equitable interest protected by a deposit of documents relating to the legal estate affected;

(ii) The benefit of any covenant or agreement restrictive of the user of land;

(iii) Any easement, liberty, or privilege over or affect-

ing land and being merely an equitable interest (in this Act referred to as an "equitable easement"); 15 Geo. 5, c. 20, s. 2.

(iv) The benefit of any contract (in this Act referred to as an "estate contract") to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right;

(v) Any equitable interest protected by registration under the Land Charges Act, 1925, other than—

(a) an annuity within the meaning of Part II. of that Act;

(b) a limited owner's charge or a general equitable charge within the meaning of that Act.

(4) Subject to the protection afforded by this section to the purchaser of a legal estate, nothing contained in this section shall deprive a person entitled to an equitable charge of any of his rights or remedies for enforcing the same.

(5) So far as regards the following interests, created before the commencement of this Act (which accordingly are not within the provisions of the Land Charges Act, 1925), namely—

(a) the benefit of any covenant or agreement restrictive of the user of the land; 15 Geo. 5, c. 22.

(b) any equitable easement;

(c) the interest under a puisne mortgage within the meaning of the Land Charges Act, 1925, unless and until acquired under a transfer made after the commencement of this Act;

(d) the benefit of an estate contract, unless and until the same is acquired under a conveyance made after the commencement of this Act;

a purchaser of a legal estate shall only take subject thereto if he has notice thereof, and the same are not overreached under the provisions contained or in the manner referred to in this section.

The words of sub-sect. 2 down to "are either" were substituted by L. P. (Amdt.) Act, 1926, s. 7, for

(2) Where the legal estate affected is not, when the equitable interest or power is created subject to a trust for sale or a settlement, then, if the estate owner, whether before or after the commencement of this Act, disposes of his estate to trustees upon trust for sale, and at the date of a conveyance made, after such commencement, under the

15 Geo. 5, c. 20, s. 2.

disposition upon trust for sale the trustees (whether original or substituted) are either—

and sect. 7 also substituted " any equitable interest or power having priority to the trust for sale " for " such equitable interest or power " (see as to the Act of 1926, p. 594, *ante*).

The scheme of this section appears to be that (sub-sect. 1) purchasers for money or money's worth (sect. 205, sub-sect. 1 (xxi), *post*) with or without notice, acquire the legal estate freed from all equitable interests or powers capable of being overreached by the particular kind of conveyance if (i) the conveyance is duly made under the S. L. Act, 1925 (see sects. 72 and 75 of that Act, *post*), or (ii) by trustees for sale (see sects. 23 *et seq.*, *post*), or (iii) by a mortgagee or personal representative (see as to the former, sect. 104, *post*, and as to the latter, Admon. of Estates Act, 1925, s. 39 (1) (ii), *ante*), or (iv) is duly made under an order of the Court binding the equitable interests or powers. This appears to be qualified as to notice with regard to interests of the classes named in sub-sect. 5 created before 1926 by the provision (*ibid.*) that a purchaser with notice takes subject to them, if not overreached by the conveyance. Further (sub-sect. 2), equitable interests or powers having priority to a trust for sale are overreached by a conveyance under that trust, if the trustees are within the categories (a) or (b) in sub-sect. 2. For " trust corporation " see p. 794, *post*. As to the interests named in sub-sect. 3 (v) see Land Charges Act, 1925, ss. 4 (5) and 10 (1), Class C (ii) and (iii), *ante*, and as to " puisne mortgages " see *ibid.*, sect. 10, sub-sect. 1, Class C. (i). See as to notice sect. 199, *post*.

Manner of giving effect to equitable interests and powers.

3.—(1) All equitable interests and powers in or over land shall be enforceable against the estate owner of the legal estate affected in manner following (that is to say):—

(a) Where the legal estate affected is settled land, the tenant for life or statutory owner shall be bound to give effect to the equitable interests and powers in manner provided by the Settled Land Act, 1925; (*a*)

(b) Where the legal estate affected is vested in trustees for sale—

(i) The trustees shall stand possessed of the net proceeds of sale after payment of costs and of the net rents and profits of the land until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the same respectively, of which they have notice, and whether created before or after the disposition upon trust for sale, according to their respective priorities:

(ii) Where, by reason of the exercise of any equitable power or under any trust affecting the proceeds of sale, any principal sum is required to be raised, or any person of full age becomes entitled to require a legal estate in the land to be

vested in him in priority to the trust for sale, then, unless the claim is satisfied out of the net proceeds of sale, the trustees for sale shall (if so requested in writing) be bound to transfer or create such legal estates, to take effect in priority to the trust for sale, as may be required for raising the money by way of legal mortgage (*b*) or for giving legal effect to the rights of the person so entitled:

Provided that, if the proceeds of sale are held in trust for persons of full age in undivided shares absolutely free from incumbrances affecting undivided shares, those persons cannot require the land to be conveyed to them in undivided shares (*c*), but may (subject to effect being given by way of legal mortgage (*b*) to incumbrances affecting the entirety) require the same to be vested in any of them (not exceeding four) as joint tenants on trust for sale; and if the conveyance purports to transfer the land to any of them in undivided shares or to more than four such persons, it shall operate only as a transfer to them or (if more than four) to the four first named therein as joint tenants on trust for sale:

(c) Where the legal estate affected is neither settled land nor vested in trustees for sale, the estate owner (*d*) shall be bound to give effect to the equitable interests and powers affecting his estate of which he has notice according to their respective priorities. This provision does not affect the priority or powers of a legal mortgagee, or the powers of personal representatives for purposes of administration.

(2) Effect may be given by means of a legal mortgage (*b*) to an agreement for a mortgage, charge, or lien (whether or not arising by operation of law) if the agreement, charge or lien ought to have priority over the trust for sale.

(3) Where, by reason of a statutory or other right of reverter (*e*), or of an equitable right of entry taking effect (*f*), or for any other reason, a person becomes entitled to require a legal estate to be vested in him, then and in any such case the estate owner (*d*) whose estate is affected shall be bound to convey or create such legal estate as the case may require.

(4) If any question arises whether any and what legal estate ought to be transferred or created as aforesaid, any person interested may apply to the court for directions in the manner provided by this Act (*g*).

(5) If the trustees for sale or other estate owners refuse

15 Geo. 5, c. 20, s. 3.

or neglect for one month after demand to transfer or create any such legal estate, or if by reason of their being out of the United Kingdom (*h*) or being unable to be found, or by reason of the dissolution of a corporation, or for any other reason, the court is satisfied that the transaction cannot otherwise be effected, or cannot be effected without undue delay or expense, the court may, on the application of any person interested, make a vesting order transferring or creating a legal estate in the manner provided by this Act (*i*).

(6) This section does not affect a purchaser of a legal estate taking free from an equitable interest or power.

(*a*) For the provisions of S. L. Act, 1925, as to the giving effect to equitable interests or powers affecting settled land see sect. 16 of that Act, p. 869, *post*, and for the meaning of "statutory owner" sect. 117, sub-sect. 1 (xxvi) of S. L. Act, 1925.

(*b*) As to mortgages, see sects. 85 *et seq.*, *post*.

(*c*) See as to undivided shares, sect. 34, *post*.

(*d*) The owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*).

(*e*) The "possibility of reverter" was the name given to the possibility that a common law fee might return to the grantor by breach of a condition, or a common law fee or other fee simple might return by natural determination. The return of the land to the donor on a grant of an estate tail was secured by the statute *De Donis* and called his "reverter" (see Challis, R. P., 2nd ed., p. 73; Fearne on Contingent Remainders, p. 381). See also *Pemberton* v. *Barnes*, [1899] 1 Ch. 544.

(*f*) As to rights of entry see sect. 4, sub-sect. 2, *post*.

(*g*) See sect. 203, sub-sect. 2, *post*.

(*h*) Great Britain and Northern Ireland (sect. 205, sub-sect. 1 (xxx), *post*.

(*i*) See sect. 9, *post*.

Creation and disposition of equitable interests.

4.—(1) Interests in land validly created or arising after the commencement of this Act, which are not capable of subsisting as legal estates, shall take effect as equitable interests, and, save as otherwise expressly provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act have been created as legal interests, shall be capable of being created as equitable interests:

Provided that, after the commencement of this Act (and save as hereinafter expressly enacted), an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement.

(2) All rights and interests in land may be disposed of, including—

(a) a contingent, executory or future equitable interest in any land, or a possibility coupled with an interest in any land, whether or not the object of the gift

or limitation of such interest or possibility be ascertained; 15 Geo. 5, c. 20, s. 4.

(b) a right of entry, into or upon land whether immediate or future, and whether vested or contingent.

(3) All rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may after the commencement of this Act, be made exercisable by any person and the persons deriving title under him, but, in regard to an estate in fee simple (not being a rentcharge held for a legal estate) only within the period authorised by the rule relating to perpetuities.

See further as to equitable interests sect. 134, *post*. Sect. 6 (repealed by this Act) of the R. P. Act, 1845, enabled interests of the kinds referred to in sub-sect. 2 of the present section to be disposed of by deed.

Sect. 6 dealt with the disposition of existing interests, not with the creation of new estates (*Savill* v. *Bethell*, [1902] 2 Ch. 540). The alienation under the old law of the interests described in the section has been already considered (see *ante*, p. 315). As to the alienation of the interest of a yearly tenant, see *Alcock* v. *Moorhouse* (9 Q. B. D. 371). As to alienation of supposed rights, see 32 Hen. 8, c. 9; *Doe* v. *Evans* (1 C. B. 717, and the cases there cited). A *spes successionis* could not be disposed of under sect. 6 (*Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 699). As to *spes successionis*, see also sect. 171, sub-sect. 4, *post*.

It has been said that sect. 6 applied to a right of entry in the nature of an estate or interest—that is, where a person by lapse of time has lost everything except his right of entry—but that the section did not include a right of entry for forfeiture (*Hunt* v. *Remnant*, 9 Exch. 640; *Hunt* v. *Bishop*, 8 Exch. 680; see *Cohen* v. *Tannar*, [1900] 2 Q. B. 609), the reason being that it was at the election of the person entitled to enter whether he would take advantage of the breach (*Jenkins* v. *Jones*, 9 Q. B. D. 131); as to the transfer of rights of re-entry for forfeiture, see sect. 141, sub-sect. 1, *post*.

Prior to the R. P. Act, 1845, all dealings with a right of entry, except by release to the person in possession, were dealings with a pretenced right within the meaning of 32 Hen. 8, c. 9, and so void and penal under that statute. Since that Act, if such a right is not fictitious in fact, it is not "pretenced" within that statute, and may be properly dealt with (*Jenkins* v. *Jones*, 9 Q. B. D. 135). In order to recover the penalty under 32 Hen. 8, c. 9, it must be proved, not only that the title is fictitious, but that at the time of the dealing the defendant knew that it was so (*Kennedy* v. *Lyell*, 15 Q. B. D. 491).

Perpetuity.

See as to perpetuities sect. 161, *post*, and as to rights of entry void on that ground *Dunn* v. *Flood*, 25 Ch. D. 629; *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562; *Mackenzie* v. *Childers*, 43 Ch. D. 265, 279. As to legal contingent remainders before this Act, see R. P. Act, 1845, s. 8, and the Contingent Remainders Act, 1877, both repealed by L. P. Act, 1924. Equitable contingent remainders were not liable to be defeated by the failure of the particular estate (see *Astley* v. *Micklethwait*, 15 Ch. D. 59; *Re Brooke, B.* v. *B.*, [1894] 1 Ch. 43; *Re Freme, F.* v. *Logan*, [1891] 3 Ch. 167; *Re Robson, Douglass* v. *D.*, [1916] 1 Ch. 116).

Contingent remainders.

15 Geo. 5, c. 20, s. 5.

Satisfied terms, whether created out of freehold or leasehold land to cease.

5.—(1) Where the purposes of a term of years created or limited at any time out of freehold land, become satisfied either before or after the commencement of this Act (whether or not that term either by express declaration or by construction of law becomes attendant upon the freehold reversion) it shall merge in the reversion expectant thereon and shall cease accordingly.

(2) Where the purposes of a term of years created or limited, at any time, out of leasehold land, become satisfied after the commencement of this Act, that term shall merge in the reversion expectant thereon and shall cease accordingly.

(3) Where the purposes are satisfied only as respects part of the land comprised in a term, this section shall have effect as if a separate term had been created in regard to that part of the land.

The Satisfied Terms Act, 1845 (repealed by this Act) enacted (sect. 1) that all terms attendant on the inheritance or reversion of any lands on 31st December, 1845, should cease and determine on that day, but continue to afford the same protection against incumbrances, &c., as if they had continued to subsist, and (sect. 2) that all terms becoming satisfied after that day and by express declaration or construction of law becoming attendant on the inheritance or reversion of any lands should absolutely cease and determine. The Act did not apply to a mortgage term created by demise of leaseholds (*Re Moore and Hulme*, [1912] 2 Ch. 105). See now sub-sect. 2 of the present section.

The subject of attendant terms is fully explained in the Second Rep. Real Prop. Comm. pp. 7—14; and see Williams, Real Prop. 434, 14th ed.; Sugd. V. & P. 616 *et seq.*, 14th ed.; Davidson, Conv. Prec. 20, 15th ed. As to terms attendant by implication or construction of law, see Sugd. V. & P. 625; *Belaney* v. *B.* (2 Ch. 138).

When is term satisfied.

A term did not become satisfied within the Act of 1845 except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, were united and merged in one person, or so long as there remained any useful purpose beneficial to the owner of the term, and consistent with the trust on which at the date of the transaction the term was held (*Anderson* v. *Pignet*, 8 Ch. 188, 189).

Cases under the Act of 1845.

An agreement to assign an attendant term to a trustee for a mortgagee has been held to prevent the term ceasing as a satisfied term under the Act (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412); but not the mere delivery to the mortgagee of the deed of assignment to a trustee for the mortgagor (*Re Sleeman*, 4 Ir. Ch. Rep. 563; *Corry* v. *Cremorne*, 12 Ir. Ch. Rep. 136). A mortgage term was held not to cease under sect. 1 of the Act when the mortgage was paid off by, and a trust of the term declared in favour of, a person who had not the inheritance, but was believed at the time to have (*Doe* v. *Jones*, 13 Q. B. 774; *Anderson* v. *Pignet*, 8 Ch. 189). Terms were held to have ceased under the Act in *Doe* v. *Price* (16 M. & W. 609); *Doe* v. *Moulsdale* (*Id.* 689).

The exception in the section: nature of the protection.

The object of the Act appears to have been to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where, upon the 31st December, 1845, it was attendant by express declaration. But even this was a limited protection; for it gave not such protection as a further

assignment of it for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist but had not been assigned or dealt with after the 31st December, 1845. This protection of course extended to a new purchaser, although the term assigned to attend was left undisturbed (Sugd. V. & P. 497, 14th ed.; *Freer* v. *Hesse*, 4 De G. M. & G. 495; see also Sugd. V. & P. 623, 624, 14th ed., as to the nature of the protection afforded by an attendant term). 15 Geo. 5, c. 20, s. 5.

The proper way of testing the right of a person to the protection of such a term is to consider whether, if the Act had not been passed, equity would restrain him from setting up the term (*Cottrell* v. *Hughes*, 15 C. B. 532). So where C. being, under a deed of settlement, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement, and the residue of two terms attendant on the inheritance was assigned to a trustee for the defendant to attend the inheritance: the terms were a protection against the settlement (*ibid.*). But where a term of 500 years, which was in fact satisfied and attendant on the inheritance, was assigned by the tenant for life under a settlement to a trustee with a declaration of trust for certain parties: such parties, having had notice that the term was satisfied, could not set up against the parties claiming under the settlement, the term which had been assigned by a person who had no right to deal with it except to the extent of his own interest (*Plant* v. *Taylor*, 7 H. & N. 211).

In *Bass* v. *Wellsted* (12 Jur. 347) a question was raised, but not decided, as to the protection against dower by a term since the above Act.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to (*Garrard* v. *Tuck*, 8 C. B. 231). As to presuming the surrender of terms, see also *Cottrell* v. *Hughes*, 15 C. B. 532 (where the decision in *Doe* v. *Hilder* (2 B. & Ald. 782) was doubted); *Doe* v. *Plowman* (2 B. & Ald. 573); *Doe* v. *Langdon* (12 Q. B. 711); *Hele* v. *Bexley* (17 Beav. 28); Sugd. V. & P. Appendix 26, 11th ed.; Dart, V. & P. 363. Presuming surrender of terms.

6.—(1) Nothing in this Part of this Act affects prejudicially the right to enforce any lessor's or lessee's covenants, agreements or conditions (including a valid option to purchase or right of pre-emption over the reversion), contained in any such instrument as is in this section mentioned, the benefit or burden of which runs with the reversion or the term. Saving of lessors' and lessees' covenants.

(2) This section applies where the covenant, agreement or condition is contained in any instrument—

(a) creating a term of years absolute, or

(b) varying the rights of the lessor or lessee under the instrument creating the term.

The provisions of this and the following sections down to sect. 22 are new, taken from L. P. Acts, 1922 and 1924.

7.—(1) A fee simple which, by virtue of the Lands Clauses Acts, the School Sites Acts, or any similar statute, Saving of certain legal

15 Geo. 5, c. 20, s. 7.

estates and statutory powers.

is liable to be divested, is for the purposes of this Act a fee simple absolute, and remains liable to be divested as if this Act had not been passed, and a fee simple subject to a legal or equitable right of entry or re-entry is for the purposes of this Act a fee simple absolute.

(2) A fee simple vested in a corporation which is liable to determine by reason of the dissolution of the corporation is, for the purposes of this Act, a fee simple absolute.

(3) The provisions of—

33 & 34 Vict. c. 23.

(a) the Forfeiture Act, 1870, in regard to the land of a convict;

59 & 60 Vict. c. 25.

(b) the Friendly Societies Act, 1896, in regard to land to which that Act applies;

(c) any other statutes conferring special facilities or prescribing special modes (whether by way of registered memorial or otherwise) for disposing of or acquiring land, or providing for the vesting (by conveyance or otherwise) of the land in trustees or any person, or the holder for the time being of an office or any corporation sole or aggregate (including the Crown);

shall remain in full force.

This subsection does not authorise an entailed interest to take effect otherwise than as an equitable interest.

(4) Where any such power for disposing of or creating a legal estate is exercisable by a person who is not the estate owner, the power shall, when practicable, be exercised in the name and on behalf of the estate owner.

The concluding portion of sub-sect. 1 from "and a fee simple," was added by L. P. (Amdt.) Act, 1926, s. 7. See as to this Act, p. 594, *ante*.

See as to the Forfeiture Act, 1870, *ante*, p. 414, and *post*, p. 1104. As to entailed interests see sect. 130, *post*. "Estate owner" means the owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*).

Saving of certain legal powers to lease.

8.—(1) All leases or tenancies at a rent for a term of years absolute authorised to be granted by a mortgagor or mortgagee or by the Settled Land Act, 1925, or any other statute (whether or not extended by any instrument) may be granted in the name and on behalf of the estate owner by the person empowered to grant the same, whether being an estate owner or not, with the same effect and priority as if this Part of this Act had not been passed; but this section does not (except as respects the usual qualified covenant for quiet enjoyment) authorise any person granting a lease in the name of an estate owner to impose any personal liability on him.

(2) Where a rentcharge is held for a legal estate, the owner thereof may under the statutory power or under any

corresponding power, create a legal term of years absolute for securing or compelling payment of the same; but in other cases terms created under any such power shall, unless and until the estate owner of the land charged gives legal effect to the transaction, take effect only as equitable interests. **15 Geo. 5, c. 20, s. 8.**

As to leases by mortgagor or mortgagee, see sect. 99, *post*, and as to leases under S. L. Act, 1925, sects. 41, *et seq.* of that Act, *post*. As to terms to secure or compel payment of rentcharges, see sect. 121, sub-sect. 4, *post*.

9.—(1) Every such order, declaration, or conveyance as is hereinafter mentioned, namely— Vesting orders and dispositions of legal estates operating as conveyances by an estate owner.

(a) every vesting order made by any court or other competent authority;

(b) every vesting declaration (express or implied) under any statutory power;

(c) every vesting instrument made by the trustees of a settlement or other persons under the provisions of the Settled Land Act, 1925 (*a*);

(d) every conveyance by a person appointed for the purpose under an order of the court or authorised under any statutory power to convey in the name or on behalf of an estate owner;

(e) every conveyance made under any power reserved or conferred by this Act,

which is made or executed for the purpose of vesting, conveying, or creating a legal estate, shall operate to convey or create the legal estate disposed of in like manner as if the same had been a conveyance executed by the estate owner of the legal estate to which the order, declaration, vesting instrument, or conveyance relates.

(2) Where the order, declaration, or conveyance is made in favour of a purchaser (*b*) the provisions of this Act relating to a conveyance of a legal estate to a purchaser shall apply thereto.

(3) The provisions of the Trustee Act, 1925, relating to vesting orders and orders appointing a person to convey (*c*) shall apply to all vesting orders authorised to be made by this Part of this Act. 15 Geo. 5, c. 19.

(*a*) See sects. 4, 5, 7 and 8 of that Act, *post*.
(*b*) See sect. 205, sub-sect. 1 (xxi), *post*.
(*c*) See sects. 44—52 of that Act, *post*.

10.—(1) Where title is shown to a legal estate in land, it shall be deemed not necessary or proper to include in the abstract of title an instrument relating only to interests or powers which will be overreached by the conveyance of the estate to which title is being shown; but nothing in this Title to be shown to legal estates.

15 Geo. 5, c. 20, s. 10.

Part of this Act affects the liability of any person to disclose an equitable interest or power which will not be so overreached, or to furnish an abstract of any instrument creating or affecting the same.

(2) A solicitor delivering an abstract framed in accordance with this Part of this Act shall not incur any liability on account of an omission to include therein an instrument which, under this section, is to be deemed not necessary or proper to be included, nor shall any liability be implied by reason of the inclusion of any such instrument.

As to interests or powers overreached, see sect. 2, *ante*, pp. 599-602.

Registration in Middlesex and Yorkshire as respects legal estates.

11.—(1) It shall not be necessary to register a memorial of any instrument made after the commencement of this Act in any local deeds registry unless the instrument operates to transfer or create a legal estate, or to create a charge thereon by way of legal mortgage; nor shall the registration of a memorial of any instrument not required to be registered affect any priority.

(2) Probates and letters of administration shall be treated as instruments capable of transferring a legal estate to personal representatives.

(3) Memorials of all instruments capable of transferring or creating a legal estate or charge by way of legal mortgage, may, when so operating, be registered.

As to local deeds registries, see Land Registration Act, 1925, sects. 135 and 136, *post*, and as to the effect of registration as regards notice sect. 197 of the present Act, *post*. As to charges by way of legal mortgage, see sect. 87, *post*.

Limitation and Prescription Acts (*a*).

12. Nothing in this Part of this Act affects the operation of any statute, or of the general law for the limitation of actions or proceedings relating to land or with reference to the acquisition of easements or rights over or in respect of land.

(*a*) See those Acts, *ante*.

Effect of possession of documents.

13. This Act shall not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land, nor affect any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of any documents relating to a legal estate in land.

See as to the right to production, &c., of documents, sects. 45 and 64, *post*.

14. This Part of this Act shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation.

15 Geo. 5, c. 20, s. 14.

Interests of persons in possession.

15. The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed to be of full age at the date thereof.

Presumption that parties are of full age.

An infant cannot hold a legal estate (sect. 1, sub-sect. 6, *ante*). See also sect. 19 and Sched. I, Part III., *post*.

Death Duties.

16.—(1) A personal representative (*a*) shall be accountable for all death duties (*b*) which may become leviable or payable on the death of the deceased in respect of land (including settled land) which devolves upon him by virtue of any statute or otherwise (*c*).

Liability for death duties.

(2) In every other case the estate owner (*d*) (other than a purchaser (*e*) who acquires a legal estate after the charge for death duties has attached and free from such charge), shall be accountable for all the duties aforesaid which become leviable or payable in respect of his estate in the land or any interest therein capable of being overreached by his conveyance, being a conveyance to a purchaser (*e*) made under the Settled Land Act, 1925, or pursuant to a trust for sale (*f*).

(3) For the purpose of raising the duty, and the costs of raising the same, the personal representative or other person accountable as aforesaid shall have all the powers which are by any statute conferred for raising the duty.

(4) Nothing in this Act shall alter any duty payable in respect of land, or impose any new duty thereon, or affect the remedies of the Commissioners of Inland Revenue against any person other than a purchaser or a person deriving title under him.

(5) Notwithstanding that any duties are by this section made payable by the personal representative or other person aforesaid, nothing in this Part of this Act shall affect the liability of the persons beneficially interested or their respective interests in respect of any duty, and they shall accordingly account for or repay the same and any interest and costs attributable thereto to the said Commissioners or to the personal representative or other person accountable as aforesaid, as the case may require.

(6) Nothing in this Part of this Act shall impose on a personal representative, tenant for life, statutory owner (*g*), trustee for sale, or other person in a fiduciary position, as such, any liability for payment of duty, in excess of the

15 Geo. 5, c. 20, s. 16.

assets (including land) vested in him or in the trustees of the settlement which may for the time being be available in his hands or in the hands of such trustees for the payment of the duty or which would have been so available but for his or their own neglect or default, or impose a charge for duties on leasehold land, or render a mortgagee liable in respect of any charge for duties which is not paramount to his mortgage.

(7) The said Commissioners, on being satisfied that a personal representative or other person accountable has paid or commuted or will pay or commute all death duties for which he is accountable in respect of the land or any part thereof, shall, if required by him, give a certificate to that effect, which shall discharge from any further claim for such duty the land to which the certificate extends, and the production of such certificate to the land registrar or other proper officer shall be a sufficient authority to enable him to cancel any land charge registered in respect of the duty so far as it affects the land to which the certificate extends.

(*a*) For definition, see sect. 205, sub-sect. 1 (xviii), *post*.
(*b*) See *ibid.* (iv).
(*c*) See Admon. of Estates Act, *ante*, s. 1.; and as to settled land sects. 22 *et seq.* of that Act, pp. 432-434.
(*d*) The owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*).
(*e*) See *ibid.* (xxi).
(*f*) See as to trusts for sale sects. 23 *et seq.*, *post*.
(*g*) See S. L. Act, 1925, s. 117 (1) (xxvi), *post*.

Protection of purchasers from liability for death duties.

17.—(1) Where a charge in respect of death duties is not registered as a land charge (*a*), a purchaser (*b*) of a legal estate shall take free therefrom, unless the charge for duties attached before the commencement of this Act and the purchaser had notice (*c*) of the facts giving rise to the charge.

(2) Where a charge in respect of death duties is not registered as a land charge, the person who conveys a legal estate to a purchaser, and the proceeds of sale, funds, and other property (if any) derived from the conveyance and the income thereof shall (subject as in this Act provided) be or remain liable in respect of and stand charged with the payment of the death duties the charge for which is overreached by the conveyance, together with any interest payable in respect of the same.

(3) Notwithstanding that any death duties may be payable by instalments, on a conveyance of a legal estate by way of sale exchange or legal mortgage (*d*) all death duties payable in respect of the land dealt with and remaining unpaid shall, if the charge for the duties is overreached by such conveyance, immediately become payable and carry

interest at the rate of four pounds per centum per annum from the date of the conveyance: 15 Geo. 5, c. 20, s. 17.

Provided that, where by reason of this subsection an amount is paid or becomes payable for duties and interest in excess of the amount which would have been payable if the duties had continued to be paid by instalments, such excess shall be repaid or allowed as a deduction by the Commissioners of Inland Revenue.

(4) Except in the case of a conveyance to a purchaser (*b*), a conveyance shall take effect subject to any subsisting charge or liability for payment of the duties and interest, if any, notwithstanding that the charge for duties may not have been registered.

(5) This section does not apply to registered land (*e*).

(*a*) See L. Charges Act, 1925, s. 10 (1), Class D (i), *ante*.
(*b*) See sect. 205, sub-sect. 1 (xxi), *post*.
(*c*) See as to notice, sect. 199, *post*.
(*d*) See sect. 87, *post*.
(*e*) As to death duties on registered land, see Land Registration Act, 1925, s. 73, *post*.

Application of capital money in discharge of death duties.

18.—(1) Capital money liable to be laid out in the purchase of land to be settled in the same manner as the land in respect of which any death duties may have become payable, and personal estate held on the same trusts as the proceeds of sale of land, being land held on trust for sale in respect of which any such duties may have become payable, may, by the direction of the tenant for life, statutory owner (*a*), or trustee for sale who is accountable, and although the duty is only payable in respect of an interest which is or is capable of being overreached by a conveyance to a purchaser (*b*), be applied in discharging all or any of the duties aforesaid and the costs of discharging the same.

(2) Where the duties would not, except by virtue of the last subsection, be payable out of the capital money or personal estate aforesaid—

(a) the amount so paid shall be repaid by the person liable for the duty to the trustees of the settlement or the trustees for sale by the like instalments and at the like rate of interest by and at which the unpaid duty and the interest thereon might have been paid, or, where the land has been conveyed to a purchaser, would have been paid if the land had not been so conveyed;

(b) the interest of the person so liable, remaining subject to the settlement of the land or of the proceeds of sale, shall stand charged with the repayment of the instalments and the interest aforesaid;

(c) the trustees of the settlement or the trustees for sale

15 Geo. 5, c. 20, s. 18.

shall be entitled to recover and receive any excess of duty which may become repayable by the said Commissioners (*c*).

(*a*) See S. L. Act, 1925, s. 117 (1) (xxvi), *post.*
(*b*) See sect. 205, sub-sect. 1 (xxi), *post.*
(*c*) See sect. 18, sub-sect. 3, *ante.*

Infants and Lunatics.

Effect of conveyances of legal estates to infants.

19.—(1) A conveyance of a legal estate in land to an infant alone or to two or more persons jointly both or all of whom are infants, shall have such operation as is provided for in the Settled Land Act, 1925 (*a*).

(2) A conveyance of a legal estate in land to an infant, jointly with one or more other persons of full age, shall operate to vest the legal estate in the other person or persons on the statutory trusts (*b*), but not so as to sever any joint tenancy in the net proceeds of sale or in the rents and profits until sale, or affect the right of a tenant for life or statutory owner (*c*) to have settled land vested in him.

(3) The foregoing provisions of this section do not apply to conveyances on trust or by way of mortgage.

(4) A conveyance of a legal estate to an infant alone or to two or more persons jointly, both or all of whom are infants, on any trusts, shall operate as a declaration of trust and shall not be effectual to pass any legal estate.

(5) A conveyance of a legal estate in land to an infant jointly with one or more other persons of full age on any trusts shall operate as if the infant had not been named therein, but without prejudice to any beneficial interest in the land intended to be thereby provided for the infant.

(6) A grant or transfer of a legal mortgage of land (*d*) to an infant shall operate only as an agreement for valuable consideration to execute a proper conveyance when the infant attains full age, and in the meantime to hold any beneficial interest in the mortgage debt in trust for the persons for whose benefit the conveyance was intended to be made:

Provided that, if the conveyance is made to the infant and another person or other persons of full age, it shall operate as if the infant had not been named therein, but without prejudice to any beneficial interest in the mortgage debt intended to be thereby provided for the infant.

(*a*) See S. L. Act, 1925, s. 27, *post.*
(*b*) See sect. 35 of the present Act, *post.*
(*c*) See S. L. Act, 1925, s. 117 (1) (xxvi), and as to the right referred to, sect. 7 of that Act, p. 863, *post.*
(*d*) See as to mortgages, sects. 85 *et seq.*, *post.*

20. The appointment of an infant to be a trustee in relation to any settlement or trust shall be void, but without prejudice to the power to appoint a new trustee to fill the vacancy. **15 Geo. 5, c. 20, s. 20.**

Infants not to be appointed trustees.

See Trustee Act, 1925, s. 36 (1), *post*.

21. A married infant shall have power to give valid receipts for all income (including statutory accumulations of income made during the minority) to which the infant may be entitled in like manner as if the infant were of full age.

Receipts by married infants.

As to the accumulations, see Trustee Act, 1925, s. 31 (2), *post*, and as to receipts, *cf. ibid.*, and Admon. of Estates Act, 1925, s. 47 (1) (ii), *ante*.

22.—(1) Where a legal estate in land (whether settled or not) is vested in a lunatic, or a defective (*a*), either solely or jointly with any other person or persons, his committee or receiver shall, under an order in lunacy or of the court, or under any statutory power, make or concur in making all requisite dispositions for conveying or creating a legal estate in the name and on behalf of the lunatic or defective.

Conveyances on behalf of lunatics and defectives and as to land held by them on trust for sale.

(2) If land held on trust for sale is vested in a lunatic, or a defective, either solely or jointly with any other person or persons, a new trustee shall be appointed in his place, or he shall be otherwise discharged from the trust, before the legal estate is dealt with under the trust for sale or under the powers vested in the trustees for sale.

(*a*) See sect. 205, sub-sect. 1 (xiii), *post*.

Dispositions on Trust for Sale.

23. Where land has, either before or after the commencement of this Act, become subject to an express or implied trust for sale, such trust shall, so far as regards the safety and protection of any purchaser thereunder, be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

Duration of trusts for sale.

This section applies to sales whether made before or after the commencement of this Act, but operates without prejudice to an order of any court restraining a sale.

This section re-enacts sect. 10, sub-sects. 3 and 4 of the Conv. Act, 1911.

15 Geo. 5, c. 20, s. 24.

Appointment of trustees of dispositions on trust for sale.

24.—(1) The persons having power to appoint new trustees of a conveyance of land on trust for sale shall be bound to appoint the same persons (if any) who are for the time being trustees of the settlement of the proceeds of sale, but a purchaser shall not be concerned to see whether the proper persons are appointed to be trustees of the conveyance of the land.

(2) This section applies whether the settlement of the proceeds of sale or the conveyance on trust for sale comes into operation before or after the commencement of this Act.

For definition of "purchaser," see sect. 205, sub-sect. 1 (xxi), *post*. Sects. 24—30 were first enacted by L. P. Acts, 1922 and 1924. The provisions of this part of this Act relating to trustees for sale apply to personal representatives holding on trust for sale, but without prejudice to their rights and powers for purposes of administration (sect. 33, *post*).

Power to postpone sale.

25.—(1) A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears.

(2) Where there is a power to postpone the sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust for sale) the trustees for sale shall not be liable in any way for postponing the sale, in the exercise of their discretion, for any indefinite period; nor shall a purchaser of a legal estate be concerned in any case with any directions respecting the postponement of a sale (*a*).

(3) The foregoing provisions of this section apply whether the trust for sale is created before or after the commencement or by virtue of this Act (*b*).

(4) Where a disposition or settlement (*c*) coming into operation after the commencement of this Act contains a trust either to retain or sell land the same shall be construed as a trust to sell the land with power to postpone the sale.

(*a*) For "purchaser," see sect. 205, sub-sect. 1 (xxi), *post*. As to the right of a party absolutely entitled to call for immediate payment, see *Re Marshall, M.* v. *M.*, [1914] 1 Ch. 192.

(*b*) The Act commenced January 1, 1926. For trusts for sale created by virtue of the Act, see sects. 31, 32, 35, 36, *post*.

(*c*) See sect. 205, sub-sect. 1 (ii), *post*, and *ibid.* (xxvi), and S. L. Act, 1925, ss. 1 (1) and 117 (1) (xxiv), *post*.

Consents to the execution of a trust for sale.

26.—(1) If the consent of more than two persons is by the disposition (*a*) made requisite to the execution of a trust for sale of land, then, in favour of a purchaser (*b*), the consent of any two of such persons to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient.

15 Geo. 5, c. 20, s. 26.

(2) Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not sui juris or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust or the exercise of the power; but the trustees shall, in any such case, obtain the separate consent of the parent or testamentary or other guardian of an infant or of the committee or receiver (if any) of a lunatic or defective (*c*).

(3) Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with.

In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this sub-section shall not apply unless the contrary intention appears in the disposition creating the trust.

(4) This section applies whether the trust for sale is created before or after the commencement or by virtue of this Act (*d*).

Sub-sect. 3 was substituted for the original sub-section (which resembled the first paragraph in a shorter form) by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

(*a*) See sect. 205, sub-sect. 1 (ii), *post*.
(*b*) See *ibid.* (xxi).
(*c*) See *ibid.* (xiii).
(*d*) See note (*b*) to sect. 25.

Purchaser not to be concerned with the trusts of the proceeds of sale which are to be paid to two or more trustees or to a trust corporation.

27.—(1) A purchaser (*a*) of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale (whether made to attach to such proceeds by virtue of this Act or otherwise), or affecting the rents and profits of the land until sale, whether or not those trusts are declared by the same instrument by which the trust for sale is created.

(2) Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where the trustee is a trust corporation (*b*), but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the

15 Geo. 5, c. 20, s. 27.

application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.

Sub-sect. 2 was substituted by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*) for the original sub-section, which referred to a "disposition" on trust for sale. *Cf.* Trustee Act, 1925, s. 37, *post*.

(*a*) See sect. 205, sub-sect. 1 (xxi), *post*.
(*b*) See p. 794, *post*.

Powers of management, &c., conferred on trustees for sale.

28.—(1) Trustees for sale shall, in relation to land or to manorial incidents (*a*) and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority (*b*): and where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner (*bb*), or trustees of the settlement; and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925 (*c*), be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale.

All land acquired under this subsection shall be conveyed to the trustees on trust for sale.

The powers conferred by this subsection shall be exercised with such consents (if any) as would have been required on a sale under the trust for sale, and when exercised shall operate to overreach any equitable interests or powers (*d*) which are by virtue of this Act or otherwise made to attach to the net proceeds of sale as if created by a trust affecting those proceeds.

(2) Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925 (*e*), in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested.

(3) Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares (whether or not such shares may be subject to a derivative trust) the trustees for sale may, with the consent of the persons, if any, of full age,

not being annuitants, interested in possession in the net rents and profits of the land until sale:—

(a) partition the land remaining unsold or any part thereof; and

(b) provide (by way of mortgage or otherwise) for the payment of any equality money;

and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any legal mortgage created for raising equality money) to persons of full age and either absolutely or on trust for sale or, where any part of the land becomes settled land, by a vesting deed (*f*), or partly in one way and partly in another in accordance with the rights of the persons interested under the partition, but a purchaser (*g*) shall not be concerned to see or inquire whether any such consent as aforesaid has been given:

Provided that—

(i) If a share in the net proceeds belongs to a lunatic or defective (*h*), the consent of his committee or receiver shall be sufficient to protect the trustees for sale:

(ii) If a share in the net proceeds is affected by an incumbrance (*i*) the trustees for sale may either give effect thereto or provide for the discharge thereof by means of the property allotted in respect of such share, as they may consider expedient.

(4) If a share in the net proceeds is absolutely vested in an infant, the trustees for sale may act on his behalf and retain land (to be held on trust for sale) or other property to represent his share, but in other respects the foregoing power shall apply as if the infant had been of full age.

(5) This section applies to dispositions on trust for sale coming into operation either before or after the commencement or by virtue of this Act (*k*).

(*a*) As to "manorial incidents," see L. P. Act, 1922, s. 128 (2). The phrase means quit, chief, and other similar rents or payments; fines, reliefs, heriots and dues (including fees payable to stewards); forfeitures (except for conveyance or attempted conveyance of an estate of freehold and alienation without licence); and rights as to timber. The above-named section preserves these incidents on the enfranchisement of copyholds by the Act, Part VI. of which provided for their extinguishment.

(*b*) See S. L. Act, 1925, s. 102, *post*.

(*bb*) See S. L. Act, 1925, s. 117 (1) (xxvi), *post*.

(*c*) See *ibid.*, sect. 73.

(*d*) See sects. 1 (7), *ante*, and 205 (1) (xi), *post*.

(*e*) See S. L. Act, 1925, s. 47, *post*. The section has rendered the rule in *Howe* v. *Dartmouth* inapplicable to leaseholds held on trust for sale (*Re Brooker*, [1926] W. N. 93). See as to the effect of the

15 Geo. 5, c. 20, s. 28.

Act and of the S. L. Act, 1925, on the powers of trustees, *Re Gray, Public Trustee* v. *Woodhouse*, [1926] W. N. 279.

(*f*) See sect. 205, sub-sect. 1 (xxvi), *post*, and S. L. Act, 1925, s. 117, sub-sect. 1 (xxxi).

(*g*) See sect. 205, sub-sect. 1 (xxi), *post*.

(*h*) See *ibid.* (xiii).

(*i*) See *ibid.* (vii).

(*k*) See note (*b*) to sect. 25, *ante*. The words from "and where by statute" to "trustees of the settlement" in sub-sect. 1 were added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

Delegation of powers of management by trustees for sale.

29.—(1) The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale whether by this Act or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period: and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.

(2) Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power.

(3) The persons delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee.

47 & 48 Vict. c. 18.

(4) Where, at the commencement of this Act, an order made under section seven of the Settled Land Act, 1884, is in force, the person on whom any power is thereby conferred shall, while the order remains in force, exercise such power in the names and on behalf of the trustees for sale in like manner as if the power had been delegated to him under this section.

As to the powers of leasing, &c., conferred by the Act on trustees for sale, see preceding section. Compare with the power of delegation the power of delegating trusts conferred by Trustee Act, 1925, s. 25, *post*, which leaves the delegating trustee liable for the acts or defaults of his delegate. For "lessee," see sect. 205, sub-sect. 1 (xxiii), *post*. Sect. 7 of S. L. Act, 1884, enacted that the powers conferred by sect. 63 of S. L. Act, 1882 (under which the person beneficially entitled to the income of land subject to a trust for sale was deemed to be tenant for life) should not be exercised without the leave of the Court; and empowered the Court by order to give leave to exercise all or any of the powers, naming the person

or persons to whom leave was given. Neither sect. 7 nor sect. 63 is re-enacted by S. L. Act, 1925. See as to the effect of an order made before 1926, *Re Cecil's Trusts*, [1926] W. N. 138. **15 Geo. 5, c. 20, s. 30.**

Powers of Court where trustees for sale refuse to exercise powers.

30. If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit.

As to applications to the Court, see sect. 203, *post*.

Trust for sale of mortgaged property where right of redemption is barred.

31.—(1) Where any property, vested in trustees by way of security, becomes, by virtue of the statutes of limitation, or of an order for foreclosure or otherwise, discharged from the right of redemption, it shall be held by them on trust for sale.

(2) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable; but this subsection operates without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman.

(3) This section does not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or in accordance with his directions.

(4) Where the mortgage money is capital money for the purposes of the Settled Land Act, 1925, the trustees shall, if the tenant for life or statutory owner so requires, instead of selling any land forming the whole or part of such property, execute such subsidiary vesting deed with respect thereto as would have been required if the land had been acquired on a purchase with capital money.

(5) This section applies whether the right of redemption was discharged before or after the first day of January, nineteen hundred and twelve, but has effect without prejudice to any dealings or arrangements made before that date.

Sub-sects. 1 to 4 and the first clause of sub-sect. 5 re-enact sect. 9 of Conv. Act, 1911 (which commenced on January 1, 1912), with the omission of an express power of postponement (see sect. 25, sub-sect. 1, *ante*, as to such a power in the case of trusts for sale of land, and for definition of "property" sect. 205, sub-sect. 1 (xx), *post*), and the substitution in sub-sect. 4 of references to "statutory owner" and "subsidiary vesting deed" (see S. L. Act, 1925, ss. 117 (1) (xxvi) and 10, *post*) for references to persons having the powers of a tenant for life and to the directions as to conveyances contained in sect. 24 of S. L. Act, 1882. The concluding clause of sub-sect. 5 is new. See *Re Bogg, Allison* v. *Price*, [1917] 2 Ch. 239, as to the retrospective effect of sect. 9 of Conv.

15 Geo. 5, c. 20, s. 31.

Act, 1911, and *Re Horn, Pub. Trustee* v. *Garnett*, [1924] 2 Ch. 222, as to the intention of the section, and the effect of sub-sect. 2.

Implied trust for sale in personalty settlements.

32.—(1) Where a settlement of personal property or of land held upon trust for sale contains a power to invest money in the purchase of land, such land shall, unless the settlement otherwise provides, be held by the trustees on trust for sale; and the net rents and profits until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase-money would be payable or applicable if a sale had been made and the proceeds had been duly invested in personal estate.

(2) This section applies to settlements (including wills) coming into operation after the thirty-first day of December, nineteen hundred and eleven, and does not apply to capital money arising under the Settled Land Act, 1925, or money liable to be treated as such.

This section reproduces sect. 10, sub-sects. 1 and 2 of Conv. Act, 1911 (see note to preceding section), which referred to a settlement within the meaning of sect. 63 of S. L. Act, 1882 (see note to sect. 29, *ante*), or other settlement of property as personal estate. The concluding clause of sub-sect. 2 is new.

Application of Part. I. to personal representatives.

33. The provisions of this Part of this Act relating to trustees for sale apply to personal representatives holding on trust for sale, but without prejudice to their rights and powers for purposes of administration.

Undivided Shares and Joint Ownership.

Effect of future dispositions to tenants in common.

34.—(1) An undivided share in land shall not be capable of being created except as provided by the Settled Land Act, 1925, or as hereinafter mentioned.

(2) Where, after the commencement of this Act, land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall (notwithstanding anything to the contrary in this Act) operate as if the land had been expressed to be conveyed to the grantees, or, if there are more than four grantees, to the four first named in the conveyance, as joint tenants upon the statutory trusts hereinafter mentioned and so as to give effect to the rights of the persons who would have been entitled to the shares had the conveyance operated to create those shares:

Provided that, where the conveyance is made by way of mortgage the land shall vest in the grantees or such four of them as aforesaid for a term of years absolute (as provided by this Act) as joint tenants subject to cesser on redemption in like manner as if the mortgage money had

belonged to them on a joint account, but without prejudice to the beneficial interests in the mortgage money and interest. 15 Geo. 5, c. 20, s. 34.

(3) A devise bequest or testamentary appointment, coming into operation after the commencement of this Act, of land to two or more persons in undivided shares shall operate as a devise bequest or appointment of the land to the trustees (if any) of the will for the purposes of the Settled Land Act, 1925, or, if there are no such trustees, then to the personal representatives of the testator, and in each case (but without prejudice to the rights and powers of the personal representatives for purposes of administration) upon the statutory trusts hereinafter mentioned.

(4) Any disposition purporting to make a settlement of an undivided share in land shall only operate as a settlement of a corresponding share of the net proceeds of sale and of the rents and profits until sale of the entirety of the land.

The provisions of sects. 34 to 39 were first enacted by L. P. Acts, 1922 and 1924. For those of S. L. Act, 1925, as to undivided shares in land see sect. 36 of that Act, *post*, p. 895, and for those of the present Act as to mortgages, sects. 85 *et seq.*, *post*. As to easements see sect. 187, *post*. The Partition Acts, 1868 and 1876 (see 2nd ed. of this work, pp. 743—753), are repealed by this Act, without prejudice to proceedings commenced thereunder before January 1, 1926. The abolition of descent, and enactment of one mode of devolution of real and personal estate, in the case of all deaths after 1925, by Admon. of Estates Act, 1925, ss. 45 and 46, *ante* (see however as to lunatics sect. 51, sub-sect. 2), have deprived the doctrine of conversion, to which the following note relates, of much of its importance.

Conversion.

An order rightfully made for the sale of land effects conversion as from its date and before sale (*Burgess* v. *Booth*, [1908] 2 Ch. 648; *Hyett* v. *Mekin*, 25 Ch. D. 735; *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257; *Pole* v. *P.*, [1924] 1 Ch. 156). Orders for sale under the Partition Act, 1868, effected a similar conversion as regards the share of a person *sui juris* (*Re Dodson, Yates* v. *Morton*, [1908] 2 Ch. 638; *Arnold* v. *Dixon*, 19 Eq. 113; 23 W. R. 314; see *Re Pickard, Turner* v. *Nicholson*, 53 L. T. 293; see *Re Morgan, Smith* v. *May*, [1900] 2 Ch. 478). As regards, however, the shares of persons under disability and who had not properly requested or consented to a sale, there was (in the case of sales under that Act) an equity for reconversion in sects. 34—36 of the Settled Estates Act, 1877 (replacing sections of S. E. Act, 1856, which were imported into the Partition Act, 1868). So held in the case of a married woman (*Mildmay* v. *Quicke*, 6 Ch. D. 553; see *Re Lloyd*, 9 P. D. 65); a lunatic (*Re Barker*, 17 Ch. D. 241; *Grimwood* v. *Bartels*, 46 L. J. Ch. 788); an infant (*Foster* v. *F.*, 1 Ch. D. 588; compare the similar case under sect. 69 of the Lands Clauses Act, 1845, *Kelland* v. *Fulford*, 6 Ch. D. 491). Under sect. 6 of the Partition Act, 1876, a request for sale might be made on the part of an infant or married woman by the next friend or guardian. Where in an action in which an infant suing by his next friend was plaintiff, other parties entitled to one moiety requested a sale, and a sale was ordered on that footing, there was an equity for

Reconversion.

15 Geo. 5, c. 20, s. 34.

reconversion of the infant's share even though according to the form of the judgment he had also requested a sale (*Re Norton, N.* v. *N.*, [1900] 1 Ch. 101; *Hopkinson* v. *Richardson*, [1913] 1 Ch. 284). Similarly where the sale was ordered upon the request of several plaintiffs, one of whom was an infant (*Howard* v. *Jalland*, [1891] W. N. 210; see *Re Norton, supra*). There was, however, no such equity for reconversion where a married woman had properly requested a sale under sect. 6 of the Partition Act, 1876 (*Wallace* v. *Greenwood*, 16 Ch. D. 362: and see *Entwistle* v. *Maconn*, [1925] N. I. 47; see as to an infant *Wallace* v. *Greenwood, supra*; *Re Norton, N.* v. *N.*, [1900] 1 Ch. 101). For reconversion is a question of intention (*Re Grimthorpe, Beckett* v. *G.*, [1908] 1 Ch. 679; but see *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231; *Re Ffennell's Settlement*, [1918] 1 Ch. 91). Where there was an equity for reconversion in the case of a married woman, she could signify her election to take the fund as personal estate by a separate examination (*Standering* v. *Hall*, 11 Ch. D. 652). The committee of a lunatic would only be authorised to request a sale upon the terms that the proceeds should be subject to the same uses as the land (*Re Pares, Lillingstone* v. *P.*, 12 Ch. D. 333; see Lunacy Act, 1890, s. 123).

It seems that proceeds of land sold under the Partition Act, 1868, which were in Court, and belonged to a person *sui juris*, who was absolutely entitled thereto and did not deal with them, were personal estate and in the event of his death payable to his personal representatives. So held in the case of a person *sui juris* who had become entitled as heir-at-law to an infant's share of such proceeds (*Mordaunt* v. *Benwell*, 19 Ch. D. 302; *Re Dyson, Challinor* v. *Sykes*, [1910] 1 Ch. 750); and in the case of a person who had become of unsound mind after the date of an order for payment out to her (*Re Pickard, Turner* v. *Nicholson*, 53 L. T. 293). Compare the converse case of property which was originally money but afterwards became in fact land which passed on the death of the beneficiary to his heir (*Re Loveridge, Pearce* v. *Marsh*, [1904], 1 Ch. 518). Where at the time of an order for sale under this Act an undivided share of the land was vested in the trustees of the will of a former owner of such share (which will contained no power to invest in real estate), and a share of the proceeds was subsequently ordered to be paid to such trustees as persons "absolutely entitled," the result of the order was that such share devolved among the beneficiaries named in the will as personal estate (*Re Morgan, Smith* v. *May*, [1900] 2 Ch. 474). But it was said that if the fund had remained in Court, it would have devolved as real estate (*ibid.* 478); compare *Re Harman, Lloyd* v. *Tardy*, [1894] 3 Ch. 607.

Where land in which persons under disability were interested was sold under the Act, the Court refused to order payment of the proceeds to trustees (*Higgs* v. *Dorkis*, 13 Eq. 280; see *Aston* v. *Meredith*, 13 Eq. 492; *Re Morgan, Smith* v. *May, supra; Grimwood* v. *Bartels*, 46 L. J. Ch. 788). As to conversion by exercise of an option to purchase see *Re Blake, Gawthorne* v. *B.*, [1917] 1 Ch. 18. As to partition by trustees for sale see sect. 28, sub-sect. 3 of the present Act, *ante*.

As to partition actions commenced before 1926, see Sched. I., Part IV., para. 1 (11), *post*.

Meaning of the statutory trusts.

35. For the purposes of this Act land held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the

same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land. 15 Geo. 5, c. 20, s. 35.

Where—

(*a*) an undivided share was subject to a settlement, and
(*b*) the settlement remains subsisting in respect of other property, and
(*c*) the trustees thereof are not the same persons as the trustees for sale,

then the statutory trusts include a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other capital money attributable to the share to the trustees of the settlement to be held by them as capital money arising under the Settled Land Act, 1925.

The last clause was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

36.—(1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity. Joint tenancies.

(2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants:

Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance. Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale.

(3) Without prejudice to the right of a joint tenant to release his interest to the other joint tenants no severance

15 Geo. 5, c. 20, s. 36.

of a mortgage term or trust estate, so as to create a tenancy in common, shall be permissible.

The concluding clause of sub-sect. 2 from "nothing in this Act" was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

Rights of husband and wife.

37. A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons.

See p. 372, *ante*.

Party structures.

38.—(1) Where under a disposition or other arrangement which, if a holding in undivided shares had been permissible, would have created a tenancy in common, a wall or other structure is or is expressed to be made a party wall or structure, that structure shall be and remain severed vertically as between the respective owners, and the owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created.

(2) Any person interested may, in case of dispute, apply to the court for an order declaring the rights and interests under this section of the persons interested in any such party structure, and the court may make such order as it thinks fit.

See as to such structures *Sack* v. *Jones*, [1925] Ch. 235, quoted, *ante*, p. 113.

Transitional Provisions.

Transitional provisions in First Schedule.

12 & 13 Geo. 5, c. 16.

39. For the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922 (*a*), to the law enacted by that Act (as amended), the provisions set out in the First Schedule to this Act shall have effect—

(1) for converting existing legal estates, interests and charges not capable under the said Act of taking effect as legal interests into equitable interests;

(2) for discharging, getting in or vesting outstanding legal estates;

(3) for making provision with respect to legal estates vested in infants;

(4) for subjecting land held in undivided shares to trusts for sale;

(5) for dealing with party structures and open spaces held in common;

(6) for converting tenancies by entireties into joint tenancies;

(7) for converting existing freehold mortgages into mortgages by demise; 15 Geo. 5, c. 20, s. 39.

(8) for converting existing leasehold mortgages into mortgages by sub-demise.

(*a*) January 1, 1926 (see Law of Property (Postponement) Act, 1924). But see note to sect. 1, *ante*.

Part II.

Contracts, Conveyances and other Instruments.

Contracts.

Contracts for sale, &c., of land to be in writing.

40.—(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court.

Sub-sect. 1 of this section re-enacts, as to contracts for the sale of land, sect. 4 of the Statute of Frauds (29 Car. 2, c. 3), and this Act repeals in that section the words "or upon any contract or sale of lands, tenements, and hereditaments or any interest in or concerning them." Sub-sect. 2 is new. For definitions of "disposition" and "land" in the present Act see sect. 205, sub-sect. 1 (ii) and (ix), *post*. As to part performance and for a full discussion of the law, see Dart, V. & P., and Fry on Specific Performance. The following is a summary of some of the decided points:—(1) As to interests within the statute, it applied to an agreement to take a specific part of a house as "lodgings" (*Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Stafford*, 1 Cr. & J. 391); but not to an agreement for board and lodging (*Wright* v. *Stavert*, 29 L. J. Q. B. 161); to contracts as to assignments of leases (*Buttemere* v. *Hayes*, 5 M. & W. 456; *Horsey* v. *Graham*, 5 C. P. 9); but not to a licence to enter land (*Wood* v. *Leadbitter*, 13 M. & W. 838; see, however, *Kerrison* v. *Smith*, [1897] 2 Q. B. 445; see also as to *Wood* v. *Leadbitter*, *Hurst* v. *Picture Theatres*, [1915] 1 K. B. 1). A verbal promise by A to pay the cost of buying a house if B will buy it is not within the statute (*Boston* v. *B.*, [1904] 1 K. B. 124). Cf. *Angell* v. *Duke*, L. R. 10 Q. B. 174; *Jervis* v. *Berridge*, 8 Ch. 351; *Vaughan* v. *Hancock*, 3 C. B. 766; *Smart* v. *Harding*, 24 L. J. C. P. 76; *Hodgson* v. *Johnson*, 28 L. J. Q. B. 88. A contract relating to the profits of a benefice was held within the statute (*Alchin* v. *Hopkins*, 1 Bing. N. C. 99); also agreements for the sale of growing crops (*Falmouth* v. *Thomas*, 1 Cr. & M. 89; *Harvey* v. *Grabham*, 5 A. & E. 61; *Emmerson* v. *Heelis*, 2 Taunt. 31, 38; *Crosby* v. *Wadsworth*, 6 East, 602; *Teall* v. *Auty*, 4 Moo. 542; *Rodwell* v. *Phillips*, 9 M. & W. 501). *Secus*, where the contract was held to be one merely for the sale of chattels (*Warwick* v. *Bruce*, 2 M. & S. 205; *Parker* v. *Staniland*, 11 East, 362; see also *Marshall*

15 Geo. 5, c. 20, s. 40.

v. *Green*, 1 C. P. D. 35; *Lavery* v. *Purssell*, 39 Ch. D. 508). As to agreements between landlord and tenant regarding improvements, &c., see *Reeve* v. *Jennings*, [1910] 2 K. B. 522; *Hoby* v. *Roebuck*, 1 Taunt. 157; *Lee* v. *Gaskell*, 1 Q. B. D. 700. As to contracts for the use of docks, see *Wells* v. *Kingston-upon-Hull*, 10 C. P. 402; *Manchester Ship Canal* v. *M. Racecourse Co.*, [1901] 2 Ch. 37. Railway shares (*Knight* v. *Barber*, 16 M. & W. 66; *Tempest* v. *Kilner*, 3 C. B. 249; *Bowlby* v. *Bell*, *ibid.*, 284), and shares in mines (*Watson* v. *Spratley*, 10 Ex. 222; *Powell* v. *Jessop*, 18 C. B. 336) were held not interests in land. As to identifying the property by extrinsic evidence, see *Auerbach* v. *Nelson*, [1919] 1 Ch. 383. (2) The agreement. Anything under the hand of the party, expressing that he has entered into the agreement, and showing its terms, is enough (*Barkworth* v. *Young*, 26 L. J. Ch. 153; and see *Horner* v. *Walker*, [1923] 2 Ch. 218; *Koenigsblatt* v. *Sweet*, *ibid.*, 314). A signed paper may refer to an unsigned one containing the terms (*Allen* v. *Bennett*, 3 Taunt. 169; *Ridgeway* v. *Wharton*, 6 H. L. C. 238). Parol evidence is admissible to prove the identity of the unsigned paper (*Clinan* v. *Cooke*, 1 Sch. & Lef. 33), but not to connect papers alleged to form the agreement (*De Beil* v. *Thompson*, 3 Beav. 471; *Holmes* v. *Mitchell*, 28 L. J. C. P. 301). As to extending verbally the time for acceptance, see *Morrell* v. *Studd*, [1913] 2 Ch. 648. A contract to grant a lease must state the time at which the term is to commence, either expressly or by reasonable inference (*Humphrey* v. *Conybeare*, 80 L. T. 40; and see *Re Lander and Bagley*, [1892] 3 Ch. 41; *Oxford* v. *Crow*, [1893] 3 Ch. 535). Both parties must be named or identified by description (*Champion* v. *Plummer*, 1 Bos. & P. (N.R.) 252; *Allen* v. *Bennett*, 3 Taunt. 173; *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Commins* v. *Scott*, 20 Eq. 11; *Catling* v. *King*, 5 Ch. D. 660; *Carr* v. *Lynch*, [1900] 1 Ch. 613; but see *Lovesey* v. *Palmer*, [1916] 2 Ch. 233). (3) Signature. The party to be charged must sign his name or do something which he intends to be equivalent to it (*Ogilvie* v. *Foljambe*, 3 Mer. 53; *Selby* v. *S.*, *ibid.*, 2). See as to printed names *Schneider* v. *Norris*, 2 M. & S. 286; *Hucklesby* v. *Hook*, 82 L. T. 117. See also, as to signature, *Evans* v. *Hoare*, [1892] 1 Q. B. 593; *Caton* v. *C.*, L. R. 2 H. L. 127. (4) Authority of agent. This need not be in writing (*Emmerson* v. *Heelis*, 2 Taunt. 48; *Coles* v. *Trecothick*, 9 Ves. 250); it may be recognised afterwards (*Maclean* v. *Dunn*, 4 Bing. 722). As to an agent deputing signature to another, see *Blore* v. *Sutton*, 3 Mer. 237. One contracting party cannot sign as the agent of the other (*Sharman* v. *Brandt*, L. R. 6 Q. B. 720). As to the authority of a solicitor to affirm the existence and validity of a contract, see *Smith* v. *Webster*, 3 Ch. D. 49; *North* v. *Loomes*, [1919] 1 Ch. 378; and as to a pleading signed by counsel being a memorandum, see *Grindell* v. *Bass*, [1920] 2 Ch. 487. As to auctioneers, see *Kenworthy* v. *Schofield*, 2 B. & C. 947; *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434.

Stipulations not of the essence of a contract.

41. Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.

This section re-enacts sect. 25, sub-sect. 7 of Jud. Act, 1873, which applied only to contracts such as before the Act were dealt with by Courts of equity, and not to mercantile contracts (*Reuter* v. *Sala*, 4 C. P. D. 249). Nor does the provision apply to stipu-

lations as to time in an action for common law relief, if equity would not, before the Jud. Act, have granted specific performance or restrained the action (*Stickney* v. *Keeble*, [1915] A. C. 386). 15 Geo. 5, c. 20, s. 41.

Provisions as to contracts.

42.—(1) A stipulation that a purchaser of a legal estate in land shall accept a title made with the concurrence of any person entitled to an equitable interest shall be void, if a title can be made discharged from the equitable interest without such concurrence—

(a) under a trust for sale; or

(b) under this Act, or the Settled Land Act, 1925, or any other statute.

(2) A stipulation that a purchaser of a legal estate in land shall pay or contribute towards the costs of or incidental to—

(a) obtaining a vesting order, or the appointment of trustees of a settlement, or the appointment of trustees of a conveyance on trust for sale; or

(b) the preparation stamping or execution of a conveyance on trust for sale, or of a vesting instrument for bringing into force the provisions of the Settled Land Act, 1925; (*a*)

shall be void.

(3) A stipulation contained in any contract for the sale or exchange of land made after the commencement of this Act, to the effect that an outstanding legal estate is to be traced or got in by or at the expense of a purchaser or that no objection is to be taken on account of an outstanding legal estate, shall be void.

(4) If the subject matter of any contract for the sale or exchange of land—

(i) is a mortgage term (*b*) and the vendor has power to convey the fee simple in the land, or, in the case of a mortgage of a term of years absolute, the leasehold reversion affected by the mortgage, the contract shall be deemed to extend to the fee simple in the land or such leasehold reversion;

(ii) is an equitable interest capable of subsisting as a legal estate, and the vendor has power to vest such legal estate in himself or in the purchaser or to require the same to be so vested, the contract shall be deemed to extend to such legal estate;

(iii) is an entailed interest (*c*) in possession and the vendor has power to vest in himself or in the purchaser the fee simple in the land, (or, if the entailed interest is an interest in a term of years absolute, such term,) or to require the same to be so vested, the contract shall be deemed to extend to the fee simple in the land or the term of years absolute.

15 Geo. 5, c. 20, s. 42.

(5) This section does not affect the right of a mortgagee of leasehold land to sell his mortgage term only if he is unable to convey or vest the leasehold reversion expectant thereon.

(6) Any contract to convey an undivided share (*d*) in land made before or after the commencement of this Act, shall be deemed to be sufficiently complied with by the conveyance of a corresponding share in the proceeds of sale of the land in like manner as if the contract had been to convey that corresponding share.

(7) Where a purchaser has power to acquire land compulsorily, and a contract, whether by virtue of a notice to treat or otherwise, is subsisting under which title can be made without payment of the compensation money into court, title shall be made in that way unless the purchaser, to avoid expense or delay or for any special reason, considers it expedient that the money should be paid into court (*e*).

(8) A vendor shall not have any power to rescind a contract by reason only of the enforcement of any right under this section.

(9) This section only applies in favour of a purchaser for money or money's worth.

(*a*) See S. L. Act, 1925, ss. 4, 5, 8, and 10, *post*.
(*b*) See sects. 85 *et seq.*, *post*.
(*c*) See sect. 130, *post*.
(*d*) See sect. 34, *ante*.
(*e*) See sect. 203, *post*. This and the next section are from L. P. Acts, 1922 and 1924.

Rights protected by registration.

43.—(1) Where a purchaser of a legal estate is entitled to acquire the same discharged from an equitable interest which is protected by registration as a pending action, annuity, writ, order, deed of arrangement or land charge, and which will not be overreached by the conveyance to him, he may nothwithstanding any stipulation to the contrary, require—

(a) that the registration shall be cancelled; or

(b) that the person entitled to the equitable interest shall concur in the conveyance;

and in either case free of expense to the purchaser.

(2) Where the registration cannot be cancelled or the person entitled to the equitable interest refuses to concur in the conveyance, this section does not affect the right of any person to rescind the contract.

See as to the registered interests mentioned in this section Land Charges Act, 1925, ss. 2—14, *ante;* and as to interests over-reached by a conveyance sect. 2 of the present Act, *ante*.

Statutory commencements of title.

44.—(1) After the commencement of this Act thirty years shall be substituted for forty years as the period of

commencement of title which a purchaser of land may require; nevertheless earlier title than thirty years may be required in cases similar to those in which earlier title than forty years might immediately before the commencement of this Act be required (*a*). 15 Geo. 5, c. 20, s. 44.

(2) Under a contract to grant or assign a term of years, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assign shall not be entitled to call for the title to the freehold (*b*).

(3) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*c*).

(4) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion (*c*), the intended lessee shall not have the right to call for the title to that reversion (*d*).

(5) Where by reason of any of the three last preceding subsections, an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not, where the contract is made after the commencement of this Act, be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice (*e*).

(6) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*f*).

(7) Where the manorial incidents formerly affecting any land have been extinguished, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title of the person entering into any compensation agreement or giving a receipt for the compensation money to enter into such agreement or to give such receipt, and shall not be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice (*g*).

(8) A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if he had investigated the title or made enquiries in regard to matters prior to the period of commencement of title fixed by this Act, or by any other statute, or by any rule of law, he might have had notice, unless he actually makes such investigation or enquiries (*h*).

(9) Where a lease whether made before or after the commencement of this Act, is made under a power contained in a settlement, will, Act of Parliament, or other

15 Geo. 5, c. 20, s. 44.

instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease (*i*).

(10) This section, save where otherwise expressly provided, applies to contracts for sale whether made before or after the commencement of this Act, and applies to contracts for exchange in like manner as to contracts for sale, save that it applies only to contracts for exchange made after such commencement (*k*).

(11) This section applies only if and so far as a contrary intention is not expressed in the contract (*l*).

Sub-sects. 5, 7, 8 and 10 of this section were first enacted by L. P. Acts, 1922 and 1924, but the remainder re-enacts sect. 1 (substituting 30 for 40 years) and sect. 2 rule 1 of V. & P. Act, 1874, and sect. 3, sub-sects. 1 and 2 and sect. 13, sub-sect. 1 of C. Act, 1881, and sect. 4, sub-sect. 1 of C. Act, 1882. For definition of "land" see sect. 205, sub-sect. 1 (ix), *post*.

(*a*) It was held under V. & P. Act, 1874, that in the case of a sale of leaseholds the deed creating the term, even where dated more than forty years before contract, must be abstracted and produced; but dealings prior to the necessary commencement of title need not be abstracted, unless under special circumstances (*Williams* v. *Spargo*, [1893] W. N. 100; see *Re Stamford and Knight*, [1900] 1 Ch. 287). If the title was a possessory one, forty years' possession must be proved (*Jacobs* v. *Revell*, [1900] 2 Ch. 858). If a purchaser under a squatter's possessory title chose to accept less than a forty years' title, he was fixed with constructive notice of all such equities affecting the land (*e.g.* under restrictive covenants) as he would have discovered by reasonable inquiries under a title for the full period (*Re Nisbett and Potts*, [1906] 1 Ch. 386; see *Re Cox and Neve*, [1891] 2 Ch. 109; *Re Judge and Sheridan*, 96 L. T. 451).

(*b*) This sub-section (re-enacting sect. 2, r. 1 of V. and P. Act, 1874), controls the right of a litigant in an action for specific performance to production of deeds, where there is merely a general denial of the title of the other party; but does not prevent the title being shown to be bad *aliunde* (*Jones* v. *Watts*, 43 Ch. D. 574). An agreement to grant a right of way for a term is within the rule (*S. C.*). The rule did not prevent a lessee being affected with the constructive notice of his lessor's title (*Patman* v. *Harland*, 17 Ch. D. 353; but see, as to contracts made after 1925, sub-sect. 5). The rule was excluded where the intended lessor expressly agreed to deliver an abstract of his title to grant the lease (*Re Pursell and Deakin*, [1893] W. N. 152).

(*c*) The "leasehold reversion" is the reversion to that leasehold interest out of which the term of years is derived (*Gosling* v. *Woolf*, [1893] 1 Q. B. 39).

(*d*) C. A. 1881, s. 13 (here re-enacted) did not absolve an intending lessor from the duty of telling his intended lessee of any defect of title (*Cresswell* v. *Davidson*, 56 L. T. 812). And see *Re Lloyds Bank and Lillington*, [1912] 1 Ch. 601.

(*e*) See note (*b*), *supra*.

(*f*) See as to production of documents of title of the manor, *Re Agg-Gardner*, 25 Ch. D. 600; and as to manorial documents, L. P. Act, 1922, ss. 144 and 144A. As to the effect of enfranchisement under L. P. Act, 1922, see sect. 128 and Sched. XII. of that Act.

(*g*) As to "manorial incidents" see note (*a*) to sect. 28, *ante*. Part VI. of L. P. Act, 1922, provided for their extinction on payment of compensation. For "purchaser" see sect. 205, subsect. 1 (xxi), *post*. 15 Geo. 5, c. 20, s. 44.

(*h*) See also as to notice sect. 199, *post*.

(*i*) See *Hughes* v. *Flanagan*, 30 L. R. Ir. 111, and S. L. Act, 1925, s. 90 (4), *post*.

(*k*) The extension to exchanges is new.

(*l*) See *Re Pursell and Deakin*, [1893] W. N. 152.

Other statutory conditions of sale.

45.—(1) A purchaser of any property shall not—

(a) require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; or

(b) require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, agreed to be produced, or noticed;

and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise:

Provided that this subsection shall not deprive a purchaser of the right to require the production, or an abstract or copy of—

(i) any power of attorney under which any abstracted document is executed; or

(ii) any document creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an abstracted document; or

(iii) any document creating any limitation or trust by reference to which any part of the property is disposed of by an abstracted document (*a*).

(2) Where land is held by lease (other than an underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears,

15 Geo. 5. c. 20, s. 45.

that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*b*).

(3) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date (*c*).

(4) On a sale of any property, the following expenses shall be borne by the purchaser where he requires them to be incurred for the purpose of verifying the abstract or any other purpose, that is to say—

(a) the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the possession of the vendor or his mortgagee or trustee, and the expenses of all journeys incidental to such production or inspection; and

(b) the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the possession of the vendor or his mortgagee or trustee, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the possession of the vendor or his mortgagee or trustee;

and where the vendor or his mortgagee or trustee retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser (*d*).

(5) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense (*e*).

(6) Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far

as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*f*). 15 Geo. 5, c. 20, s. 45.

(7) The inability of a vendor to furnish a purchaser with an acknowledgment of his right to production and delivery of copies of documents of title or with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents (*g*).

(8) Such acknowledgments of the right of production or covenants for production and such undertakings or covenants for safe custody of documents as the purchaser can and does require shall be furnished or made at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser (*h*).

(9) A vendor shall be entitled to retain documents of title where—

(a) he retains any part of the land to which the documents relate; or

(b) the document consists of a trust instrument or other instrument creating a trust which is still subsisting, or an instrument relating to the appointment or discharge of a trustee of a subsisting trust (*i*).

(10) This section applies to contracts for sale made before or after the commencement of this Act, and applies to contracts for exchange in like manner as to contracts for sale, except that it applies only to contracts for exchange made after such commencement:

Provided that this section shall apply subject to any stipulation or contrary intention expressed in the contract (*k*).

(11) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the court (*l*).

(*a*) The proviso in this sub-section is new, but otherwise it re-enacts sect. 3, sub-sect. 3, of C. A. 1881. For definition of "purchaser" see sect. 205, sub-sect. 1 (xxi), *post*. This sub-section was not intended to repeal the doctrines or qualify the principles on which before the Act the Courts granted or refused specific performance (*Nottingham Co.* v. *Butler*, 15 Q. B. D. 272). Accordingly, it does not preclude a purchaser who has discovered *aliunde* a defect prior to the stipulated commencement of title, and which was known to the vendor, from refusing to complete, *S. C.*, 16 Q. B. D. 778; and see *Waddell* v. *Wolfe*, L. R. 9 Q. B. 515; *Smith* v. *Robinson*, 13 Ch. D. 148. For the effect of a condition against objecting to prior title, see *Re National* Sub-s. (1).

15 Geo. 5, c. 20, s. 45.

Bank and March, [1895] 1 Ch. 190; *Re Turpin and Akern*, [1905] 1. I. R. 85.

Sub-s. (2).

(*b*) This sub-section (re-enacting C. A. 1881, s. 3 (4)) applies only to a payment of money, and not to a rent of a peppercorn, or in kind (*Re Moody and Yates*, 30 Ch. D. 344). As to the effect of breaches after contract and before completion, see *Lawrie* v. *Lees* (14 Ch. D. 249; 7 App. Cas. 19). No assumption as to performance of covenants was required from a purchaser who made "the contrary" appear by adducing evidence of non-performance (*Re Highett and Bird*, [1903] 1 Ch. 287). See as to this decision, *Re Allen and Driscoll*, [1904] 2 Ch. 231. Where there had been breaches of a repairing covenant the production of the receipt was held not in itself conclusive evidence (*Re Taunton, &c., Society and Roberts*, [1912] 2 Ch. 381).

Sub-s. (3).

(*c*) Re-enacts C. A. 1881, s. 3 (5). The production of the ground landlord's receipt is not sufficient (*Re Higgins and Percival*, 59 L. T. 213).

Sub-s. (4).

(*d*) Re-enacts C. A. 1881, s. 3 (6), adding after "vendor" "or his mortgagee or trustee." This sub-section does not interfere with the duty of the vendor to deliver a proper abstract of title, and only deals with the expenses of requisitions made on the footing of such an abstract (*Re Johnson and Tustin*, 30 Ch. D. 42). Every document which forms a link in the vendor's title must be abstracted in chief at the vendor's expense (*Re Stamford Banking Co. and Knight*, [1900] 1 Ch. 287); but on a sale of a lease more than forty years old it was sufficient that a "link" more than forty years old appeared by way of recital (*Williams* v. *Spargo*, [1893] W. N. 100; see sub-sect. 1). Where there is a covenant to finish, to the satisfaction of a surveyor, a house contracted to be sold, the surveyor's certificate forms part of the vendor's title, and must be procured at his expense (*Re Moody and Yates*, 30 Ch. D. 344). But when a proper abstract has been delivered, this sub-section applies to the production of all documents properly comprised therein (*Re Ebsworth and Tidy*, 42 Ch. D. 34). The purchaser bore the cost of production of deeds in the hands of a mortgagee (*Re Willett and Argenti*, 60 L. T. 735; see now *supra*); and the cost of statutory declarations made by the vendor (*Re Edwards and Rudkin*, 58 L. T. 789); and the cost of searching for an underlease which was the root of the vendor's title (*Re Stuart and Olivant and Seadon*, [1896] 2 Ch. 328). But the vendor must bear the cost of obtaining documents of title required to be handed over on completion (*Re Duthy and Jesson*, [1898] 1 Ch. 419), and of obtaining secondary evidence of documents, which cannot be handed over, *e.g.*, a Scottish will (*Halkett* v. *Dudley*, [1907] 1 Ch. 604; see as to a vendor furnishing secondary evidence, *Re Halifax Bank and Wood*, 15 Times L. R. 106). It has been held in Ireland that in the absence of stipulation the vendor bears the cost of registry researches (*Re Murray and Heggarty*, 15 L. R. Ir. 510). See also *Re Wright and Thompson*, [1920] 1 Ch. 191.

Sub-s. (5).

(*e*) Re-enacts C. A. 1881, s. 3 (7).

Sub-s. (6).

(*f*) Under the second rule in sect. 2 of V. and P. Act, 1874, re-enacted by this sub-section, a recital in a deed more than twenty years old that the vendor was seised in fee simple prevented a purchaser from demanding any abstract of prior title (*Bolton* v. *School Board for London*, 7 Ch. D. 766; but see *Re Wallis and Grout*, [1906] 2 Ch. 206). A recital that a sale was made in pursuance of a trust for sale precluded a requisition as to whether it was a valid exercise of that trust (*Re Marsh and Granville*, 24 Ch. D. 11).

(*g*) This sub-section re-enacts rule 3 of sect. 2 of V. and P. Act, 1874, adding the words from "an acknowledgment" to "or" (see sect. 64, *post*). See note (*d*) *supra*. **15 Geo. 5, c. 20, s. 45.**

(*h*) This sub-section re-enacts rule 4 of the above section, with similar additions referring to the subsequent statutory provisions now contained in sect. 64 of the present Act, *post*. Sub-s. (7). Sub-s. (8).

(*i*) Clause (a) re-enacts rule 5 of sect. 2 of V. and P. Act, 1874, substituting "the land" for "an estate." The fifth rule referred only to a retainer of land, and accordingly where a mortgage comprised land and policies, and the mortgagee sold the land and retained the policies, the purchaser was entitled to have the mortgage deed (*Re Williams and Newcastle*, [1897] 2 Ch. 144). But where the vendor retained a servient tenement over which an easement had formerly existed, the vendor was entitled to retain documents showing the title to, and the extinguishment of, the easement (*Re Lehmann and Walker*, [1906] 2 Ch. 640). As to "trust instruments" see S. L. Act, 1925, ss. 4 and 9, *post*. As to covenants for production, see sect. 64, *post*. Sub-s. (9).

(*k*) Replaces C. A. 1881, s. 3 (9) and (10), the provision as to exchanges being new. Sub-s. (10).

(*l*) Re-enacts C. A. 1881, s. 3 (11). Sub-s. (11).

Forms of contracts and conditions of sale.

46. The Lord Chancellor may from time to time prescribe and publish forms of contracts and conditions of sale of land, and the forms so prescribed shall, subject to any modification, or any stipulation or intention to the contrary, expressed in the correspondence, apply to contracts by correspondence, and may, but only by express reference thereto, be made to apply to any other cases for which the forms are made available (*a*).

(*a*) Sects. 46 to 48 are taken from L. P. Acts, 1922 and 1924. Forms under sect. 46 were issued, dated August 7, 1925.

Application of insurance money on completion of a sale or exchange.

47.—(1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.

(2) This section applies only to contracts made after the commencement of this Act, and has effect subject to—

(a) any stipulation to the contrary contained in the contract,

(b) any requisite consents of the insurers,

(c) the payment by the purchaser of the proportionate part of the premium from the date of the contract.

(3) This section applies to a sale or exchange by an order of the court, as if—

(a) for references to the "vendor" there were sub-

15 Geo. 5, c. 20, s. 47.

stituted references to the "person bound by the order";

(b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into court;

(c) for the reference to the date of the contract there were substituted a reference to the time when the contract becomes binding.

Fire assurance policies are not in their nature assignable, nor intended to be assigned without the consent of the insurers (*Lynch* v. *Dayrell*, 3 Bro. P. C. 497; *Sadlers' Co.* v. *Badcock*, 2 Atk. 557); and therefore a purchaser had hitherto had no claim on insurance moneys in the absence of an express stipulation, before the completion of the contract (*Rayner* v. *Preston*, 18 Ch. D. 1).

Stipulations preventing a purchaser, lessee, or underlessee from employing his own solicitor to be void.

48.—(1) Any stipulation made on the sale of any interest in land after the commencement of this Act to the effect that the conveyance to, or the registration of the title of, the purchaser shall be prepared or carried out at the expense of the purchaser by a solicitor appointed by or acting for the vendor, and any stipulation which might restrict a purchaser in the selection of a solicitor to act on his behalf in relation to any interest in land agreed to be purchased, shall be void; and, if a sale is effected by demise or subdemise, then, for the purposes of this subsection, the instrument required for giving effect to the transaction shall be deemed to be a conveyance:

Provided that nothing in this subsection shall affect any right reserved to a vendor to furnish a form of conveyance to a purchaser from which the draft can be prepared, or to charge a reasonable fee therefor, or, where a perpetual rentcharge is to be reserved as the only consideration in money or money's worth, the right of a vendor to stipulate that the draft conveyance is to be prepared by his solicitor at the expense of the purchaser.

(2) Any covenant or stipulation contained in, or entered into with reference to any lease or underlease made before or after the commencement of this Act—

(a) whereby the right of preparing, at the expense of a purchaser, any conveyance of the estate or interest of the lessee or underlessee in the demised premises or in any part thereof, or of otherwise carrying out, at the expense of the purchaser, any dealing with such estate or interest, is expressed to be reserved to or vested in the lessor or underlessor or his solicitor; or

(b) which in any way restricts the right of the purchaser to have such conveyance carried out on his behalf by a solicitor appointed by him;

shall be void:

Provided that, where any covenant or stipulation is rendered void by this subsection, there shall be implied in lieu thereof a covenant or stipulation that the lessee or underlessee shall register with the lessor or his solicitor within six months from the date thereof, or as soon after the expiration of that period as may be practicable, all conveyances and devolutions (including probates or letters of administration) affecting the lease or underlease and pay a fee of one guinea in respect of each registration, and the power of entry (if any) on breach of any covenant contained in the lease or underlease shall apply and extend to the breach of any covenant so to be implied. 15 Geo. 5, c. 20, s. 48.

(3) Save where a sale is effected by demise or subdemise, this section does not affect the law relating to the preparation of a lease or underlease or the draft thereof.

(4) In this section "lease" and "underlease" include any agreement therefor or other tenancy, and "lessee" and "underlessee" and "lessor" and "underlessor" have corresponding meanings.

For definition of "land" see sect. 205, sub-sect. 1 (ix), *post*, and for the general definition of "lease" in the Act, *ibid.* (xxiii).

Applications to the Court by vendor and purchaser.

49.—(1) A vendor or purchaser of any interest in land, or their representatives respectively, may apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as to the court may appear just, and may order how and by whom all or any of the costs of and incident to the application are to be borne and paid (*a*).

(2) Where the court refuses to grant specific performance of the contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit (*b*).

(3) This section applies to a contract for the sale or exchange of any interest in land.

(*a*) Sub-sect. 1 re-enacts, as to England (substituting "any interest in land" (see sub-sect. 3 and sect. 205, sub-sect. 1 (ix), *post*) for "real or leasehold estate"), sect. 9 of the V. and P. Act, 1874, repealed by this Act. In an action for specific performance of a contract as to real estate an ordinary form of relief is as follows:—The Court (1) makes a declaration establishing the contract; (2) directs a reference as to title; and (3) gives directions consequent on the result of the reference (Seton, 7th ed. 2136, 2158, 2170).

Cases under this section.

Questions between lessor and lessee arising on a contract to grant a lease have been treated as falling within this section (*Re Lander and Bagley*, [1892] 3 Ch. 41; see *Re Anderton and Milner*, 45 Ch. D. 476; *Re Stephenson and Cox*, 36 S. J. 287). A question not within the section as to a voluntary gift was determined under

15 Geo. 5, c. 20, s. 49.

it on counsel admitting a contract for nominal consideration (*Re Salisbury*, 23 W. R. 824). So where rights other than those arising under the contract had to be considered the case was by consent dealt with as if an action had been brought (*Re Cosh*, [1897] 1 Ch. 12). Questions as to the amount of vendor's costs on a sale should not be raised under the section, the solicitor not being a party (*Re Webster and Jones*, [1902] 2 Ch. 551).

According to the words of this section the parties cannot, upon an application under it, question either the existence or the validity of the contract, *e.g.*, on the ground of fraud (*Re Hargreaves and Thompson*, 32 Ch. D. 459; see *Re Davis and Cavey*, 40 Ch. D. 608; *Re Sandbach and Edmondson*, [1891] 1 Ch. 102). But it is only the existence and validity of the contract, in its inception, which cannot be questioned; and therefore questions as to rescission can be dealt with (*Re Jackson and Woodburn*, 37 Ch. D. 47). Questions of construction arising on the contract as it stands should be decided, although grounds may exist for an action for rescission (*Re Hughes and Ashley*, [1900] 2 Ch. 595; *Re Wallis and Barnard*, [1899] 2 Ch. 515; see *Re Lander and Bagley*, [1892] 3 Ch. 50, where a question of construction was decided, the result of the decision being to show that there was a valid subsisting agreement).

Kind of questions raisable under this section.

An application under this section should not in general be treated as if an action had been brought (*Re Hargreaves and Thompson*, 32 Ch. D. 456; compare *Re Cosh*, [1897] 1 Ch. 11, where by consent an application was so treated). In one case a vendor, who had succeeded on a strict legal question raised by the purchaser's summons, subsequently failed in his action for specific performance, the Court refusing in its discretion to grant the equitable remedy (*Scott* v. *Alvarez*, [1895] 2 Ch. 603). But whatever could be done in Chambers upon reference as to title where the contract had been established in an action can be done on a summons under this section (*Re Burroughs, Lynn and Sexton*, 5 Ch. D. 604). And accordingly the same kind of evidence can be used (*ibid.*). The section, however, was not intended to enable the Court to try in this way disputed questions of fact (*ibid.*, 603; *Re Popple and Barratt*, 25 W. R. 248; *Re Gray and the Metropolitan Ry. Co.*, 44 L. T. 567); or questions of fraud (*Re Delany and Deigan*, [1905] 1 I. R. 602); but was intended to enable either vendor or purchaser to obtain a decision upon some isolated point (*Re Hargreaves and Thompson*, 32 Ch. D. 459; *Re Wallis and Barnard*, [1899] 2 Ch. 515); *e.g.*, any short point of law or construction arising upon the abstract or upon the purchaser's requisitions (*Re Popple and Barratt*, *supra*).

Where a vendor's title depends on the construction of a difficult document, he should get that question determined by originating summons. And if he insists on proceeding by summons under the present section, the Court may declare the title too doubtful to force on the purchaser (*Re Nichols and Von Joel*, [1910] 1 Ch. 43; *Re Hogan and Marnell*, [1919] 1 I. R. 822; see *Re Atkinson and Horsell*, [1912] 2 Ch. 1). Such a declaration has under this section been frequently made by the Court when deciding a question in favour of the vendor (*Re Hollis Hospital and Hague*, [1899] 2 Ch. 555; *Re Thackwray and Young*, 40 Ch. D. 34; *Re Marshall and Salt*, [1900] 2 Ch. 202; see *Re New Land, &c., and Gray*, [1892] 2 Ch. 138; *Re Wallis and Barnard*, [1899] 2 Ch. 521; *Mogridge* v. *Clapp*, [1892] 3 Ch. 396; *Re Handman and Wilcox*, [1902] 1 Ch. 599; *Re Douglas and Powell*, [1902] 2 Ch. 296). The Court has authority not only to decide the questions asked, but also to make an order which will be just, as the natural consequence of the decision (*Re Hargreaves and Thompson*, 32 Ch. D. 457). As to the kind of orders that will be made, see cases quoted pp. 643-644, *post*.

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Questions in respect of requisitions and objections.

Under this section the Court has dealt with the following (among other) questions in respect of requisitions and objections, *e.g.* whether a requisition as to the completeness of the abstract should be answered (*Re Ford and Hill*, 10 Ch. D. 365); what documents should be comprised in the abstract (*Re Stamford Co. and Knight*, [1900] 1 Ch. 287); whether vendor's refusal to answer requisitions was unreasonable (*Re Glenton and Saunders*, 53 L. T. 434).

Also whether an annual payment sold was properly described as "a rent-charge" and was charged on water rates (*Re Gerard and Beecham*, [1894] 3 Ch. 295); whether land was "adjoining" to an existing churchyard (*Re Bateman and Parker*, [1899] 1 Ch. 599); whether land sold as "building land" was part of a disused burial ground (*Re Ponsford and Newport Board*, [1894] 1 Ch. 454; *Re Eccl. Commrs. and New City, &c. Co.*, [1895] 1 Ch. 702).

Also whether succession duty was payable (*Re Cooper and Allen*, 4 Ch. D. 802; *Re Warner*, 17 Ch. D. 711); and by whom (*Re Kidd and Gibbon*, [1893] 1 Ch. 695); whether a purchaser was entitled to have a deed stamped (*Whiting to Loomes*, 17 Ch. D. 10); who should pay for registry searches (*Re Murray and Heggarty*, 15 L. R. Ir. 510); for searches for documents (*Re Stuart and Olivant*, [1896] 2 Ch. 328; *Re Duthy and Jesson*, [1898] 1 Ch. 419); for production of documents (*Re Willett and Argenti*, 60 L. T. 735); for procuring concurrence of mortgagees (*Re Sander and Walford*, [1900] W. N. 183); or for certificates or abstracts of deeds (*Re Moody and Yates*, 30 Ch. D. 344; *Re Johnson and Tustin*, *ibid.*, 42).

Also whether the vendor was bound to apply for the discharge of incumbrances under sect. 5 of the Conv. Act, 1881 (*Re G. N. Ry. Co. and Sanderson*, 25 Ch. D. 788; *Re Evans and Bettell*, [1910] 2 Ch. 438); whether a purchaser was entitled to evidence that a debenture charge had not attached (*Re Horne and Hellard*, 29 Ch. D. 736); what was sufficient evidence of performance of covenants (*Ringer to Thompson*, 45 L. T. 580); or that no common rights existed (*Re Bridges and McRae*, 30 W. R. 539); whether there was a presumption of enfranchisement of copyholds (*Re Lidiard*, 42 Ch. D. 254); what fine was payable on a sale of copyholds under the S. L. Act, 1882 (*Re Naylor and Spendla*, 34 Ch. D. 217).

Also whether notice of a trust entitled the purchaser to require the trust title to be proved (*Re Harman and Uxbridge Co.*, 24 Ch. D. 720; *Re Blaiberg and Abrahams*, [1899] 2 Ch. 340; *Re Chafer and Randall*, [1916] 2 Ch. 8); whether trustees had been properly appointed (*Re Walker and Hughes*, 24 Ch. D. 698; *Re Glenny and Hartley*, 25 Ch. D. 611; *Re Coates to Parsons*, 34 Ch. D. 370); or had effectually disclaimed (*Re Lord and Fullerton*, [1896] 1 Ch. 228; *Re Clout and Frewer*, [1924] 2 Ch. 230).

Also whether a lease has been properly granted (*Hallett to Martin*, 24 Ch. D. 624); whether a trust for sale of leaseholds authorised under-leases (*Re Judd and Poland*, [1906] 1 Ch. 684); whether a power of sale and exchange authorised a partition (*Re Frith and Osborne*, 3 Ch. D. 618); whether powers of sale were exercisable when given by mortgages (*Re Rumney and Smith*, [1897] 2 Ch. 351; *Re Irish Society and O'Keefe*, 7 L. R. Ir. 136); or by wills (*Re Sudeley and Baines*, [1894] 1 Ch. 334; *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Tweedie and Miles*, 27 Ch. D. 315); or by Law of Prop. Amend. Act, 1859 (*Re Adams and Perry*, [1899] 1 Ch. 554; *Re Barrow in Furness*, [1903] 1 Ch. 339).

Also whether a mortgaged estate passed under a devise (*Re Packman and Moss*, 1 Ch. D. 214); questions on the construction of wills (*Re Brown and Sibly*, 3 Ch. D. 156; *Re Coleman and Jarrom*, 4 Ch. D. 165; *Re White and Hindle*, 7 Ch. D. 201; *Re Hutchinson*

15 Geo. 5, c. 20, s. 49.

and Tenant, 8 Ch. D. 540; *Re Sturge and G. W. Ry. Co.*, 19 Ch. D. 444).

Also whether a post-nuptial settlement was valid (*Re Foster and Lister*, 6 Ch. D. 87); whether a title under a voluntary settlement was good in the case of a settlor's subsequent bankruptcy (*Re Carter and Kenderdine*, [1897] 1 Ch. 776); whether a bankrupt could dispose of after-acquired freeholds (*Re New Land Association and Gray*, [1892] 2 Ch. 138), or leaseholds (*Re Clayton and Barclay*, [1895] 2 Ch. 212); whether an adjudication in bankruptcy required registration in Middlesex (*Re Calcott and Elvin*, [1898] 2 Ch. 460); whether the trustee of a bankrupt could exercise a power of appointment (*Nichols to Nixey*, 29 Ch. D. 1005).

Also questions under the Companies Act, 1862 (*Re Bowling and Welby*, [1895] 1 Ch. 663); under the Fines and Recoveries Act, 1833 (*Re Dudson*, 8 Ch. D. 628); under the S. L. Acts (*Re Earle and Webster*, 24 Ch. D. 144; *Re Hale and Smyth*, 55 L. T. 151; *Re Strafford and Maples*, [1896] 1 Ch. 235; *Re Pocock and Prankerd*, *ibid.*, 302; *Re Marlborough and Queen Anne's Bounty* [1897] 1 Ch. 712; *Re Fisher and Grazebrook*, [1898] 2 Ch. 660; *Re Mundy and Roper*, [1899] 1 Ch. 275; *Re Newell and Nevill*, [1900] 1 Ch. 90); under the Conv. Act, 1881 (*Re Higgins and Percival*, 59 L. T. 213; *Re Arran and Knowlesden*, [1912] 2 Ch. 141), or under the Land Transfer Act, 1897 (*Re Pawley and London, &c. Bank*, [1900] 1 Ch. 58; *Re Cary and Lott*, [1901] 2 Ch. 463; *Re Cohen's Executors and London C.C.*, [1902] 1 Ch. 187); or under the Satisfied Terms Act, 1845 (*Re Moore and Hulme*, [1912] 2 Ch. 105); or the Finance (1909—10) Act, 1910 (*Re Soden and Alexander*, [1918] 2 Ch. 258); or the Execution of Trusts (War Facilities) Act, 1914 (*Re Donoughmore and Hackett*, [1918] 1 I. R. 359).

Also whether the rule against perpetuities applied to common law conditions (*Re Hollis Hospital and Hague*, [1899] 2 Ch. 540).

Also whether the concurrence was necessary: of the Charity Commissioners (*Re Royal Society and Thompson*, 17 Ch. D. 407; *Finnis to Forbes*, 24 Ch. D. 591; *Re Corporation of Clergy Sons and Skinner*, [1893] 1 Ch. 178; *Re Mason's Orphanage and L. and N. W. Ry.*, [1896] 1 Ch. 54, 596); or of incumbrancers and trustee in bankruptcy of life tenant (*Re Bedingfield and Herring*, [1893] 2 Ch. 332); or of *cestuis que trust* (*Re Cooke*, 4 Ch. D. 454); or of the husband of a married woman (*Re Thompson and Curzon*, 29 Ch. D. 177).

Also whether the receipt of a married woman for legacy discharged property (*Re Coward and Adam*, 20 Eq. 179); whether a good title could be made without payment of legacies (*Re Morrell and Chapman*, [1915] 1 Ch. 162); whether the joint receipt of different mortgagees was a good receipt (*Re Parker and Beech*, 56 L. T. 95); whether trustees must receive money personally (*Re Bellamy*, 24 Ch. D. 387; *Re Flower*, 27 Ch. D. 592).

Also whether a good title could be made by the following persons: — An infant selling gavelkind lands (*Re Maskell and Goldfinch*, [1895] 2 Ch. 525); an heir (*Re Morton and Hallett*, 15 Ch. D. 143); a devisee (*Osborne to Rowlett*, 13 Ch. D. 774); an executor selling freeholds (*Re Tanqueray-Willaume*, 20 Ch. D. 465), or leaseholds (*Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze*, [1894] 2 Ch. 101); an administrator (*Re Clay and Tetley*, 16 Ch. D. 3; *Re Adams and Kensington*, 27 Ch. D. 394); trustees (*Re Wright and Marshall*, 28 Ch. D. 93; *Patten to Edmonton*, 48 L. T. 870: as to which case see *Power* v. *Banks*, [1901] 2 Ch. 496; *Re Arbib and Class*, [1891] 1 Ch. 601; *Re Jenkins and Randall*, [1903] 2 Ch. 362; *Re Hailes and Hutchinson*, [1920] 1 Ch. 233); a compounding debtor (*Re Kearley and Clayton*, 7 Ch. D. 615); the survivor of two trustees

of a bankrupt (*Re Waddell*, 2 Ch. D. 172); or of two liquidators of a company (*Re Metropolitan Bank and Jones, ibid.*, 366). **15 Geo. 5, c. 20, s. 49.**

The Court has also decided claims for compensation: *e.g.*, whether compensation was payable before completion (*Aspinalls to Powell*, 60 L. T. 595; *Re Herbalt and Chaytor*, 57 L. J. Ch. 421; *Re Orange and Wright*, 52 L. T. 606), or after completion (*Re Turner and Skelton*, 13 Ch. D. 130; *Re Leyland and Taylor*, [1900] 2 Ch. 625). As to reference to Chambers, see *Aspinalls to Powell* (60 L. T. 595). Claims for compensation.

The Court has also decided other questions: *e.g.* what should be the form of conveyance (*Re Pigott and G. W. Ry. Co.*, 18 Ch. D. 146); whether particular covenants should be inserted (*Re Agg-Gardner*, 25 Ch. D. 600; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Gray and Metropolitan Ry. Co.*, 44 L. T. 567; *Re Sawyer and Baring*, 51 L. T. 356; *Re Mordy and Cowman, ibid.*, 721; *Re Lander and Bagley*, [1892] 3 Ch. 41; *Re Birmingham, &c. Co. and Allday*, [1893] 1 Ch. 342; *Re Wallis and Barnard*, [1899] 2 Ch. 515; *Re Hughes and Ashley*, [1900] 2 Ch. 595); who had the right to deeds (*Re Doherty*, 15 L. R. Ir. 247; *Re Williams and Newcastle*, [1897] 2 Ch. 144; *Re Jenkins and Commercial Co.*, 61 S. J. 283); whether a purchaser was entitled to damages for non-repair paid to the vendor by a former tenant (*Re Edie and Brown*, 58 L. T. 307); whether a vendor having sold by auction building land subject to restriction could afterwards sell unsold lots not so subject (*Re Birmingham Land Co. and Allday*, [1893] 1 Ch. 342). Other questions: *e.g.*, as to completion.

The Court has also decided whether a right of way was included in the contract (*Re Lavery and Kirk*, 33 S. J. 127; *Re Hughes and Ashley*, [1900] 2 Ch. 595); the effect of a plan annexed to particulars as regards a right of way (*Re Lindsay and Forde*, 72 L. T. 832); what was the effect of conditions restricting title and objections thereto (*Re National Provincial Bank and Marsh*, [1895] 1 Ch. 190; *Re Scott and Alvarez*, [1895] 1 Ch. 596; [1895] 2 Ch. 603; *Re Cox and Neve*, [1891] 2 Ch. 109; *Re Davys and Saurin*, 17 L. R. Ir. 334); the effect of a condition on the costs of pending litigation (*Re Spindler and Mear*, [1901] 1 Ch. 908); whether a purchaser was bound by a condition of sale alleged to be misleading (*Re Marsh and Granville*, 24 Ch. D. 11; *Re Sandbach and Edmondson*, [1891] 1 Ch. 99); to what a condition as to misdescription applied (*Re Beyfus and Masters*, 39 Ch. D. 110); whether under the conditions the vendor had the right to rescind (*Re Jackson and Oakshott*, 14 Ch. D. 851; *Re G. N. Ry. Co. and Sanderson*, 25 Ch. D. 788; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Dames and Wood*, 29 Ch. D. 626; *Re Jackson and Woodburn*, 37 Ch. D. 44; *Re Arbib and Class*, [1891] 1 Ch. 601; *Re Deighton and Harris*, [1898] 1 Ch. 458; *Re Jackson and Haden*, [1906] 1 Ch. 412); or the purchaser to repudiate the contract (*Re Gloag and Miller*, 23 Ch. D. 320), *e.g.* on the ground of onerous covenants (*Re White and Smith*, [1896] 1 Ch. 637; *Re Haedicke and Lipski*, [1901] 2 Ch. 666; as to which, see *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487); what price was payable under the contract (*Re Popple and Barratt*, 25 W. R. 248); whether any, and what, interest was payable (*Re Pigott and G. W. Ry. Co.*, 18 Ch. D. 146; *Riley to Streatfield*, 34 Ch. D. 386; *Re Golds and Norton*, 52 L. T. 321; *Re Hetling and Merton*, [1893] 3 Ch. 269; *Re London and Tubbs*, [1894] 2 Ch. 524; *Re Wilsons and Stevens*, [1894] 3 Ch. 546; *Re Strafford and Maples*, [1896] 1 Ch. 235; *Re Woods and Lewis*, [1898] 2 Ch. 211); and the Court has ordered the return of interest paid under protest (*Re Young and Harston*, 31 Ch. D. 168). As to contracts.

The section provides that the judge shall make such order as to him shall appear just; accordingly the Court has upon a purchaser's summons ordered a return of the deposit with interest (*Re Cosh and* Orders under section: for return of deposit;

15 Geo. 5, c. 20, s. 49.

Metropolitan District Ry. Co., 13 Ch. D. 607; *Re Hargreaves and Thompson*, 32 Ch. D. 454; *Re Smith and Stott*, 48 L. T. 512; *Re Haedicke and Lipski*, [1901] 2 Ch. 666; see, however, *Re Davis and Cavey*, 40 Ch. D. 608, where a return was claimed on the ground of misrepresentation in particulars); and has, in addition, ordered payment by the vendor of the purchaser's cost of investigating the title (*Re Higgins and Hitchman*, 21 Ch. D. 95; *Re Ebsworth and Tidy*, 42 Ch. D. 53; *Re Bryant and Barningham*, 44 Ch. D. 218; *Re Hare and O'Moore*, [1901] 1 Ch. 93); and such costs may be charged on the vendor's interest in the property (*Re Yielding and Westbrook*, 31 Ch. D. 344). See now sub-sect. 2, *infra*. Similarly, on a vendor's summons, the Court has ordered rescission and a return of the deposit (*Re Higgins and Percival*, 59 L. T. 213; *Re Walker and Oakshott*, [1901] 2 Ch. 383); and see the conditional order for return of deposit in *Re Beyfus and Masters*, 39 Ch. D. 112.

as to costs of investigating title; rescission.

Damages.

Damages for delay in completion cannot be recovered under this section (*Re Wilson and Stevens*, [1894] 3 Ch. 546). See as to repudiation, *Re Bayley and Shoesmith*, 87 L. J. Ch. 626.

Form of order.

Orders have frequently been made under the Act declaring that the vendor has or has not shown a good title (Seton, 7th ed. 327; but see *Re Wallis and Barnard*, [1899] 2 Ch. 520). The order may direct a reference to Chambers as to the form of the conveyance (*Re Monckton and Gilzean*, 27 Ch. D. 564), or as to the amount of compensation (*Aspinalls to Powell*, 60 L. T. 595).

Parties.

In actions for specific performance the general rule is that the parties to the contract, or their representatives, are the necessary and sufficient parties to the action (Fry, 6th ed. 75, 85). On a summons under this section the only persons between whom the Court can decide anything are, it has been said, the vendor and the purchaser (*Re Naylor and Spendla*, 34 Ch. D. 220; *Re Bartlett and Berry*, 76 L. T. 751); but other parties (*e.g.* a lord of the manor) may come in and be bound (*ibid.*). Questions as to the amount of vendor's costs on a sale should not be raised under the Act, the solicitor not being a party (*Re Webster and Jones*, [1902] 2 Ch. 551). The Court may direct other parties to be served; see *Re Tippett and Newbould*, 37 Ch. D. 446, a case in which the summons was subsequently by amendment made an originating summons on a question of construction. No decision will bind any party not before the Court; *e.g.* the Crown in respect of duty (*Re Cooper and Allen*, 4 Ch. D. 827); nor will it prevent subsequent litigation against the same purchaser in respect of the same title (*Osborne to Rowlett*, 13 Ch. D. 781).

Hearing of summons.

A summons may be adjourned into Court without discussion (*Re Jackson and Woodburn*, 37 Ch. D. 47; see, however, *Re Coleman and Jarrom*, 4 Ch. D. 168), or for further argument. An adjournment may be ordered either at the request of one of the parties (*Re Warner*, 17 Ch. D. 712), or at the discretion of the judge (*Re Cooper and Allen*, 4 Ch. D. 805); and the adjournment may be on part only of the summons (*Re Tippett and Newbould*, 37 Ch. D. 445). The judgment may be given in Court if the purchaser desires it (*Re Coleman and Jarrom*, 4 Ch. D. 168). In a proper case the summons may be stayed as frivolous or vexatious (*Re Bartlett and Berry*, 76 L. T. 751).

Appeals.

For the practice as to appeals from orders made in Chambers under the Act, see Annual Practice. The time within which an appeal can be brought is fourteen days (*Re Blyth and Young*, 13 Ch. D. 416; *Re Ricketts and Avent* (1890), W. N. 16). As to the time from which this period is calculated, see R. S. C., Ord. LVIII., r. 15. When an order dismissing an application contains a declaration as such, or as an expression of opinion so as to bind the rights

of the parties, it is not a simple refusal of the application within that rule (*Re Clay and Tetley*, 16 Ch. D. 3). **15 Geo. 5, c. 20, s. 49.**

As to reviewing a decision under this section, see *Re Scott and Alvarez*, [1895] 1 Ch. 596. Review.

As a general rule the costs will follow the event (*Re Davis and Cavey*, 40 Ch. D. 609; *Re Starr-Bowkett Society and Sibun*, 42 Ch. D. 386; *Re Johnson and Tustin*, 30 Ch. D. 49). If the question submitted is whether a good title can be made, and the title, even though not one which a conveyancer would recommend a purchaser to accept, is yet held good, the purchaser should pay the costs (*Osborne to Rowlett*, 13 Ch. D. 798; *Re Tanqueray-Williaume*, 20 Ch. D. 483). But no order was made as to costs where the difficulty arose from conflicting decisions (*Osborne to Rowlett*, 13 Ch. D. 774), or from the language of the contract (*Re Baker and Salmon*, [1907] 1 Ch. 244; see *Re Atkinson and Horsell*, [1912] 2 Ch. 1), or where there was a fair point for discussion (*Re Coward and Adams*, 20 Eq. 179; *Re Cosh and Metropolitan Ry. Co.*, 13 Ch. D. 613; *Finch* v. *Jukes* (1877), W. N. 211; see *Re G. N. Ry. Co. and Sanderson*, 25 Ch. D. 788). The vendor was ordered to pay costs where he rescinded after summons issued (*Re Spindler and Mear*, [1901] 1 Ch. 908). Costs given against the vendor may be charged on his interest in the property (*Re Yielding and Westbrook*, 31 Ch. D. 345; *Re Higgins and Percival*, 59 L. T. 214). Costs.

Where a respondent has not complied with an order made under this section, a further application should be made in Chambers to enforce the order (*Thompson* v. *Ringer*, 44 L. T. 507); where Bacon, V.-C., dismissed a subsequent action for specific performance on the ground that this had not been done. Enforcement of order.

(*b*) This and sub-sect. 3 are new. See as to orders for return of deposit on summons under V. and P. Act, 1874, *Re Cosh and Metropolitan District Ry. Co.*, and other cases cited *ante*, p. 644. Return of deposit.

50.—(1) Where land subject to any incumbrance, whether immediately realisable or payable or not, is sold or exchanged by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale or exchange, direct or allow payment into court of such sum as is hereinafter mentioned, that is to say— Discharge of incumbrances by the Court on sales or exchanges.

(a) in the case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, the sum to be paid into court shall be of such amount as, when invested in Government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge; and

(b) in any other case of capital money charged on the land, the sum to be paid into court shall be of an amount sufficient to meet the incumbrance and any interest due thereon;

but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original

15 Geo. 5, c. 20, s. 50.

amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale or exchange, and give directions for the retention and investment of the money in court and for the payment or application of the income thereof.

(3) The court may declare all other land, if any, affected by the incumbrance (besides the land sold or exchanged) to be freed from the incumbrance, and this power may be exercised either after or without notice to the incumbrancer, and notwithstanding that on a previous occasion an order, relating to the same incumbrance, has been made by the court which was confined to the land then sold or exchanged.

(4) On any application under this section the court may, if it thinks fit, as respects any vendor or purchaser, dispense with the service of any notice which would otherwise be required to be served on the vendor or purchaser.

(5) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(6) This section applies to sales or exchanges whether made before or after the commencement of this Act, and to incumbrances whether created by statute or otherwise.

Sub-sects. 1, 2 and 5 re-enact C. A. 1881, s. 5 (1), (2) and (3). References to exchange are added, as are the words "realisable or" before "payable" in sub-sect. 1, and "and" to "thereof" at the end of sub-sect. 2. Sub-sect. 4 re-enacts C. A., 1911, s. 1 (see as to notices, sect. 203, sub-sect. 2 (b) and (c), *post*). Sub-sects. 3 and 6 are new.

An order should not be made except by a judge (*Re Wilberforce, W.* v. *W.*, [1915] 1 Ch. 94).

The Court has refused to compel a vendor to free land from a rent-charge where this would be a great hardship (*Re G. N. Ry. Co. and Sanderson*, 25 Ch. D. 788). It was doubtful if C. A., 1881, s. 5, applied to statutory rent-charges (*ibid.*). But see sub-sect. 6 and the definition of "rent" in sect. 205, *post*. On a sale by a mortgagor part of the purchase-money was paid into Court under this section, and the property vested in the purchaser (*Milford Haven Co.* v. *Mowatt*, 28 Ch. D. 402). An order was made under this section where the land was charged with legacies (*Archdale* v. *Anderson*, 21 L. R. Ir. 527). The court has decided interests *in futuro* in order to ascertain what sum should be set aside (*Re Freme*, [1895] 2 Ch. 256, 778). For form of order on sale by the

Court, see *Dickin* v. *D.* (30 W. R. 887); *Patching* v. *Bull* (46 L. T. 227; 30 W. R. 244); and see Seton, 7th ed. 2197 *et seq.* For definition of "incumbrance" see sect. 205, sub-sect. 1 (vii), *post.* **15 Geo. 5, c. 20, s. 50.**

An order is necessary although a fund has been set apart in an administration action (*Re Evans and Bettell*, [1910] 2 Ch. 438). And on a sale the purchase-money remains liable to make up deficiencies (*Re Wilberforce*, *supra*).

Conveyances and other Instruments.

51.—(1) All lands and all interests therein lie in grant and are incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale; and a conveyance of an interest in land may operate to pass the possession or right to possession thereof, without actual entry, but subject to all prior rights thereto (*a*). Lands lie in grant only.

(2) The use of the word grant is not necessary to convey land or to create any interest therein (*b*).

(*a*) Sect. 2. of R. P. Act, 1845 (repealed by this Act) enacted that all corporeal tenements and hereditaments should, as regarded the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

Corporeal hereditaments were said to lie in livery, incorporeal hereditaments to lie in grant (Co. Litt. 9 a). Incorporeal hereditaments (such as rents, advowsons, remainders, reversions) were not the subjects of a feoffment, for a feoffment operated on the possession which the owners of such estates had not to convey; hence incorporeal hereditaments were said to lie in *grant*, which was the mode of conveyance at the common law of those estates of which livery could not be given. The object proposed by sect. 2 of R. P. Act, 1845, was to impart to *corporeal* hereditaments, that is, to hereditaments which lie in livery only, the capacity of being transferred by deed of grant.

Prior to 4 & 5 Vict. c. 21, the usual mode of conveying corporeal hereditaments was by lease for a year and re-lease, the lease being executed for the purpose of giving to the purchaser that possession without which the re-lease would have been ineffectual (Challis, R. P. 376). The lease was rendered unnecessary by 4 & 5 Vict. c. 21. And since the statute of 1845 a simple deed of grant has been adopted as the ordinary mode of conveying freehold estates in possession (Williams, R. P., 24th ed. 227). 4 & 5 Vict. c. 21.

There has been discussion as to the bearing of sect. 2 on the technical doctrine of seisin, which distinguished between a seisin in deed and a seisin in law (see *Eager* v. *Furnival*, 17 Ch. D. 120). In connection with this doctrine (which latterly mainly applied to the question of curtesy and conveyance by infants under the custom of gavelkind, see Sweet, 12 Law Q. R. 246), some doubt has been expressed as to whether a conveyance by grant taking effect under sect. 2 of R. P. Act, 1845, gave to the grantee seisin in deed of the land until he entered (Lightwood, Poss. Land, 35; Sweet, 51 S. J. 289). As to this point, it is suggested that (as regards the conveyance of the immediate freehold) the real object and operation of the section was to assimilate corporeal to incorporeal hereditaments. And it may be pointed out that in the case of incorporeal hereditaments the distinction between seisin in deed and seisin in law applied; and seisin in deed of these hereditaments

15 Geo. 5, c. 20, s. 51.

could not be obtained without acts of ownership equivalent to possession.

A person, however, who had lent money on the security of customary freeholds conveyed to him in 1887 by a statutory mortgage, and who had never entered, was held by the C. A. to be "seised" within the meaning of a custom which arose prior to the Statute Quia Emptores (*Copestake* v. *Hoper*, [1908] 2 Ch. 10).

By the term *immediate freehold* was meant the first of all the estates of freehold; for example, when A is tenant for life, remainder to B for life, in tail or in fee, B has an *estate of freehold*, but A has the *immediate freehold* (1 Preston's Convey. 48). See now sect. 1, sub-sect. 1, of the present Act, *ante*.

For definition of "land," see sect. 205, sub-sect. 1 (ix), *post*.

(*b*) Re-enacts C. A., 1881, s. 49, substituting "land" for "tenements or hereditaments, corporeal or incorporeal."

Conveyances to be by deed.

52.—(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed (*a*).

(2) This section does not apply to—

(a) assents by a personal representative (*b*);

(b) disclaimers made in accordance with section fifty-four of the Bankruptcy Act, 1914, or not required to be evidenced in writing (*c*);

(c) surrenders by operation of law, including surrenders which may, by law, be effected without writing (*d*);

(d) leases or tenancies or other assurances not required by law to be made in writing;

(e) receipts not required by law to be under seal;

(f) vesting orders of the court or other competent authority;

(g) conveyances taking effect by operation of law.

(*a*) The R. P. Act, 1845, s. 3 (repealed by this Act) enacted that a feoffment, other than a feoffment made by an infant under a custom, should be void at law unless evidenced by deed. Conveyancing by feoffment is abolished by sect. 51, *ante*, and gavelkind, under which an infant could convey by feoffment at fifteen (see *Re Maskell and Goldfinch*, [1895] 2 Ch. 525) is abolished by Admon. of Estates Act, 1925, s. 45, *ante*. And by sect. 1, sub-sect. 6 of the present Act, *ante*, a legal estate in land cannot be held by an infant. The present section makes conveyances not made by deed void for the purpose of conveying or creating a legal estate (see as to legal and equitable estates, sect. 1, sub-sects. 1 to 4, *ante*). The R. P. Act, 1845, s. 3, used the phrase "void at law." The result of that section, and of sects. 1 and 2 of the Statute of Frauds, was that in all cases where writing had been previously required a lease was void at law unless made by deed (see now as to leases, sects. 53 and 54, *post* also. "Conveyance" includes a lease (sect. 205, sub-sect. 1 (ii), *post*)). Even at law, however, the Courts held (overruling *Stratton* v. *Pettit*, 16 C. B. 420) that an instrument void as a lease might be good as an agreement (*Bond* v. *Rosling*, 1 Best & Sm. 371; see *Rollason* v. *Leon*, 7 H. & N. 73; *Adams* v. *Hagger*, 4 Q. B. D. 480); so that an action could be brought against the intended tenant either for not accepting a lease (*ibid.*), or for not complying with a stipulation contained in the agreement (*Martin* v. *Smith*, L. R. 9 Ex. 50; *Adams* v. *Clutterbuck*, 10 Q. B. D. 403);

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15 Geo. 5, c. 20, s. 52.

or against the intended landlord for having no title to grant a lease (*Stranks* v. *St. John*, L. R. 2 C. P. 376). And in equity specific performance could be obtained of an agreement which was void at law as a lease (*Parker* v. *Taswell*, 2 De G. & J. 559; see *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577, where specific performance was granted of a document void as a demise for life).

Estate taken by person entering under agreement for lease.

As regards the estate taken by a person entering under an instrument void under R. P. Act, 1845, as a lease, it was settled at law (before the Jud. Act, 1873) that he held as tenant from year to year upon the terms of the instrument, so far as applicable to such a tenancy; the tenancy being determinable, during the term mentioned in the instrument, by the usual half-year's notice, but expiring without notice at the end of such term (*Tress* v. *Savage*, 4 El. & Bl. 36; see *Lee* v. *Smith*, 9 Exch. 662; *Wood* v. *Beard*, L. R. 2 Ex. D. 37). Since the Jud. Act, 1873, it has been held that a tenant holding under an agreement for a lease of which specific performance would be decreed, holds on the same terms and has the same rights and liabilities as if a lease had been granted (*Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 21 Q. B. D. 289; *Lowther* v. *Heaver*, 41 Ch. D. 264; *Manchester Co.* v. *Coombs*, [1901] 2 Ch. 617; see *Warren* v. *Murray*, [1894] 2 Q. B. 648). But in such a case, if the value of the property exceed £500, the county court, having no jurisdiction to order specific performance, cannot order payment of rent (*Foster* v. *Reeves*, [1892] 2 Q. B. 255).

This provision as to leases did not apply to agreements for the lease of tolls under the Turnpike Roads Act, 1882, s. 57 (*Shepherd* v. *Hodsman*, 18 Q. B. 316).

Incorporeal hereditaments.

A lease of incorporeal hereditaments had to be under seal (*Gardiner* v. *Williamson*, 2 B. & Ad. 336; see *Bird* v. *Higginson*, 3 Ad. & El. 83; *Holford* v. *Pritchard*, 3 Exch. 793).

For definitions of "conveyance" and "land" in the present Act see sect. 205, sub-sect. 1 (ii) and (ix), *post*.

(*b*) See Admon. of Estates Act, 1925, s. 36, *ante*.

Disclaimers.

(*c*) Disclaimers by a trustee under Bankruptcy Act, 1914, s. 54, may be in writing. See as to disclaimers note to sect. 77 of the Fines and Recov. Act, 1833, p. 350, *ante*; and as to disclaimers of powers, sect. 156, *post*, and as to disclaimers by married women, sect. 168, *post*.

Surrenders.

(*d*) As to what is a surrender by operation of law, see *Lyon* v. *Reed* (13 M. & W. 305, 306); *Kingston's Case* (2 Smith, L. C. 917, 9th ed.); *Wallis* v. *Hands* ([1893] 2 Ch. 75); *Knight* v. *Williams* ([1901] 1 Ch. 257).

Instruments required to be in writing.

53.—(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol—

(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same,

15 Geo. 5, c. 20, s. 53.

or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

Sub-sect. 1 replaces sects. 3, 7, 8 and 9 of the Stat. of Frauds repealed by this Act. See as to evidence of trusts *Randall* v. *Morgan*, 12 Ves. 67, 73, 74; *Forster* v. *Hale*, 3 Ves. 696; 5 Ves. 308; *Smith* v. *Matthews*, 30 L. J. Ch. 445; *Re Marlborough, Davis* v. *Whitehead*, [1894] 2 Ch. 133; *Re Cozens, Green* v. *Brisley*, [1913] 2 Ch. 478; and as to resulting and constructive trusts, pp. 189, *ante*, and 1108, *post*. See also sect. 60, sub-sect. 3, *post*.

Creation of interests in land by parol.

54.—(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

Replaces sects. 1 and 2 of the Statute of Frauds. See as to options to extend the term *Hand* v. *Hall*, 2 Ex. D. 355.

Savings in regard to last two sections.

55. Nothing in the last two foregoing sections shall—

(a) invalidate dispositions by will; or

(b) affect any interest validly created before the commencement of this Act; or

(c) affect the right to acquire an interest in land by virtue of taking possession; or

(d) affect the operation of the law relating to part performance.

Cf. as to part performance, sect. 40, sub-sect. 2, *ante*.

Persons taking who are not parties and as to indentures.

56.—(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

(2) A deed between parties, to effect its objects, has the effect of an indenture though not indented or expressed to be an indenture.

The R. P. Act, 1845, s. 5, repealed by this Act, contained similar provisions as to indentures and tenements and hereditaments only. "Over or" is added in the present section before

"respecting" and "right of entry" and "agreement" are added. For definition of "conveyance" see sect. 205, sub-sect. 1 (ii), *post.* **15 Geo. 5, c. 20, s. 56.**

Before the R. P. Act, 1845, a practical distinction between an indenture and a deed poll was, that no person could take an immediate estate or benefit under an indenture, unless he was named as a party to it; but any person could take an immediate estate or benefit under a deed poll, inasmuch as it is addressed to all the world (Co. Litt. 26 a, 231; Burton's Real Prop. 442 n.; 2 Prest. Conv. 394 *et seq.*; 1 David Conv. 324). This rule did not extend to remainders (Co. Litt. 231 a, 259 b), nor, it was said, to uses or the benefit of a trust (2 Prest. Conv. 394).

Another practical distinction between a deed poll and an indenture was, that a covenant entered into by a deed poll with any covenantee named in the deed was valid; but a covenant in an indenture entered into with a person not a party could not be sued on by that person (*Green* v. *Hoare*, Salk. 197; *Berkley* v. *Hardy*, 5 B. & C. 353; *Southampton* v. *Browne*, 6 B. & C. 718; see in the case of a composition deed, *Isaacs* v. *Green*, L. R. 2 Ex. 352, and cases there quoted). But a person not a party to a deed might covenant with one who was, and would be bound by executing the deed (*Salter* v. *Kidgly*, Carth. 76; 2 Prest. Conv. 415). The rule in *Berkley* v. *Hardy* (*supra*) still held good except so far as altered by the above section (*Forster* v. *Elvet*, [1908] 1 K. B. 639).

As regards the relation of the above provisions to covenants, it is doubtful whether their operation is confined to covenants running with the land (1908, 1 K. B. 639; *Dyson* v. *Forster*, [1909] A. C. 102). Compare sect. 142 of the present Act and note thereto, p. 731, *post.* In dealing with a covenant made with owners in fee "their heirs and assigns and separately with the owners for the time being" of Blackacre, it was said by Jessel, M.R., that sect. 5 of R. P. Act, 1845, did not enable the benefit of a covenant to be taken by a person not existing at the date of the deed (*Kelsey* v. *Dodd*, 52 L. J. Ch. 39). But where by a lease of coal to which the only parties were the lessor and lessee, the lessee covenanted with the lessor (who was not the owner of the surface) and as separate covenants with the owners or occupiers for the time being of the surface, to pay damage from working, it was said (1) that the covenant with the occupiers was bad (*Forster* v. *Elvet*, [1908] 1 K. B. 636); (2) that the covenant with the owners for the time being meant the owners at the date of the deed (*ibid.* 641), and (3) that under sect. 58, sub-sect. 1 of the Conv. Act, 1881 (see now sect. 78, *post*), the covenant was made with such owners their heirs and assigns (*ibid.*). It was held accordingly that persons claiming under the owners of the surface at the date of the deed could sue on the covenant (*Forster* v. *Elvet*, [1908] 1 K. B. 629; *Dyson* v. *Forster*, [1909] A. C. 98). See *Westhoughton* v. *Wigan Co.*, [1919] 1 Ch. 159.

Description of deeds.

57. Any deed, whether or not being an indenture, may be described (at the commencement thereof or otherwise) as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

Provisions as to supplemental instruments.

58. Any instrument (whether executed before or after the commencement of this Act) expressed to be supplemental to a previous instrument, shall, as far as may be, be

15 Geo. 5, c. 20, s. 58.

read and have effect as if the supplemental instrument contained a full recital of the previous instrument, but this section does not operate to give any right to an abstract or production of any such previous instrument, and a purchaser may accept the same evidence that the previous instrument does not affect the title as if it had merely been mentioned in the supplemental instrument.

Replaces down to the words "previous instrument" sect. 53 of C. Act, 1881, which applied only to deeds. References in that section to reading deeds as annexes to previous deeds, and to indorsement on previous deeds, are omitted; and the concluding part of the present section is new.

Conditions and certain covenants not implied.

59.—(1) An exchange or other conveyance of land made by deed after the first day of October, eighteen hundred and forty-five, does not imply any condition in law.

(2) The word "give" or "grant" does not, in a deed made after the date last aforesaid, imply any covenant in law, save where otherwise provided by statute.

Replaces part of R. P. Act, 1845, s. 4, which enacted also that a feoffment should not have any tortious operation, and referred to exchanges or partitions (see now as to feoffments, sect. 51, *ante*, and as to partition, sect. 34 and notes, *ante*). Oct. 1, 1845, is the date named in R. P. Act, 1845. For "conveyance" see sect. 205, sub-sect. 1 (ii), *post*.

Exchange.

As to the conditions formerly implied on exchanges and partitions, see 4 Cruise, Dig. tit. 32, c. 6, 20. An exchange since the Statute of Frauds (29 Car. 2, c. 3) had, if it related to land for a larger interest than a term of three years, to be in writing, and if the things whereof the exchange was made lay in grant, *i.e.*, if they consisted of reversions, rents or other incorporeal hereditaments, or if they laid in several counties, it had to be by deed (Co. Litt. 51 b). The operation of the words "grant" and "give" in creating an implied warranty of title in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years, is discussed in Butler's note to Co. Litt. 384 a (see 4 Cruise, Dig. tit. 32, c. 24; and see 1 Davidson, Conv. 70, 103, 3rd. ed.; *Doe* v. *Prince*, 20 L. J. C. P. 223).

Covenant implied by words "grant," "give."

Exception as to Acts of Parliament.

In the conveyance of lands by the promoters of the undertaking under the L. C. C. Act, the word "grant" implies certain covenants by them for title, except so far as limited by express words (L. C. C. Act, 1845, s. 132). Similarly a conveyance by a joint stock company under 19 and 20 Vict. c. 47, s. 46. The words "grant, bargain, and sell," operated as covenants for title in deeds of bargain and sale of lands lying in the East and North Ridings of Yorkshire by stat. 6 Anne, c. 62, s. 30; 8 Geo. 2, c. 6, s. 35. Both the last-mentioned Acts have been repealed by the Yorkshire Registries Act, 1884.

"demise."

As regards words other than "give" or "grant," the word "demise" in a lease, imports a covenant in law on the part of the lessor that he has a good title, and that the lessee shall quietly enjoy during the term (*Burnett* v. *Lynch*, 5 B. & C. 609; *Walker* v. *Bartlett*, 18 C. B. 845; *Mathew* v. *Blackmore*, 1 H. & N. 766). But there is no implied covenant for quiet enjoyment if there is an

express covenant (*Line* v. *Stephenson*, 5 Bing. N. C. 183; *Merrill* v. *Frame*, 4 Taunt. 329; *Grosvenor* v. *Hamilton*, [1894] 2 Q. B. 840; and see *Hoare* v. *Chambers*, 11 Times L. R. 185). Again, where by writing not under seal A agreed to "let" Blackacre to B for a yearly tenancy, a contract for quiet enjoyment without interruption by A or any one claiming under him was implied from the word "let" (*Markham* v. *Paget*, [1908] 1 Ch. 712; where the decisions are reviewed). And it seems that such a contract will be implied from the mere relation of landlord and tenant (*Budd Scott* v. *Daniell*, [1902] 2 K. B. 351). But in these cases the implied contract does not extend to a lawful interruption by a person claiming under title paramount ([1908] 1 Ch. 718; *Jones* v. *Lavington*, [1903] 1 K. B. 253).

15 Geo. 5, c. 20, s. 59.

"let."

As to the covenants implied under sect. 76 of the present Act see that section and Sched. II., *post*.

Abolition of technicalities in regard to conveyances and deeds.

60.—(1) A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance (*a*).

(2) A conveyance of freehold land to a corporation sole by his corporate designation without the word "successors" shall pass to the corporation the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance.

(3) In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

(4) The foregoing provisions of this section apply only to conveyances and deeds executed after the commencement of this Act:

Provided that in a deed executed after the thirty-first day of December, eighteen hundred and eighty-one, it is sufficient—

(a) In the limitation of an estate in fee simple, to use the words "in fee simple," without the word "heirs";

(b) In the limitation of an estate tail, to use the words "in tail" without the words "heirs of the body"; and

(c) In the limitation of an estate in tail male or in tail female, to use the words "in tail male" or "in tail female," as the case requires, without the words "heirs male of the body," or "heirs female of the body" (*b*).

(*a*) Sub-sects. 1 to 3 were first enacted by L. P. Act, 1922. For "conveyance" see sect. 205, sub-sect. 1 (ii), *post*. It was settled before 1926 as regards legal interests that under a grant of land by deed to A, without mentioning his heirs, A took only an estate for

15 Geo. 5, c. 20, s. 60.

his life (see *Re Hunter and Hewlett*, [1907] 1 Ch. 46; *Re Thursby, Grant* v. *Littledale*, [1910] 2 Ch. 181; Norton on Deeds, 329—332).

As regards equitable interests, an equitable fee simple might in certain cases pass without words of limitation (*Re Irwin, I.* v. *Parkes*, [1904] 2 Ch. 764). And it was clear that a limitation (in a deed) of a trust of land for A without words of limitation would confer an equitable fee where the intention was sufficiently shown by the deed (*Re Oliver, Evered* v. *Leigh*, [1905] 1 Ch. 191; *Re Tringham's Trusts*, [1904] 2 Ch. 487).

In a case since the C. Act, 1881, freeholds on payment off of a mortgage were reconveyed to the mortgagor "in fee freed and discharged" from the mortgage; the legal estate in the fee simple, however, did not pass, the Court refusing to supply by construction the word "simple" (*Re Ethel and Mitchell*, [1901] 1 Ch. 945). See *Re Ottley*, [1910] 1 I. R. 10; *Re Ford and Ferguson*, [1906] 1 I. R. 607.

(*b*) This sub-section, from "Provided that," re-enacts C. Act, 1881, s. 51.

Construction of expressions used in deeds and other instruments.

61. In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires—

(a) "Month" means calendar month;

(b) "Person" includes a corporation;

(c) The singular includes the plural and vice versa;

(d) The masculine includes the feminine and vice versa.

This section is new. "Month" in legal documents has hitherto primarily meant lunar month (*Bruner* v. *Moore*, [1904] 1 Ch. 305; and see *Morrell* v. *Studd*, [1913] 2 Ch. 648; *Phipps* v. *Rogers*, [1925] 1 K. B. 14). For similar provisions as to Acts of Parliament see the Interpretation Act, 1889, ss. 1, 3, 19. "Instrument" in the present Act does not include a statute unless the statute creates a settlement (sect. 205, sub-sect. 1 (viii), *post*). See also sect. 83, *post*.

General words implied in conveyances.

62.—(1) A conveyance of land (*a*) shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges,

easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (*b*).

(3) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quitrents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or, at the time of conveyance, demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

For the purposes of this subsection the right to compensation for manorial incidents on the extinguishment thereof shall be deemed to be a right appertaining to the manor (*c*).

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained (*d*).

(5) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one (*e*).

(*a*) Re-enacts (with the addition of the concluding paragraph of sub-sect. 3) C. Act, 1881, sect. 6.

(*b*) Rights claimed under this section arise by virtue of a grant which is not implied but express (*Broomfield* v. *Williams*, [1897] 1 Ch. 608, 610; *Quicke* v. *Chapman*, [1903] 1 Ch. 670; see *L. & N. W. Ry.* v. *Boulton*, 62 L. T. 398). The section does not operate so as to pass under a conveyance an easement which the

15 Geo. 5. c. 20, s. 62.

grantor had no power to grant in express words (*Quicke* v. *Chapman*, [1903] 1 Ch. 659).

The words "enjoyed with" pass easements not existing as of right at the time of the conveyance, but enjoyed *de facto* (*Re Peck and London School Board*, [1893] 2 Ch. 319), *e.g.*, a way enjoyed by permission (*International Co.* v. *Hobbs*, [1903] 2 Ch. 165; *Lewis* v. *Meredith*, [1913] 1 Ch. 571; and see *Long* v. *Gowlett*, [1923] 2 Ch. 177). See cases as to right of way, *ante*, p. 77. To be "enjoyed" within this section an easement must be enjoyed under circumstances which would lead to an expectation that the enjoyment will be continued (*Birmingham Banking Co.* v. *Ross*, 38 Ch. D. 307; *Burrows* v. *Lang*, [1901] 2 Ch. 506; *Godwin* v. *Schweppes*, [1902] 1 Ch. 933). The right to use a tramway was held to pass as a "right" enjoyed with the land conveyed (*Brazier* v. *Glasspool*, [1901] W. N. 237). Rights of way not appurtenant nor of necessity do not pass (*Re Walmsley and Shaw*, [1917] 1 Ch. 93). A right of sheepwalk was held to pass (*White* v. *Williams*, [1922] 1 K. B. 727), and a water right (*Westwood* v. *Heywood*, [1921] 2 Ch. 130). See also *Gregg* v. *Richards*, [1926] Ch. 521; *Hansford* v. *Jago*, [1921] 1 Ch. 322.

Prima facie the grant of land with a house on it gives under this section a full right to light to all windows, and the grantor cannot build so as to obstruct them. The onus is on the grantor to show any limitation of the right (*Broomfield* v. *Williams*, [1897] 1 Ch. 602; *Pollard* v. *Gare*, [1901] 1 Ch. 834; see *Quicke* v. *Chapman*, [1903] 1 Ch. 659). This sub-section was held to give a right to light on a sale by a mortgagee under his power of sale (*Born* v. *Turner*, [1900] 2 Ch. 211).

Contrary intention.

(*c*) As to manorial incidents, see note (*a*) to sect. 28, *ante*.

(*d*) The express grant of "appurtenances" would seem to amount to a contrary intention so far as regards anything not strictly appurtenant (*Birmingham Banking Co.* v. *Ross*, 38 Ch. D. 308; see *Beddington* v. *Atlee*, 35 Ch. D. 331). Under a contract to sell hereditaments "with appurtenances," the purchaser will only be entitled to a conveyance in accordance with the contract; and if the conveyance is drawn in such a form as that the section would apply, the vendor is entitled to have a limitation inserted to prevent the section giving to the purchaser more than he is entitled to (*Re Peck and London School Board*, [1893] 2 Ch. 315; see *Re Hughes and Ashley*, [1900] 2 Ch. 595). The reference in the conveyance and plan to adjoining land as "building land" will not show a contrary intention excluding the grant of rights of light (*Broomfield* v. *Williams*, [1897] 1 Ch. 602).

(*e*) As to the construction of similar words in conveyances before the C. Act, 1881, see the cases quoted *ante*, p. 77. See also the cases as to implied grants of easements, quoted *ante*, pp. 77, 94, 120.

All estate clause implied.

63.—(1) Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one. **15 Geo. 5, c. 20, s. 63.**

Re-enacts C. Act, 1881, s. 63, under which a mortgage deed purporting to convey the legal fee was held to pass the only interest of the mortgagor, which was an equitable title to a term (*Thellusson* v. *Liddard*, [1900] 2 Ch. 635).

Production and safe custody of documents.

64.—(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4) The obligations imposed under this section by an acknowledgment are—

(i) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any person by him authorised in writing; and

(ii) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the

15 Geo. 5, c. 20, s. 64.

person entitled to request production, or for any other purpose relative to that title or claim; and

(iii) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss or destruction of, or injury to, the documents or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents, as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained. 15 Geo. 5, c. 20, s. 64.

(13) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14) This section applies to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the thirty-first day of December, eighteen hundred and eighty-one.

This section re-enacts C. Act, 1881, s. 9. "United Kingdom" (sub-sect. 14 (ii)) means Great Britain and Northern Ireland (sect. 205, sub-sect. 1 (xxx), *post*).

Reservation of legal estates.

65.—(1) A reservation of a legal estate shall operate at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made.

(2) A conveyance of a legal estate expressed to be made subject to another legal estate not in existence immediately before the date of the conveyance, shall operate as a reservation, unless a contrary intention appears.

(3) This section applies only to reservations made after the commencement of this Act.

This and sect. 66 are from L. P. Acts, 1922 and 1924. See also as to reservations, pp. 3, 75, *ante*. Sect. 62 of C. Act, 1881, providing for the conveyance of freeholds to uses conferring easements, &c., is not re-enacted, the Statute of Uses being repealed by this Act (see sect. 1, sub-sect. 10, *ante*).

Confirmation of past transactions.

66.—(1) A deed containing a declaration by the estate owner that his estate shall go and devolve in such a manner as may be requisite for confirming any interests intended to affect his estate and capable under this Act of subsisting as legal estates which, at some prior date, were expressed to have been transferred or created, and any dealings therewith which would have been legal if those interests had been legally and validly transferred or created, shall, to the extent of the estate of the estate owner, but without prejudice to the restrictions imposed by this Act in the case of mortgages, operate to give legal effect to the interests

15 Geo. 5, c. 20, s. 66.

so expressed to have been transferred or created and to the subsequent dealings aforesaid.

(2) The powers conferred by this section may be exercised by a tenant for life or statutory owner, trustee for sale or a personal representative (being in each case an estate owner) as well as by an absolute owner, but if exercised by any person, other than an absolute owner, only with the leave of the court.

(3) This section applies only to deeds containing such a declaration as aforesaid if executed after the commencement of this Act.

For form of deed see Sched. 5, Form No. 7, *post*. An "estate owner" is the owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*). For "statutory owner," see S. L. Act, 1925, s. 117 (1) (xxvi), *post*.

Receipt in deed sufficient.

67.—(1) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2) This section applies to deeds executed after the thirty-first day of December, eighteen hundred and eighty-one.

This and the two next sections re-enact C. Act, 1881, ss. 54—56. Since that Act the absence of an indorsed receipt, when there is a receipt in the body of the deed, does not put a purchaser upon inquiry as previously (*Capell* v. *Winter*, [1907] 2 Ch. 382; *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192).

Receipt in deed or indorsed evidence.

68.—(1) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2) This section applies to deeds executed after the thirty-first day of December, eighteen hundred and eighty-one.

A mortgagor who had executed a deed containing a receipt for the full amount named therein could only redeem from a transferee without notice, on payment of the full amount, though a less sum was really due on the mortgage (*Bickerton* v. *Walker*, 31 Ch. D. 151; *Gordon* v. *James*, 30 Ch. D. 249; *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192). And the fact that the original mortgagee was the solicitor of the mortgagor was no notice that there were accounts between them (*Saunders* v. *Kent* (1885), W. N. 147; *Powell* v. *Browne*, [1907] W. N. 228; see as to such dealings between a solicitor and his client, *Gresley* v. *Mousley*, 3 D. F. & J. 433, and *Bateman* v. *Hunt*, *infra*). So a sub-mortgagee without

notice was entitled as against the original mortgagor to rely on a receipt in the body of the original mortgage as showing that the full amount had been paid (*Bateman* v. *Hunt*, [1904] 2 K. B. 530; *Powell* v. *Browne*, *supra*). Again, an equitable mortgagee without notice who has had deposited with him a conveyance containing a proper receipt for the purchase money may be entitled as against an unpaid vendor's lien to rely on the receipt as giving him a better equity (*Capell* v. *Winter*, [1907] 2 Ch. 381). But where land held on trust for sale was fraudulently conveyed by a trustee, a receipt for purchase money being inserted in the deed, the beneficiaries were not under the circumstances estopped by the receipt (as between themselves and a subsequent equitable mortgagee) from showing that the money had not been paid (*Capell* v. *Winter*, *supra*). 15 Geo. 5, c. 20, s. 68.

As to what constitutes a receipt, see, further, *Renner* v. *Tolley* ([1893] W. N. 90). A statement in a transfer of mortgage made in form prescribed by statute that consideration money had been paid was a receipt within the section and created an estoppel (*Rimmer* v. *Webster*, [1902] 2 Ch. 163).

Receipt in deed or indorsed authority for payment to solicitor.

69.—(1) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be a sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2) This section applies whether the consideration was paid or given before or after the commencement of this Act.

This section, which had been held not to extend to the case of trustees selling (*Re Bellamy and Metropolitan Board*, 24 Ch. D. 387), was extended to them (Trustee Act, 1888, s. 2, now replaced by Trustee Act, 1925, s. 23 (3), *post*). A deed in the form pointed out in the section is equivalent to a special authority given to the solicitor to receive the money (*Re Bellamy and Metropolitan Board*, 24 Ch. D. 399, 403). The solicitor producing the deed must be a solicitor acting for the payee (*Day* v. *Woolwich Society*, 40 Ch. D. 491; see *Gordon* v. *James*, 30 Ch. D. 256). It has been said that if it should turn out that the solicitor had stolen the deed, or had not been permitted by the person for whom he is acting to have the custody of the deed and to produce it, the purchaser would not be protected (*Re Hetling and Merton*, [1893] 3 Ch. 280). On the other hand, in the absence of anything to suggest the contrary, the person paying the money is bound to assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge (*King* v. *Smith*, [1900] 2 Ch. 432). And if a purchaser, without reason, requires proof of the vendor's permission to the solicitor to have the custody of the deed and to produce it, such purchaser would *prima facie* be acting unreasonably (*Re Hetling and Merton*, [1893] 3 Ch. 280). The fact of a deed being in the office of a solicitor is not equivalent to its production (*Day* v. *Woolwich Society*, *supra*).

15 Geo. 5, c. 20, s. 70.

Partial release of security from rentcharge.

70.—(1) A release from a rentcharge of part of the land charged therewith does not extinguish the whole rentcharge, but operates only to bar the right to recover any part of the rentcharge out of the land released, without prejudice to the rights of any persons interested in the land remaining unreleased, and not concurring in or confirming the release.

(2) This section applies to releases made after the twelfth day of August, eighteen hundred and fifty-nine.

Release of rent-charges.

Re-enacts L. P. Amendment Act, 1859, s. 10. Before that Act a person having a rent-charge, by releasing his right in part of the land charged, extinguished the whole rent (18 Vin. Abr. 504). On a release, since the Act, of part of the land subject to a rent-charge, without the concurrence of the persons interested in the remaining part, such remaining part will be subject only to a proportionate part of the whole rent-charge (*Booth* v. *Smith*, 14 Q. B. D. 318). But where the persons so interested concurred, the remaining part of the land was subject to the whole rent-charge (*Price* v. *John*, [1905] 1 Ch. 744). In the last case, on the construction of the deed (which was one of grant and release), no part of the rent-charge passed under the "all estate" clause (*ibid.*). The construction of a release (for the purpose of her husband's mortgage) by a married woman of her rent-charge, was dealt with in *Re Betton*, 12 Eq. 553. A person having a rent-charge may release part of it to the tenant of the land, and reserve part (Co. Litt. 148 a; 3 Vin. Abr. 10, 11).

Extinguishment of rent-charges.

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole (Litt. s. 222; Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152); unless the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, for this amounts to a new grant (Co. Litt. 147 b). A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge (*Dennet* v. *Pass*, 1 Bing. N. C. 388); although it is otherwise where part of the lands out of which the rent issues descends on the grantee (1 Roll. Abr. 236, pl. 5).

Eviction by title paramount.

If part of the land out of which a rent-charge is reserved is evicted by a title paramount, the rent will be apportioned (*Hartley* v. *Maddocks*, [1899] 2 Ch. 199). If a suit was due in respect of land which descended to parceners, and they made partition, and one was distrained for the whole, she might compel the others to contribution. The same doctrine applied to co-feoffees of the land, or of different parts of the land (Stat. Marlbridge, c. 9; 2 Coke, Inst. 119; see Co. Litt. 146, 148, 149; Com. Dig. Suspension, E. G.; Bac. Abr. Rent, M. 1, 2; *Averall* v. *Wade*, Lloyd & G. temp. Sugd. 252). (See now sects. 34, *et seq.*, *ante*.)

Apportionment of rent-charges.

As to the apportionment of a rent-charge charged on lands devised to trustees, see *Mills* v. *Cobb* (L. R. 2 C. P. 95). Where a testator charged freeholds and leaseholds with rent-charges, these properties were held liable to contribute to the rent-charges in proportion to their respective annual values at the testator's death (*Young* v. *Hassard*, 1 Jo. & Lat. 466; see *Fielding* v. *Preston*, 1 D. G. & Jo. 438). On the other hand, two freehold properties, one mineral and the other agricultural, which by settlement were charged with a rent-charge, were held liable to contribute thereto

in proportion to the actual income *de anno in annum*, and not in proportion to the capitalised value (*Ley* v. *L.*, 6 Eq. 174). For conditions of sale apportioning a rent-charge, where the property charged is sold in lots, see 1 Prideaux, Conv. 71, 13th ed.; and see the Conditions, 1 Key & Elph., 8th ed., 339. 15 Geo. 5, c. 20, s. 70.

As to the meaning of "rent-charge" and the property out of which a rent-charge can issue, see *ante*, pp. 138, 140. See, also, for definition, sect. 205, sub-sect. 1 (xxiii), *post*; and see now as to redemption and apportionment of rent-charges, sects. 190—192, *post*.

Release of part of land affected from a judgment.

71.—(1) A release from a judgment (including any writ or order imposing a charge) of part of any land charged therewith does not affect the validity of the judgment as respects any land not specifically released.

(2) This section operates without prejudice to the rights of any persons interested in the property remaining unreleased and not concurring in or confirming the release.

(3) This section applies to releases made after the twelfth day of August, eighteen hundred and fifty-nine.

Re-enacts (adding the bracketed words in sub-sect. 1), L. P. Amendment Act, 1859, s. 11.

Under the law before that Act, the release from a judgment of part of the land charged therewith discharged the whole (see *Handcock* v. *H.*, 1 Ir. Ch. R. 444). Where a tenant by *elegit* took a conveyance of part of the lands extended, in satisfaction of part of his debt, his tenancy by *elegit* on the rest was extinguished (*Hele* v. *Bexley*, 17 Beav. 14). See also as to a release from a judgment, *Moscrop* v. *Sandeman* (9 Jur. (N.S.) 1146). A similar provision was applied to Ireland by 11 & 12 Vict. c. 48, s. 72.

Conveyances by a person to himself, &c.

72.—(1) In conveyances made after the twelfth day of August, eighteen hundred and fifty-nine, personal property, including chattels real, may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person.

(2) In conveyances made after the thirty-first day of December, eighteen hundred and eighty one, freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(3) After the commencement of this Act a person may convey land to or vest land in himself.

(4) Two or more persons (whether or not being trustees or personal representatives) may convey, and shall be deemed always to have been capable of conveying, any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party; provided that if the persons in whose

15 Geo. 5, c. 20, s. 72.

favour the conveyance is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance shall be liable to be set aside.

Sub-sects. 1 and 2 re-enact respectively L. P. Amendment Act, 1859, s. 21, and C. Act, 1881, s. 50. According to the old common law, a person could not convey or assign real or personal estate to himself and another. As regards freeholds, this inconvenience was avoided by means of the Statute of Uses. The power given by sect. 21 of the 1859 Act did not include choses in action which were not then assignable.

Compare note to sect. 1 of M. W. P. Act, 1882, *ante*, p. 372.

Sub-sects. 3 and 4 are taken from L. P. Act, 1922. Note that sub-sect. 4 is retrospective.

Execution of deeds by an individual.

73.—(1) Where an individual executes a deed, he shall either sign or place his mark upon the same and sealing alone shall not be deemed sufficient.

(2) This section applies only to deeds executed after the commencement of this Act.

First enacted by L. P. Act, 1922. At common law signing was not essential to the validity of a deed. See also sect. 159, *post*.

Execution of instruments by or on behalf of corporations.

74.—(1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.

(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and in the case of a deed by affixing his own seal, and such execution shall take

effect and be valid in like manner as if the corporation had executed the conveyance. 15 Geo. 5, c. 20, s. 74.

(4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person; and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.

(5) The foregoing provisions of this section apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.

(6) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

This sect. is taken from L. P. Acts, 1922 and 1924.

Rights of purchaser as to execution.

75.—(1) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2) This section applies to sales made after the thirty-first day of December, eighteen hundred and eighty-one.

Re-enacts C. Act, 1881, s. 8. See *Viney* v. *Chaplin*, 2 De G. & J. 468; *Re Bellamy and Metropolitan Board*, 24 Ch. D. 398.

Covenants.

Covenants for title.

76.—(1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter

15 Geo. 5, c. 20, s. 76.

expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is (when the law permits) made as tenants in common, that is to say:

(A) In a conveyance for valuable consideration, other than a mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part I. of the Second Schedule to this Act;

(B) In a conveyance of leasehold property for valuable consideration, other than a mortgage, a further covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part II. of the Second Schedule to this Act;

(C) In a conveyance by way of mortgage (including a charge) a covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part III. of the Second Schedule to this Act;

(D) In a conveyance by way of mortgage (including a charge) of freehold property subject to a rent or of leasehold property, a further covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part IV. of the Second Schedule to this Act;

(E) In a conveyance by way of settlement, a covenant by a person who conveys and is expressed to convey as settlor in the terms set out in Part V. of the Second Schedule to this Act;

(F) In any conveyance, a covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic or as receiver of a defective, or under an order of the court, in the terms set out in Part VI. of the Second Schedule to this Act, which covenant shall be deemed to extend to every such person's own acts only, and may be implied in an assent by a personal representative in like manner as in a conveyance by deed.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, for the purposes of this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or

not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly. 15 Geo. 5, c. 20, s. 76.

(3) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, for the purposes of this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic or as receiver of a defective, or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5) In this section a conveyance does not include a demise by way of lease at a rent, but does include a charge and "convey" has a corresponding meaning.

(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7) A covenant implied as aforesaid may be varied or extended by a deed or an assent, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one, but only to assents by a personal representative made after the commencement of this Act.

This section re-enacts C. Act, 1881, s. 7. "When the law permits" is added in sub-sect. 1 as to tenants in common; and the references to charges, to freeholds subject to a rent, to assents by personal representatives, and to receivers of defectives are also added. See the covenants (which in C. Act, 1881, were inserted in sect. 7) in Sched. 2, and notes, *post*, pp. 814 *et seq.*

15 Geo. 5, c. 20, s. 77.

Implied covenants in conveyances subject to rents.

77.—(1) In addition to the covenants implied under the last preceding section, there shall in the several cases in this section mentioned, be deemed to be included and implied, a covenant to the effect in this section stated, by and with such persons as are hereinafter mentioned, that is to say:—

(A) In a conveyance for valuable consideration, other than a mortgage, of the entirety of the land affected by a rentcharge, a covenant by the grantee or joint and several covenants by the grantees, if more than one, with the conveying parties and with each of them, if more than one, in the terms set out in Part VII. of the Second Schedule to this Act. Where a rentcharge has been apportioned in respect of any land, with the consent of the owner of the rentcharge, the covenants in this paragraph shall be implied in the conveyance of that land in like manner as if the apportioned rentcharge were the rentcharge referred to, and the document creating the rentcharge related solely to that land:

(B) In a conveyance for valuable consideration, other than a mortgage, of part of land affected by a rentcharge, subject to a part of that rentcharge which has been or is by that conveyance apportioned (but in either case without the consent of the owner of the rentcharge) in respect of the land conveyed:—

(i) A covenant by the grantee of the land or joint and several covenants by the grantees, if more than one, with the conveying parties and with each of them, if more than one, in the terms set out in paragraph (i) of Part VIII. of the Second Schedule to this Act;

(ii) A covenant by a person who conveys or is expressed to convey as beneficial owner, or joint and several covenants by the persons who so convey or are expressed to so convey, if at the date of the conveyance any part of the land affected by such rentcharge is retained, with the grantees of the land and with each of them (if more than one) in the terms set out in paragraph (ii) of Part VIII. of the Second Schedule to this Act:

(C) In a conveyance for valuable consideration, other than a mortgage, of the entirety of the land comprised in a lease, for the residue of the term or interest created by the lease, a covenant by the assignee or joint and several covenants by the

15 Geo. 5, c. 20, s. 77.

assignees (if more than one) with the conveying parties and with each of them (if more than one) in the terms set out in Part IX. of the Second Schedule to this Act. Where a rent has been apportioned in respect of any land, with the consent of the lessor, the covenants in this paragraph shall be implied in the conveyance of that land in like manner as if the apportioned rent were the original rent reserved, and the lease related solely to that land:

(D) In a conveyance for valuable consideration, other than a mortgage, of part of the land comprised in a lease, for the residue of the term or interest created by the lease, subject to a part of the rent which has been or is by the conveyance apportioned (but in either case without the consent of the lessor) in respect of the land conveyed:—

(i) A covenant by the assignee of the land, or joint and several covenants by the assignees, if more than one, with the conveying parties and with each of them, if more than one, in the terms set out in paragraph (i) of Part X. of the Second Schedule to this Act;

(ii) A covenant by a person who conveys or is expressed to convey as beneficial owner, or joint and several covenants by the persons who so convey or are expressed to so convey, if at the date of the conveyance any part of the land comprised in the lease is retained, with the assignees of the land and with each of them (if more than one) in the terms set out in paragraph (ii) of Part X. of the Second Schedule to this Act.

(2) Where in a conveyance for valuable consideration, other than a mortgage, part of land affected by a rentcharge, or part of land comprised in a lease is, without the consent of the owner of the rentcharge or of the lessor, as the case may be, expressed to be conveyed—

(i) subject to or charged with the entire rent—

then paragraph (B) (i) or (D) (i) of the last subsection, as the case may require, shall have effect as if the entire rent were the apportioned rent; or

(ii) discharged or exonerated from the entire rent—

then paragraph (B) (ii) or (D) (ii) of the last subsection, as the case may require, shall have effect as if the entire rent were the balance of the rent, and the words "other than the covenant to pay the entire rent" had been omitted.

(3) In this section "conveyance" does not include a demise by way of lease at a rent.

15 Geo. 5, c. 20, s. 77.

(4) Any covenant which would be implied under this section by reason of a person conveying or being expressed to convey as beneficial owner may, by express reference to this section, be implied, with or without variation, in a conveyance, whether or not for valuable consideration, by a person who conveys or is expressed to convey as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, or as receiver of a defective, or under an order of the court.

(5) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(6) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied.

(7) In particular any covenant implied under this section may be extended by providing that—

(a) the land conveyed; or

(b) the part of the land affected by the rentcharge which remains vested in the covenantor; or

(c) the part of the land demised which remains vested in the covenantor;

shall, as the case may require, stand charged with the payment of all money which may become payable under the implied covenant.

(8) This section applies only to conveyances made after the commencement of this Act.

This section is taken from L. P. Amdt. Act, 1924. Note the special definition of "conveyance" (sub-sect. 3). For "defective" see sect. 205, sub-sect. 1 (xiii), *post*. As to apportionment of rentcharges see sect. 190, *post*, and note to sect. 70, *ante*.

Benefit of covenants relating to land.

78.—(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

For the purposes of this subsection in connection with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

(2) This section applies to covenants made after the commencement of this Act, but the repeal of section fifty-

eight of the Conveyancing Act, 1881, does not affect the operation of covenants to which that section applied. 15 Geo. 5, c. 20, s. 78.

C. Act, 1881, s. 58, replaced by this section, was as follows:— 44 & 45 Vict. c. 41.

53.—(1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed. Covenants to bind heirs, &c.

(2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3) This section applies only to covenants made after the commencement of this Act.

A covenant by a lessee of minerals with surface owners (who were not parties to the lease) was held to have been made with such owners, their heirs and assigns, and could be sued on by the devisees of one who was a surface owner at the date of the lease (*Forster* v. *Elvet*, [1908] 1 K. B. 641).

79.—(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed. Burden of covenants relating to land.

This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

(2) For the purposes of this section in connection with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of such land.

(3) This section applies only to covenants made after the commencement of this Act.

This section is from L. P. Amdt. Act, 1924. The assigns of a covenantor had not hitherto been bound if the subject-matter was not in existence at the date of the covenant, unless that was made by the covenantor for himself and his assigns (see *Spencer's Case*, 1 Sm. L. C.).

80.—(1) A covenant and a bond and an obligation or contract under seal made after the thirty-first day of December, eighteen hundred and eighty-one, binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation, or contract. Covenants binding land.

This subsection extends to a covenant implied by virtue of this Act.

(2) Every covenant running with the land, whether entered into before or after the commencement of this Act, shall take effect in accordance with any statutory enact-

15 Geo. 5, c. 20, s. 80.

ment affecting the devolution of the land, and accordingly the benefit or burden of every such covenant shall vest in or bind the persons who by virtue of any such enactment or otherwise succeed to the title of the covenantee or the covenantor, as the case may be.

(3) The benefit of a covenant relating to land entered into after the commencement of this Act may be made to run with the land without the use of any technical expression if the covenant is of such a nature that the benefit could have been made to run with the land before the commencement of this Act.

(4) For the purposes of this section, a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be.

Sub-sect. 1 re-enacts C. Act, 1881, s. 59, but the remainder of the section is new. For the devolution of real estate on deaths after 1925, see Admon. of Estates Act, 1925, ss. 45, 46, *ante*. As to covenants in leases see sects. 141, 142, *post*, which replace C. Act, 1881, ss. 10, 11.

Effect of covenant with two or more jointly.

81.—(1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves, and where made after the commencement of this Act shall be construed as being also made with each of them.

(2) This section extends to a covenant implied by virtue of this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and has effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4) Except as otherwise expressly provided, this section applies to a covenant, contract, bond, or obligation made or implied after the thirty-first day of December, eighteen hundred and eighty-one.

Re-enacts C. Act, 1881, s. 60, with the addition of the concluding words (from " and where ") of sub-sect. 1.

Covenants and agreements entered into

82.—(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of

being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone. 15 Geo. 5, c. 20, s. 82.

(2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before such commencement. by a person with himself and another or others.

This section is new. Such covenants had hitherto been void. (*Ellis* v. *Kerr*, [1910] 1 Ch. 529; *Napier* v. *Williams*, [1911] 1 Ch. 361.)

83. In the construction of a covenant or proviso, or other provision, implied in a deed or assent by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require. Construction of implied covenants.

Re-enacts sect. 64 of C. A., 1881, adding "or assent." See also s. 61, *ante*.

84.—(1) The Authority hereinafter defined shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied— Power to discharge or modify restrictive covenants affecting land.

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly

15 Geo. 5, c. 20, s. 84.

or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction, the amount of the consideration paid for the acquisition of the land was reduced.

(2) The court shall have power on the application of any person interested—

(a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or

(b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

(3) The Authority shall, before making any order under this section, direct such enquiries, if any, to be made of any local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries notices or other proceedings previously made, given or taken, the Authority may think fit.

(4) The Reference Committee mentioned in this section may make rules in relation to any applications to be made to the Authority under this section, and with the consent of the Treasury may prescribe the fees to be paid in connection with any application to the Authority.

(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not, but any order made by the

Authority shall, in accordance with rules of court, be subject to appeal to the court. 15 Geo. 5, c. 20, s. 84.

(6) An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with, may not have been produced to the court or the Authority, and the court or the Authority may act on such evidence of that instrument as it may think sufficient.

(7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes.

(8) This section applies whether the land affected by the restrictions is registered or not, but, in the case of registered land, the Land Registrar shall give effect on the register to any order under this section when made.

(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Authority under this section, and staying the proceedings in the meantime.

(10) In this section " the Authority " means such one or more of the Official Arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, as may be selected by the Reference Committee under that Act. 9 & 10 Geo. 5, c. 57.

(11) This section does not apply to restrictions imposed by the Commissioners of Works under any statutory power for the protection of any Royal Park or Garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before the commencement of this Act in any manor vested in His Majesty in right of the Crown or the Duchy of Lancaster, nor to restrictions created or imposed—

(a) for Naval, Military or Air Force purposes,

(b) for civil aviation purposes under the powers of the Air Navigation Act, 1920. 10 & 11 Geo. 5, c. 80.

(12) Where a term of more than seventy years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of fifty years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold:

Provided that this subsection shall not apply to mining leases.

This section is taken from L. P. Acts, 1922 & 1924. The Housing, Town Planning, &c. Act, 1919, s. 27, empowers a county court to

15 Geo. 5, c. 20, s. 84.

vary the terms of a lease imposing prohibitions or restrictions (see definition of "Court" in the present Act, s. 203 (3), *post*).

As to the restrictions first mentioned in sub-sect. 11, see L. P. Act, 1922, s. 137, and Town Planning Act, 1925, s. 19. See as to the right to apply, *Feilden* v. *Byrne*, [1926] Ch. 620. For the rules issued under sub-sect. 4, see p. 844, *post*.

Part III.

Mortgages, Rentcharges, and Powers of Attorney.

Mortgages.

Mode of mortgaging freeholds.

85.—(1) A mortgage of an estate in fee simple shall only be capable of being effected at law either by a demise for a term of years absolute, subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage:

Provided that a first mortgagee shall have the same right to the possession of documents as if his security included the fee simple.

(2) Any purported conveyance of an estate in fee simple by way of mortgage made after the commencement of this Act shall (to the extent of the estate of the mortgagor) operate as a demise of the land to the mortgagee for a term of years absolute, without impeachment for waste, but subject to cesser on redemption, in manner following, namely:—

(a) A first or only mortgagee shall take a term of three thousand years from the date of the mortgage:

(b) A second or subsequent mortgagee shall take a term (commencing from the date of the mortgage) one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of such second or subsequent mortgagee:

and, in this subsection, any such purported conveyance as aforesaid includes an absolute conveyance with a deed of defeasance and any other assurance which, but for this subsection, would operate in effect to vest the fee simple in a mortgagee subject to redemption.

15 Geo. 5, c. 21.

(3) This section applies whether or not the land is registered under the Land Registration Act, 1925, or the mortgage is expressed to be made by way of trust for sale or otherwise.

(4) Without prejudice to the provisions of this Act respecting legal and equitable powers, every power to mortgage or to lend money on mortgage of an estate in fee simple shall be construed as a power to mortgage the estate for a term of years absolute, without impeachment for

waste, or by a charge by way of legal mortgage or to lend on such security. 15 Geo. 5, c. 20, s. 85.

Sections 85 to 90 contain the new provisions as to legal mortgages, first enacted by L. P. Act, 1922 (amended by L. P. Act, 1924), under which the mortgagor retains the legal estate (the first mortgagee having the same right to title deeds as formerly), and the mortgagee obtains a term of years absolute (see definition, sect. 205, sub-sect. 1 (xxvii), *post*), or, if the mortgage is effected by deed expressed to be by way of legal mortgage (sect. 87) a mortgage term or sub-term. (An estate in fee simple absolute in possession and a term of years absolute are, by sect. 1, sub-sect. 1, *ante*, the only estates in land capable of subsisting or of being conveyed or created at law.) For definitions of "mortgage," &c., see sect. 205, sub-sect. 1 (xvi), *post*. For the provisions of the Act respecting legal and equitable powers see sect. 1, sub-sects. 7 and 8, *ante*, and sect. 205, sub-sect. 1 (xi), *post*. For the mortgagee's powers of sale see sects. 101 *et seq.*, as to foreclosure, sect. 88, sub-sect. 2, and sect. 89, sub-sect. 2, and for the leasing powers of mortgagors and mortgagees, sects. 99 and 100, *post*. For the provisions as to freehold and leasehold mortgages existing on December 31, 1925, see Sched. 1, Parts vii and viii, and sect. 87, sub-sect. 2, *post*. As to orders for sale in reference to equitable mortgages, see sect. 90, *post*.

Mode of mortgaging leaseholds.

86.—(1) A mortgage of a term of years absolute shall only be capable of being effected at law either by a subdemise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage; and where a licence to subdemise by way of mortgage is required, such licence shall not be unreasonably refused:

Provided that a first mortgagee shall have the same right to the possession of documents as if his security had been effected by assignment.

(2) Any purported assignment of a term of years absolute by way of mortgage made after the commencement of this Act shall (to the extent of the estate of the mortgagor) operate as a subdemise of the leasehold land to the mortgagee for a term of years absolute, but subject to cesser on redemption, in manner following, namely:—

(a) The term to be taken by a first or only mortgagee shall be ten days less than the term expressed to be assigned:

(b) The term to be taken by a second or subsequent mortgagee shall be one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of the second or subsequent mortgagee, if the length of the last-mentioned term permits, and in any case for a term less by one day at least than the term expressed to be assigned:

and, in this subsection, any such purported assignment as

15 Geo. 5, c. 20, s. 86.

aforesaid includes an absolute assignment with a deed of defeasance and any other assurance which, but for this subsection, would operate in effect to vest the term of the mortgagor in a mortgagee subject to redemption.

(3) This section applies whether or not the land is registered under the Land Registration Act, 1925, or the mortgage is made by way of sub-mortgage of a term of years absolute, or is expressed to be by way of trust for sale or otherwise.

(4) Without prejudice to the provisions of this Act respecting legal and equitable powers, every power to mortgage for or to lend money on mortgage of a term of years absolute by way of assignment shall be construed as a power to mortgage the term by subdemise for a term of years absolute or by a charge by way of legal mortgage, or to lend on such security.

Charges by way of legal mortgage.

87.—(1) Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them) as if—

(a) where the mortgage is a mortgage of an estate in fee simple, a mortgage term for three thousand years without impeachment of waste had been thereby created in favour of the mortgagee; and

(b) where the mortgage is a mortgage of a term of years absolute, a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee.

(2) Where an estate vested in a mortgagee immediately before the commencement of this Act has by virtue of this Act been converted into a term of years absolute or sub-term, the mortgagee may, by a declaration in writing to that effect signed by him, convert the mortgage into a charge by way of legal mortgage, and in that case the mortgage term shall be extinguished in the inheritance or in the head term as the case may be, and the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them) as if the mortgage term or sub-term had remained subsisting.

The power conferred by this subsection may be exercised by a mortgagee notwithstanding that he is a trustee or personal representative.

(3) Such declaration shall not affect the priority of the mortgagee or his right to retain possession of documents,

nor affect his title to or right over any fixtures or chattels personal comprised in the mortgage. 15 Geo. 5, c. 20, s. 87.

For forms of charge and further charge by way of legal mortgage see Sched. 5, Forms 1 and 2, *post.*

Realisation of freehold mortgages.

88.—(1) Where an estate in fee simple has been mortgaged by the creation of a term of years absolute limited thereout or by a charge by way of legal mortgage and the mortgagee sells under his statutory or express power of sale—

(a) the conveyance by him shall operate to vest in the purchaser the fee simple in the land conveyed subject to any legal mortgage having priority to the mortgage in right of which the sale is made and to any money thereby secured, and thereupon;

(b) the mortgage term or the charge by way of legal mortgage and any subsequent mortgage term or charges shall merge or be extinguished as respects the land conveyed;

and such conveyance may, as respects the fee simple, be made in the name of the estate owner (*a*) in whom it is vested.

(2) Where any such mortgagee obtains an order for foreclosure absolute, the order shall operate to vest the fee simple in him (subject to any legal mortgage having priority to the mortgage in right of which the foreclosure is obtained and to any money thereby secured), and thereupon the mortgage term, if any, shall thereby be merged in the fee simple, and any subsequent mortgage term or charge by way of legal mortgage bound by the order shall thereupon be extinguished.

(3) Where any such mortgagee acquires a title under the Limitation Acts (*b*), he, or the persons deriving title under him, may enlarge the mortgage term into a fee simple under the statutory power for that purpose discharged from any legal mortgage affected by the title so acquired, or in the case of a chargee by way of legal mortgage may by deed declare that the fee simple is vested in him discharged as aforesaid, and the same shall vest accordingly.

(4) Where the mortgage includes fixtures or chattels personal any statutory power of sale and any right to foreclose or take possession shall extend to the absolute or other interest therein affected by the charge.

(5) In the case of a sub-mortgage by subdemise of a long term (less a nominal period) itself limited out of an estate in fee simple, the foregoing provisions of this section shall operate as if the derivative term, if any, created by the sub-mortgage had been limited out of the fee simple,

15 Geo. 5, c. 20, s. 88.

and so as to enlarge the principal term and extinguish the derivative term created by the sub-mortgage as aforesaid, and to enable the sub-mortgagee to convey the fee simple or acquire it by foreclosure, enlargement, or otherwise as aforesaid.

(6) This section applies to a mortgage whether created before or after the commencement of this Act, and to a mortgage term created by this Act, but does not operate to confer a better title to the fee simple than would have been acquired if the same had been conveyed by the mortgage (being a valid mortgage) and the restrictions imposed by this Act in regard to the effect and creation of mortgages were not in force, and all prior mortgages (if any) not being merely equitable charges had been created by demise or by charge by way of legal mortgage.

(*a*) The owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*).
(*b*) See *ibid.* (xii) and as to enlargement sect. 153, *post*.

Realisation of leasehold mortgages.

89.—(1) Where a term of years absolute has been mortgaged by the creation of another term of years absolute limited thereout or by a charge by way of legal mortgage and the mortgagee sells under his statutory or express power of sale,—

(a) the conveyance by him shall operate to convey to the purchaser not only the mortgage term, if any, but also (unless expressly excepted with the leave of the court) the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority to the mortgage in right of which the sale is made and to any money thereby secured, and thereupon

(b) the mortgage term, or the charge by way of legal mortgage and any subsequent mortgage term or charge, shall merge in such leasehold reversion or be extinguished unless excepted as aforesaid;

and such conveyance may, as respects the leasehold reversion, be made in the name of the estate owner (*c*) in whom it is vested.

Where a licence to assign is required on a sale by a mortgagee, such licence shall not be unreasonably refused.

(2) Where any such mortgagee obtains an order for foreclosure absolute, the order shall, unless it otherwise provides, operate (without giving rise to a forfeiture for want of a licence to assign) to vest the leasehold reversion affected by the mortgage and any subsequent mortgage term in him, subject to any legal mortgage having priority to the mortgage in right of which the foreclosure is obtained and to any money thereby secured, and thereupon the mortgage term and any subsequent mortgage term or charge

by way of legal mortgage bound by the order shall, subject to any express provision to the contrary contained in the order, merge in such leasehold reversion or be extinguished. 15 Geo. 5, c. 20, s. 39.

(3) Where any such mortgagee acquires a title under the Limitation Acts (*d*), he, or the persons deriving title under him, may by deed declare that the leasehold reversion affected by the mortgage and any mortgage term affected by the title so acquired shall vest in him, free from any right of redemption which is barred, and the same shall (without giving rise to a forfeiture for want of a licence to assign) vest accordingly, and thereupon the mortgage term, if any, and any other mortgage term or charge by way of legal mortgage affected by the title so acquired shall, subject to any express provision to the contrary contained in the deed, merge in such leasehold reversion or be extinguished.

(4) Where the mortgage includes fixtures or chattels personal, any statutory power of sale and any right to foreclose or take possession shall extend to the absolute or other interest therein affected by the charge.

(5) In the case of a sub-mortgage by sub-demise of a term (less a nominal period) itself limited out of a leasehold reversion, the foregoing provisions of this section shall operate as if the derivative term created by the sub-mortgage had been limited out of the leasehold reversion, and so as (subject as aforesaid) to merge the principal mortgage term therein as well as the derivative term created by the sub-mortgage and to enable the sub-mortgagee to convey the leasehold reversion or acquire it by foreclosure, vesting, or otherwise as aforesaid.

(6) This section takes effect without prejudice to any incumbrance or trust affecting the leasehold reversion which has priority over the mortgage in right of which the sale, foreclosure, or title is made or acquired, and applies to a mortgage whether executed before or after the commencement of this Act, and to a mortgage term created by this Act, but does not apply where the mortgage term does not comprise the whole of the land included in the leasehold reversion unless the rent (if any) payable in respect of that reversion has been apportioned as respects the land affected, or the rent is of no money value or no rent is reserved, and unless the lessee's covenants and conditions (if any) have been apportioned, either expressly or by implication, as respects the land affected. In this subsection references to an apportionment include an equitable apportionment made without the consent of the lessor.

(*c*) The owner of a legal estate (sect. 205, sub-sect. 1, (v), *post*).
(*d*) See *ibid.* (xii.).

See also as to the effect of a conveyance on sale by a mortgagee, sect.

15 Geo. 5, c. 20, s. 89.

104, *post*, replacing C. A., 1881, s. 21. The final clause of the subsection was added by L. P. (Amendment) Act, 1926, s. 7 (see p. 595, *ante*).

Realisation of equitable charges by the Court.

90.—(1) Where an order for sale is made by the court in reference to an equitable mortgage on land (not secured by a legal term of years absolute or by a charge by way of legal mortgage) the court may, in favour of a purchaser, make a vesting order conveying the land or may appoint a person to convey the land or create and vest in the mortgagee a legal term of years absolute to enable him to carry out the sale, as the case may require, in like manner as if the mortgage had been created by deed by way of legal mortgage pursuant to this Act, but without prejudice to any incumbrance having priority to the equitable mortgage unless the incumbrancer consents to the sale.

(2) This section applies to equitable mortgages made or arising before or after the commencement of this Act, but not to a mortgage which has been over-reached under the powers conferred by this Act or otherwise.

Sale of mortgaged property in action for redemption or foreclosure.

91.—(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that—

(a) any other person dissents; or

(b) the mortgagee or any person so interested does not appear in the action;

and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.

(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the court may, if it

thinks fit, direct a sale without previously determining the priorities of incumbrancers. 15 Geo. 5, c. 20, s. 91.

(5) This section applies to actions brought either before or after the commencement of this Act.

(6) In this section "mortgaged property" includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable.

(7) For the purposes of this section the court may, in favour of a purchaser, make a vesting order conveying the mortgaged property, or appoint a person to do so, subject or not to any incumbrance, as the court may think fit; or, in the case of an equitable mortgage, may create and vest a mortgage term in the mortgagee to enable him to carry out the sale as if the mortgage had been made by deed by way of legal mortgage.

Apart from sub-sects. 6 and 7, which are new, this section re-enacts C. A., 1881, s. 25.

The powers given by sub-sects. 1 and 2 are distinct (*Woolley* v. *Colman*, 21 Ch. D. 873). It has been said that the order for sale under sub-sect. 1 is a matter of right (*Clarke* v. *Pannell*, 29 S. J. 147). The discretion referred to in sub-sect. 2 must be exercised judicially (*Merchant Banking Co.* v. *London, &c.*, 55 L. J. Ch. 479).

Sale at request of mortgagor;

Where a mortgagee's notice to pay off had expired and his power of sale was exercisable, and the mortgagor commenced an action for sale or redemption, an order for sale was made on the application of the mortgagor, such sale to be conducted by himself out of court, and to take place within three months (*Brewer* v. *Square*, 1892, 2 Ch. 111). In a foreclosure action a sale was ordered at the request of the mortgagor upon his depositing £150 in court to meet expenses of sale (*Weston* v. *Davidson*, 1882, W. N. 28).

of mortgagee.

A sale has been ordered under sub-sect. 2, at the request of an equitable mortgagee by simple deposit (*Oldham* v. *Stringer*, 51 L. T. 895; 33 W. R. 251); and of a second mortgagee (*Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); and of a fourth mortgagee on a deposit in Court being made (*Norman* v. *Beaumont*, [1893] W. N. 45). A sale may be ordered of so much only as will satisfy the plaintiff's claim (*Wade* v. *Wilson*, 22 Ch. D. 235). At the request of the mortgagee, orders for sale have been made without allowing time for redemption (*Wade* v. *Wilson*, *supra*; *Oldham* v. *Stringer*, *supra*); but such time will usually be given (*Green* v. *Biggs*, 52 L. T. 680). Three months have been given (*Ibid.*, *Jones* v. *Harris*, 55 L. T. 884). Ten days, where the security was clearly insufficient (*Charlewood* v. *Hammer*, 28 S. J. 710; see *Williams* v. *Owen*, 27 S. J. 256).

Sale out of Court.

The sale may be ordered out of Court, a reserve price being fixed and the purchase-money being paid into Court (*Union Bank* v. *Ingram*, 20 Ch. D. 463; *Woolley* v. *Colman*, 21 Ch. D. 169; *Davies* v. *Wright*, 32 Ch. D. 220; see R. S. C. Ord. 51, r. 1a). But a sale out of Court can only be ordered when all parties interested are before the Court or bound by the order (R. S. C. Ord. 51, r. 1a); *e.g.*, a second mortgagee (*Brewer* v. *Square*, 1892, 2 Ch. 114). As to when a sale is "altogether out of Court," see *Cumberland Banking Co.* v. *Maryport Co.* (1892, 1 Ch. 92).

Conduct of sale.

The conduct of the sale has been given to the mortgagor (*Woolley* v. *Colman*, *supra*; *Davies* v. *Wright*, *supra*; *Brewer* v. *Square*, *supra*; see *Christy* v. *Van Tromp* (1886), W. N. 111). Where the mortgagor requests a sale he should give security for costs where the conduct

15 Geo. 5, c. 20, s. 91.

is to be by the mortgagee (*Davies* v. *Wright*, 32 Ch. D. 220; see *Weston* v. *Davidson* (1882), W. N. 28); and the mortgagor has been ordered to give security where he has the conduct himself (*Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, [1892] 2 Ch. 111; but see *Davies* v. *Wright*, *supra*). When the mortgagee requests the sale and the conduct is given to the mortgagor, the mortgagor need not give security (*Davies* v. *Wright*, *supra*). The conduct has been given to a fourth mortgagee on giving security (*Norman* v. *Beaumont*, [1893] W. N. 45).

At what time sale will be ordered.

A sale may be ordered on an interlocutory application (*Woolley* v. *Colman*, 21 Ch. D. 173); or upon motion for judgment (*Wade* v. *Wilson*, 22 Ch. D. 235); or at any time before a foreclosure decree has become absolute (*Union Bank* v. *Ingram*, 20 Ch. D. 463); as when application for final order is made (*Weston* v. *Davidson*, 1882, W. N. 28).

Sale refused.

A sale has been refused when in an action for foreclosure alone it was asked for in the absence of the mortgagor, and without notice to him (*South Western Bank* v. *Turner*, 47 L. T. 433; 31 W. R. 113); also when asked by a second mortgagee in a case where the value was clearly insufficient for the first mortgage (*Merchant Banking Co.* v. *London, &c.*, 55 L. J. Ch. 479; see *Provident Clerks' Assoc.* v. *Lewis*, 62 L. J. Ch. 89; 67 L. T. 644, which see also for other reasons); also when the order asked for would necessarily include property not subject to the mortgage (*Gibbs* v. *Hayden*, 47 L. T. 184; 30 W. R. 725). This section does not enable the Court, at the instance of debenture holders, to order a sale of an undertaking of a public character (*Blaker* v. *Herts, &c. Co.*, 41 Ch. D. 406).

The section did not authorise an order sanctioning a licence to work peat on the mortgaged property (*Stamford Banking Co.* v. *Keeble*, [1913] 2 Ch. 96). As to deeds by way of legal mortgage, see sect. 87, *ante*.

Power to authorise land and minerals to be dealt with separately.

92. Where a mortgagee's power of sale in regard to land has become exercisable but does not extend to the purposes mentioned in this section, the court may, on his application, authorise him and the persons deriving title under him to dispose—

(a) of the land, with an exception or reservation of all or any mines and minerals, and with or without rights and powers of or incidental to the working, getting or carrying away of minerals; or

(b) of all or any mines and minerals, with or without the said rights or powers separately from the land;

and thenceforth the powers so conferred shall have effect as if the same were contained in the mortgage.

By sect. 44 of the Trustee Act, 1893, amended by Trustee Act, 1894, a similar power was given to the Court on the application of trustees or other persons authorised to dispose of land by way of sale exchange, &c. (see *Re Chaplin and Staffs Potteries Co.*, [1922] 2 Ch. 824).

Those provisions replaced sect. 2 of 25 & 26 Vict. c. 108; which Act was passed in consequence of the decisions in *Buckley* v. *Howell* (29 Beav. 546); *Cholmley* v. *Paxton* (3 Bing. 207).

The Court sanctioned a sale of land reserving the minerals, or of the minerals apart from the land without reference to any particular sale (*Re Willway*, 32 L. J. Ch. 226; *Re Wynn*, 28 L. T. 615; 21 W. R. 695).

A petition by mortgagees had to be served on the mortgagor (*Re Hirst*, 45 Ch. D. 263); but not on subsequent incumbrancers (*Re Beaumont*, 12 Eq. 86). Section 44 of the T. Act, 1893, is repealed by the present Act and not re-enacted as to trustees. See now T. Act, 1925, s. 12, *post*. As to mortgages made after 1911 see sect. 101, sub-sect. 2 of the present Act, *post*. As to applications to the Court see sect. 203, sub-sect. 2, *post*. **15 Geo. 5, c. 20, s. 92.**

As to leases of land and minerals separately under the S. L. Acts, see S. L. Act, 1925, s. 50, *post*, and *Re Gladstone, G.* v. *G.* ([1900] 2 Ch. 101); and under a special power, see *Re Rutland, R.* v. *Bristol* ([1900] 2 Ch. 206).

Restriction on consolidation of mortgages.

93.—(1) A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, solely on property other than that comprised in the mortgage which he seeks to redeem.

This subsection applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(2) This section does not apply where all the mortgages were made before the first day of January, eighteen hundred and eighty-two.

(3) Save as aforesaid, nothing in this Act, in reference to mortgages, affects any right of consolidation or renders inoperative a stipulation in relation to any mortgage made before or after the commencement of this Act reserving a right to consolidate.

Sub-sect. 3 is new, and "solely" is added before "on property" in sub-sect. 1, but otherwise this section re-enacts C. Act, 1881, s. 17.

Before that Act the right to consolidate mortgages was well established. It meant the right to treat them as one and decline to be redeemed as to any unless redeemed as to all (*Jennings* v. *Jordan*, 6 A. C. 700). This right (which could only arise when all the mortgages were originally made by the same mortgagor, *Sharp* v. *Rickards*, [1909] 1 Ch. 109) is explained in *Pledge* v. *White*, [1895] A. C. 192; Coote, 873.

The above section deals with claims of consolidation over different properties in several mortgages (*Re Salmon*, [1903] 1 K. B. 149); and governs cases where redemption is sought by a puisne mortgagee as well as by a mortgagor (*Hughes* v. *Britannia Society*, [1906] 2 Ch. 611). In any such case where one of the mortgages is made since 1881, the section prevents consolidation except where there is a contrary intention. A sufficient intention can be expresed by one of the mortgages (*Re Salmon*, *supra*); and where it occurs, the old law applies (*Hughes* v. *Britannia Society*, *supra*); but the right of consolidation is not extended (*Bird* v. *Wenn*, 33 Ch. D. 218).

The costs of foreclosing two mortgages cannot, in cases to which this section applies, be consolidated, but must be apportioned (*De Caux* v. *Skipper*, 31 Ch. D. 635). An agreement in a memorandum of deposit binding the mortgagor to execute a legal mortgage in such form as the mortgagee might require did not entitle the latter to the insertion of a clause excluding this section (*Farmer* v. *Pitt*, [1902] 1 Ch. 954).

15 Geo. 5, c. 20, s. 94.

Tacking and further advances.

94.—(1) After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—

(a) if an arrangement has been made to that effect with the subsequent mortgagees; or

(b) if he had no notice of such subsequent mortgages at the time when the further advance was made by him; or

(c) whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances.

This sub-section applies whether or not the prior mortgage was made expressly for securing further advances.

(2) In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the time when the original mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.

This sub-section only applies where the prior mortgage was made expressly for securing a current account or other further advances.

(3) Save in regard to the making of further advances as aforesaid, the right to tack is hereby abolished:

Provided that nothing in this Act shall affect any priority acquired before the commencement of this Act by tacking, or in respect of further advances made without notice of a subsequent incumbrance or by arrangement with the subsequent incumbrancer.

(4) This section applies to mortgages of land made before or after the commencement of this Act, but not to charges registered under the Land Registration Act, 1925, or any enactment replaced by that Act.

This section is from L. P. Acts, 1922 and 1924. Registration (sub-sect. 2) is in general actual notice (see sects. 197—199, *post*). In sub-sect. 2 the words "time when the original mortgage was created" were substituted for "date of the original advance" by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

Obligation to transfer instead of reconveying, and as to right to take possession.

95.—(1) Where a mortgagor is entitled to redeem, then subject to compliance with the terms on compliance with which he would be entitled to require a reconveyance or surrender, he shall be entitled to require the mortgagee, instead of re-conveying or surrendering, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall be bound to assign and convey accordingly.

15 Geo. 5, c. 20, s. 95.

(2) The rights conferred by this section belong to and are capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer prevails over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer prevails over a requisition of a subsequent incumbrancer.

(3) The foregoing provisions of this section do not apply in the case of a mortgagee being or having been in possession.

(4) Nothing in this Act affects prejudicially the right of a mortgagee of land whether or not his charge is secured by a legal term of years absolute to take possession of the land, but the taking of possession by the mortgagee does not convert any legal estate of the mortgagor into an equitable interest.

(5) This section applies to mortgages made either before or after the commencement of this Act, and takes effect notwithstanding any stipulation to the contrary.

Sub-sects. 1, 3 and 5 re-enact, with the addition of reference to surrender, C. Act, 1881, s. 15, and sub-sect. 2 re-enacts C. Act, 1882, s. 12, passed in consequence of the decision in *Teevan* v. *Smith* (20 Ch. D. 724). Sub-sect. 4 is new.

The word "terms" in this section does not refer merely to the amount of principal, interest, and costs, but includes any other term, such as a trust. So a mortgagor who is a trustee cannot claim a simple transfer (*Alderson* v. *Elgey*, 26 Ch. D. 567). As to who are entitled to redeem, see Coote on Mortgages (8th ed.), 717 *et seq.* This section was held applicable to the lien of a company on the shares of a shareholder (*Everitt* v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506).

The mortgagee must obtain the consent of puisne incumbrancers of whose charges he has notice (*Re Magneta Time Co.*, 84 L. J. Ch. 814).

Regulations respecting inspection, production and delivery of documents, and priorities.

96.—(1) A mortgagor, as long as his right to redeem subsists, shall be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

This subsection applies to mortgages made after the thirty-first day of December, eighteen hundred and eighty-one, and takes effect notwithstanding any stipulation to the contrary.

(2) A mortgagee, whose mortgage is surrendered or otherwise extinguished, shall not be liable on account of delivering documents of title in his possession to the person not having the best right thereto, unless he has notice of the right or claim of a person having a better right, whether by virtue of a right to require a surrender or

15 Geo. 5, c. 20, s. 96.

re-conveyance or otherwise. In this subsection notice does not include notice implied by reason of registration under the Land Charges Act, 1925, or in a local deeds register.

Sub-sect. 1 re-enacts C. Act, 1881, s. 16. Sub-sect. 2 is new, and the concluding clause, from "In this subsection," was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*). See the Land Charges Act, 1925, *ante*, and for "local deeds register," the Land Registration Act, 1925, s. 135, *post*.

A director of a mortgagor company was refused inspection of a subsidiary mortgage deed (*Burn* v. *London & S. Wales Co.*, 1890, W. N. 209).

Apart from this section, the rule is, that after a mortgage has become absolute the mortgagor cannot see the title deeds in the hands of the mortgagee without paying him off (*Chichester* v. *Donegall*, 5 Ch. 502; *Bank of N. S. W.* v. *O'Connor*, 14 App. Cas. 283).

Priorities as between puisne mortgages.

97. Every mortgage affecting a legal estate in land made after the commencement of this Act, whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate affected) shall rank according to its date of registration as a land charge pursuant to the Land Charges Act, 1925.

This section does not apply to mortgages or charges of registered land or of land within the jurisdiction of a local deeds registry.

This section is taken from L. P. Act, 1924. As to registration of land charges, see L. Charges Act, 1925, s. 10, *ante*, and as to mortgages of registered land, and local deeds registries, Land Registration Act, 1925, ss. 25 *et seq.*, and 135, *post*. A first mortgagee retains the right to the possession of documents (sects. 85, 86, of the present Act, *ante*).

Actions for possession by mortgagors.

98.—(1) A mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(2) This section does not prejudice the power of a mortgagor independently of this section to take proceedings in his own name only, either in right of any legal estate vested in him or otherwise.

(3) This section applies whether the mortgage was made before or after the commencement of this Act.

Sub-sect. 1 re-enacts Jud. Act, 1873, s. 25, sub-s. 5.

15 Geo. 5, c. 20, s. 99.

Leasing powers of mortgagor and mortgagee in possession.

99.—(1) A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised.

(2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make from time to time any such lease as aforesaid.

(3) The leases which this section authorises are—

(i) agricultural or occupation leases for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of this Act, fifty years; and

(ii) building leases for any term not exceeding ninety-nine years, or, in the case of a mortgage made after the commencement of this Act, nine hundred and ninety-nine years.

(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connection with building purposes.

(10) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the

15 Geo. 5, c. 20, s. 99.

mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.

(12) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14) The mortgagor and mortgagee may, by agreement in writing, whether or not contained in the mortgage deed, reserve to or confer on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences:

Provided that the powers so reserved or conferred shall not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement.

(15) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act and the enactments replaced by this section had not been passed:

Provided that, in the case of a mortgage of leasehold land, a lease granted under this section shall reserve a reversion of not less than one day.

(16) Subject as aforesaid, this section applies to any mortgage made after the thirty-first day of December, eighteen hundred and eighty-one, but the provisions thereof, or any of them, may, by agreement in writing made after that date between mortgagor and mortgagee, be applied to a mortgage made before that date, so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

(18) For the purposes of this section " mortgagor " does

not include an incumbrancer deriving title under the original mortgagor. 15 Geo. 5, c. 20, s. 99.

(19) The powers of leasing conferred by this section shall, after a receiver of the income of the mortgaged property or any part thereof has been appointed by a mortgagee under his statutory power, and so long as the receiver acts, be exercisable by such mortgagee instead of by the mortgagor, as respects any land affected by the receivership, in like manner as if such mortgagee were in possession of the land, and the mortgagee may, by writing, delegate any of such powers to the receiver.

Sub-sects. 1 to 17 of this section re-enact C. Act, 1881, s. 18, with the addition in sub-sect. 3 of longer terms for leases after 1925, the extension of sub-sect. 14 to agreements outside the mortgage deed, and the omission at the end of that sub-section of the words "unless a contrary intention is expressed in the mortgage deed," and the addition of the provisoes in that sub-sect. and sub-sect. 15. Sub-sects. 18 and 19 re-enact C. Act, 1911, s. 3 (10) and (11), omitting references to surrenders (see sect. 100, *post*) and adding the power of delegation to the receiver.

See as to the statement of the "consideration" mentioned in sub-sect. 9, and sect. 68 (*ante*), *Renner* v. *Tolley*, [1893] W. N. 90.

Before 1882, a lease could not be granted by a mortgagor in possession so as to bind the mortgagee (*Robbins* v. *Whyte*, [1906] 1 K. B. 129; see *Keith* v. *Gancia*, [1904] 1 Ch. 783). Or (in the absence of necessity) by a mortgagee in possession so as to bind the mortgagor (*Hungerford* v. *Clay*, 9 Mod. 1; *Franklinski* v. *Ball*, 33 Beav. 560).

Since the Act of 1881 a lease by a mortgagor under this section has the same effect as if the mortgagees had joined (*Wilson* v. *Queen's Club*, [1891] 3 Ch. 525). And the mortgagee, on giving notice to the tenant to pay rent to himself can sue on the tenant's covenants (*Municipal Society* v. *Smith*, 22 Q. B. D. 70; compare the mortgagor's right to sue where no such notice, *Turner* v. *Walsh*, [1909] 2 K. B. 484). Where a first mortgagee and the mortgagor in possession granted a lease, the lessee held under title derived from the mortgagor leasing under this section (as being the better title), and was bound by restrictive covenants binding on the mortgagor (*John Brothers Co.* v. *Holmes*, [1900] 1 Ch. 188).

A mortgagor in possession can under this section grant a lease of a mortgaged house with sporting rights over other parts of the mortgaged land (*Brown* v. *Peto*, [1900] 2 Q. B. 653); and may give the lessee an option to determine the lease or to renew it (*King* v. *Bird*, [1909] 1 K. B. 837); but must not include in one lease at a single rent land comprised in the mortgage with land not so comprised (*Ibid*). He cannot without the concurrence of his mortgagee accept a surrender of a lease granted by himself (*Robbins* v. *Whyte*, [1906] 1 K. B. 125), but see now sect. 100, *post*.

Where an agreement dated before the Act for a mortgage stipulated for all clauses usual in mortgages, the mortgagee was not entitled to a clause excluding sub-sect. 1 (*Re Nugent and Riley*, 49 L. T. 132. See *Farmer* v. *Pitt*, [1902] 1 Ch. 954). A trustee advancing money on mortgage is not bound to exclude the mortgagor's power of granting occupation leases (*Shaw* v. *Cates*, [1909] 1 Ch. 408).

The failure by the mortgagor to deliver to the mortgagee (see sub-sect. 11) a counterpart of a lease granted under the powers of the section, or of an extension of those powers by the mortgage deed

15 Geo. 5, c. 20, s. 99.

does not invalidate the lease unless a contrary intention appears (*Public Trustee* v. *Laurence*, [1912] 1 Ch. 789).

Powers of mortgagor and mortgagee in possession to accept surrenders of leases.

100.—(1) For the purpose only of enabling a lease authorised under the last preceding section, or under any agreement made pursuant to that section, or by the mortgage deed (in this section referred to as an authorised lease) to be granted, a mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to accept from time to time a surrender of any lease of the mortgaged land or any part thereof comprised in the lease, with or without an exception of or in respect of all or any of the mines and minerals therein, and, on a surrender of the lease so far as it comprises part only of the land or mines and minerals leased, the rent may be apportioned.

(2) For the same purpose, a mortgagee of land while in possession shall, as against all prior or other incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to accept from time to time any such surrender as aforesaid.

(3) On a surrender of part only of the land or mines and minerals leased, the original lease may be varied, provided that the lease when varied would have been valid as an authorised lease if granted by the person accepting the surrender; and, on a surrender and the making of a new or other lease, whether for the same or for any extended or other term, and whether subject or not to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may, subject to the provisions of this section, be taken into account in the determination of the amount of the rent to be reserved, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(4) Where any consideration for the surrender, other than an agreement to accept an authorised lease, is given by or on behalf of the lessee to or on behalf of the person accepting the surrender, nothing in this section authorises a surrender to a mortgagor without the consent of the incumbrancers, or authorises a surrender to a second or subsequent incumbrancer without the consent of every prior incumbrancer.

(5) No surrender shall, by virtue of this section, be rendered valid unless:—

(a) An authorised lease is granted of the whole of the land or mines and minerals comprised in the surrender to take effect in possession immediately or within one month after the date of the surrender; and

(b) The term certain or other interest granted by the

new lease is not less in duration than the unexpired term or interest which would have been subsisting under the original lease if that lease had not been surrendered; and 15 Geo. 5, c. 20, s. 100.

(c) Where the whole of the land mines and minerals originally leased has been surrendered, the rent reserved by the new lease is not less than the rent which would have been payable under the original lease if it had not been surrendered; or where part only of the land or mines and minerals has been surrendered, the aggregate rents respectively remaining payable or reserved under the original lease and new lease are not less than the rent which would have been payable under the original lease if no partial surrender had been accepted.

(6) A contract to make or accept a surrender under this section may be enforced by or against every person on whom the surrender, if completed, would be binding.

(7) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(8) This section applies to a mortgage made after the thirty-first day of December, nineteen hundred and eleven, but the provisions of this section, or any of them, may, by agreement in writing made after that date, between mortgagor and mortgagee, be applied to a mortgage made before that date, so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(9) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

(10) The mortgagor and mortgagee may, by agreement in writing, whether or not contained in the mortgage deed, reserve or confer on the mortgagor or mortgagee, or both, any further or other powers relating to the surrender of leases; and any further or other powers so conferred or reserved shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects and consequences:

Provided that the powers so reserved or conferred shall not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement.

(11) Nothing in this section operates to enable a mort-

15 Geo. 5, c. 20, s. 100.

gagor or mortgagee to accept a surrender which could not have been accepted by the mortgagor with the concurrence of all the incumbrancers if this Act and the enactments replaced by this section had not been passed.

(12) For the purposes of this section "mortgagor" does not include an incumbrancer deriving title under the original mortgagor.

(13) The powers of accepting surrenders conferred by this section shall, after a receiver of the income of the mortgaged property or any part thereof has been appointed by the mortgagee, under the statutory power, and so long as the receiver acts, be exercisable by such mortgagee instead of by the mortgagor, as respects any land affected by the receivership, in like manner as if such mortgagee were in possession of the land; and the mortgagee may, by writing, delegate any of such powers to the receiver.

This section re-enacts C. Act, 1911, s. 3. In sub-sect. 1 the words "in like manner as if the legal estate were vested in him" are omitted, as are the words "unless a contrary intention is expressed in the mortgage deed" at the end of sub-sect. 10. The extension of that sub-section to agreements outside the mortgage deed, and the proviso, are new, as is the power in sub-sect. 13 to delegate to the receiver. See as to surrenders apart from this section, *Robbins* v. *Whyte*, [1906] 1 K. B. 125, quoted in notes to sect. 99, *ante*.

Powers incident to estate or interest of mortgagee.

101.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest wherein is mortgaged, and the premiums paid for any such insurance shall be a charge on the mortgaged property or estate or interest, in addition to the mort-

gage money, and with the same priority, and with interest at the same rate, as the mortgage money: and 15 Geo. 5, c. 20, s. 101.

(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof; or, if the mortgaged property consists of an interest in income, or of a rentcharge or an annual or other periodical sum, a receiver of that property or any part thereof; and

(iv) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2) Where the mortgage deed is executed after the thirty-first day of December, nineteen hundred and eleven, the power of sale aforesaid includes the following powers as incident thereto (namely):—

(i) A power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing:

(ii) A power to sell the mortgaged property, or any part thereof, or all or any mines and minerals apart from the surface:—

(a) With or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold: and

(b) With or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements, rights, and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof, or to any property sold: and

15 Geo. 5, c. 20, s. 101.

(c) With or without covenants by the purchaser to expend money on the land sold.

(3) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(4) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and has effect subject to the terms of the mortgage deed and to the provisions therein contained.

(5) Save as otherwise provided, this section applies where the mortgage deed is executed after the thirty-first day of December, eighteen hundred and eighty-one.

(6) The power of sale conferred by this section includes such power of selling the estate in fee simple or any leasehold reversion as is conferred by the provisions of this Act relating to the realisation of mortgages.

Sub-sects. 1, 3, 4 and 5 of this section re-enact C. Act, 1881, s. 19. In sub-sect. 1 (ii) "the property which or an estate or interest wherein is mortgaged" is substituted for "the mortgaged property," and the words from "or, if" to "thereof" are added in sub-sect. 1 (iii). Sub-sect. 2 re-enacts C. Act, 1911, s. 4. Sub-sect. 6 is new. For the provisions of the Act relating to the realisation of mortgages see sects. 88, 89, *ante*. For forms of conveyance on sale see Sched. 5, Forms 3 and 4, p. 827, *post*.

As to the appointment, powers, &c., of a receiver, see sect. 109, *post*, p. 701.

In certain events the owner of a rentcharge created under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 30, sub-s. 4) could exercise the powers conferred by C. Act, 1881.

The power of sale under this section can, after an order *nisi* for foreclosure, be exercised with leave of court (*Stevens* v. *Theatres*, [1903] 1 Ch. 863). An equitable mortgagee selling under this section can only sell his interest under the mortgage (*Re Hodson and Howe*, 35 Ch. D. 668; compare *Hiatt* v. *Helman*, 19 W. R. 694). (See as to orders for sale in reference to equitable mortgages, sect. 90, *ante*). The present section does not give power to sell fixtures apart from the freehold (*Re Yates, Batchelor* v. *Y.*, 38 Ch. D. 112; see *Born* v. *Turner*, [1900] 2 Ch. 215). But a mortgagee selling part of the mortgaged property can give an implied easement of light over the unsold part (*Born* v. *Turner*, [1900] 2 Ch. 211).

The power of sale given by this section is not incorporated in a bill of sale in the statutory form (*Calvert* v. *Thomas*, 19 Q. B. D. 204). It has been said that it does not apply in the case of debentures of a joint-stock company (*Blaker* v. *Herts Co.*, 41 Ch. D. 399); but see Palmer's Comp. Precedents (9th ed.), Part III. 403. Apart from this Act a mortgagee of stock or shares, who has the legal title, can without express power sell on default in payment after a reasonable time (*Deverges* v. *Sandeman*, [1902] 1 Ch. 579). And see *Stubbs* v. *Slater*, [1910] 1 Ch. 632. As to the duty of the mortgagee to obtain a fair value for the property, see *McHugh* v.

Union Bank, [1913] A. C. 299; and as to evidence of fraud or collusion, *Haddington Co.* v. *Huson*, [1911] A. C. 722.

When a foreclosure action is pending, it is desirable that the appointment of a receiver should be made, not by the mortgagee but by the Court (*Tillett* v. *Nixon*, 25 Ch. D. 238). As to whether a receiver can be appointed, under this section, of mortgaged book debts, see *Rutter* v. *Everett*, [1895] 2 Ch. 872.

For form of conveyances by legal chargees or mortgagees see Sched. 5, Form 4, *post*.

Provision as to mortgages of undivided shares in land.

102.—(1) A person who was before the commencement of this Act a mortgagee of an undivided share in land shall have the same power to sell his share in the proceeds of sale of the land and in the rents and profits thereof until sale, as, independently of this Act, he would have had in regard to the share in the land; and shall also have a right to require the trustees for sale in whom the land is vested to account to him for the income attributable to that share or to appoint a receiver to receive the same from such trustees corresponding to the right which, independently of this Act, he would have had to take possession or to appoint a receiver of the rents and profits attributable to the same share.

(2) The powers conferred by this section are exercisable by the persons deriving title under such mortgagee.

Taken from L. P. Act, 1922. As to undivided shares in land, see sect. 34, *ante*, and for the provisions relating to undivided shares existing on December 31, 1925, Sched. 1, Part IV, *post*.

Regulation of exercise of power of sale.

103. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act, or in an enactment replaced by this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

This section re-enacts C. Act, 1881, s. 20.

A notice under sub-sect. 1 does not prevent a sale under sub-sects. 2 and 3, as soon as the condition of those sub-sections are fulfilled (*Farrar* v. *Farrars, Lim.*, 40 Ch. D. 395). As to notices, see sect. 196, *post*, p. 783.

15 Geo. 5, c. 20, s. 103.

A notice under sub-sect. 1, given by a mortgagee who holds several mortgages executed by the same mortgagor, and has excluded sect. 17 of this Act, does not affect the mortgagee's right to consolidate (*Griffith* v. *Pound*, 45 Ch. D. 553). Where the notice fixed a date for payment, the three months' "default" ran from the service of the notice, not from the fixed date (*Barker* v. *Illingworth*, [1908] 2 Ch. 20).

The "interest in arrear" may, where a mortgagor can pay by instalments, be part of an instalment (*Walsh* v. *Derrick*, 19 Times L. R. 209).

Conveyance on sale.

104.—(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage.

(2) Where a conveyance is made in exercise of the power of sale conferred by this Act, or any enactment replaced by this Act, the title of the purchaser shall not be impeachable on the ground—

(a) that no case had arisen to authorise the sale; or

(b) that due notice was not given; or

(c) where the mortgage is made after the commencement of this Act, that leave of the court, when so required, was not obtained; or

(d) whether the mortgage was made before or after such commencement, that the power was otherwise improperly or irregularly exercised;

and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.

Sub-sects. 1 and 2 re-enact sub-sects. 1 and 2 of C. Act, 1881, s. 21, with the following changes: in sub-sect. 1 the words "as he is by this Act" to "mortgage" are substituted for "as is the subject of the mortgage"; and in sub-sect. 2 "professed" is omitted before "exercise of the power of sale," and (c) and the words from "and a purchaser" to "regularly exercised" are added, the latter addition re-enacting C. Act, 1911, s. 5, sub-s. 1. Sub-sect. 3 is new.

C. Act, 1881, s. 21, did not enable an equitable mortgagee to convey the legal estate (*Re Hodson and Howe*, 35 Ch. D. 668).

Sub-sect. 2.

Sub-sect. 2 of that section did not apply until after conveyance (*Life Interest Corporation* v. *Hand in Hand*, [1898] 2 Ch. 238;

compare the language of the proviso in *Dicker* v. *Angerstein*, 3 Ch. D. 600). Before conveyance the sub-sect. did not preclude a purchaser from inquiring whether the power is exercisable or from proving that is was improperly exercised (*Ibid.*) See now the words added from C. Act, 1911, s. 5 (*supra*). After conveyance the sub-sect. absolutely protects a *bona fide* purchaser who has no notice of any irregularity in the sale, at all events when he has the legal estate (*Bailey* v. *Barnes*, [1894] 1 Ch. 25; see *Re Thompson and Holt*, 44 Ch. D. 492); but not a purchaser who has notice (*Bailey* v. *Barnes*, [1894] 1 Ch. 30; *Selwyn* v. *Garfit*, 38 Ch. D. 273). See, as to registering a title acquired under this sub-section, *Re Tritton*, ([1891] W. N. 194). The damages under this sub-section may be recovered by common law action in the County Court when the amount is within the jurisdiction (*Ames* v. *Higdon*, 69 L. T. 292).

15 Geo. 5, c. 20, s. 104.

As to the leave of the Court being required (sub-sect. 2 (c)), see *Stevens* v. *Theatres*, [1903] 1 Ch. 863, quoted in note to sect. 101, *ante*, and sect. 110, *post*. As to the effect of the Courts (Emergency Powers) Act, 1914, on a conveyance by a mortgagee under sect. 21 of the C. Act, 1881, see *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805.

Application of proceeds of sale.

105. The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

Re-enacts C. Act, 1881, s. 21, sub-s. 3. A first mortgagee exercising his statutory power is a trustee of the surplus proceeds of sale for the second mortgagee, and cannot refuse to hand them over because the latter claims more than six years' arrears of interest (*Re Thomson's Mortgage Trusts*, [1920] 1 Ch. 508).

A mortgagee with notice of a subsequent mortgage will be answerable if, on exercising his power of sale, he pays over the surplus to the wrong person (*West London Bank* v. *Reliance Society*, 29 Ch. D. 962).

Provisions as to exercise of power of sale.

106.—(1) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(2) The power of sale conferred by this Act does not affect the right of foreclosure.

(3) The mortgagee shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act, or of any trust connected therewith, or, where the mortgage is executed after the thirty-first day of December, nineteen hundred and eleven, of any power or provision contained in the mortgage deed.

15 Geo. 5, c. 20, s. 106.

(4) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Re-enacts C. Act, 1881, s. 21, sub-ss. 4 to 7, the concluding part of sub-s. 3 being added from C. Act, 1911, s. 5, sub-s. 2.

Sub-sect. 1.

Sub-sect. 1 does not extend to everybody who has power to give a receipt, *e.g.*, an agent. It applies only to those persons who are either mortgagees or have vested in them the property of the mortgagees, such as executors (*Re Dowson and Jenkins*, [1904] 2 Ch. 223). On the construction of a mortgage dated before 1882 an express power of sale was not exercisable by a transferee (*Re Rumney and Smith*, [1897] 2 Ch. 351).

Mortgagee's receipts, discharges, &c.

107.—(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act, but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Re-enacts C. Act, 1881, s. 22.

The effect of this section is that trustees of a fund the beneficial interest in which is mortgaged are, if acting *bona fide*, perfectly safe in paying over the money to the mortgagee, and are not concerned to inquire whether any money remains due on the mortgage (*Hockey* v. *Weston*, [1898] 1 Ch. 356; see *Re Hancock, H.* v. *Berrey*, 59 L. T. 199; and compare *Re Hazeldine*, [1907] 1 Ch. 686). But they may refuse to pay over on reasonable grounds—*e.g.*, where they know that there may be some dispute as to the amount due (*ibid.*), or where they have notice of subsequent incumbrances (*Re Bell, Jeffery* v. *Sales*, [1896] 1 Ch. 1).

Amount and application of insurance money.

108.—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, two third parts of the amount that would

be required, in case of total destruction, to restore the property insured. 15 Geo. 5, c. 20, s. 108.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i) Where there is a declaration in the mortgage deed that no insurance is required:

(ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee to the amount to which the mortgagee is by this Act authorised to insure.

(3) All money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, be applied in or towards the discharge of the mortgage money.

This section replaces C. Act, 1881, s. 23. "With the consent of the mortgagee" is added in sub-sect. 2 (iii), and in sub-sects. 3 and 4 the words "of mortgaged property" to "under the mortgage deed" are substituted for "effected under the mortgage deed or under this Act" in the former case and added in the latter. A policy existing at the date of the mortgage deed and afterwards renewed by the mortgagor was "an insurance effected under the mortgage deed" within sect. 23, sub-sect. 3 of C. Act, 1881 (*Sinnott* v. *Bowden*, [1912] 2 Ch. 414; *q.v.* also as to the mortgagee's right to require the insurance money to be spent in rebuilding).

Appointment, powers, remuneration and duties of receiver.

109.—(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) A receiver appointed under the powers conferred by this Act, or any enactment replaced by this Act, shall be

15 Geo. 5, c. 20, s. 109.

deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such other rate as the court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:

(i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv) In payment of the interest accruing due in respect of any principal money due under the mortgage; and 15 Geo. 5, c. 20, s. 109.

(v) In or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

This section re-enacts C. Act, 1881, s. 24. In sub-sect. 3 "of the property" is omitted after "income," and the words from "and to exercise" to the end are added (see sect. 99, sub-sect. 19 and sect. 100, sub-sect. 13, *ante*). In sub-sect. 6 "other" rate is substituted for "higher," and in sub-sect. 7 the words from "to the extent" to "have insured" are added. In sub-sect. 8, (v) is added, and "the income of which he is appointed receiver" substituted for "the income of the mortgaged property."

The appointment of a receiver under the Act determined the interest of a mortgagor in possession, and extinguished or suspended the interest of a tenant by elegit under a judgment obtained against such mortgagor (*Johns* v. *Pink*, [1900] 1 Ch. 296). After the appointment of a receiver the mortgagor cannot distrain without the receiver's authority (*Woolston* v. *Ross*, [1900] 1 Ch. 788). Even where the receiver refuses, or is negligent (*ibid.*; *Bayley* v. *Went*, 51 L. T. 764). In the case of a mortgage of book debts, the appointment of a receiver without notice being given to the debtors will not take the book debts out of the order and disposition of the mortgagor (*Rutter* v. *Everett*, [1895] 2 Ch. 872). The mere fact of a receiver having been appointed will not prevent an application by the mortgagee for judgment under R. S. C. Ord. XIV. (*Lynde* v. *Waithman*, [1895] 2 Q. B. 180; see *Poulett* v. *Hill*, [1893] 1 Ch. 277).

Sub-sect. 2.

In a case where sub-sect. 2 was in question, it was said that the section only applies as between mortgagor and mortgagee, and where a receiver who had originally been appointed under this Act by a mortgagee of leaseholds by sub-demise was subsequently appointed receiver by the Court, his agency for the mortgagor thereupon ceased (*Hand* v. *Blow*, [1901] 2 Ch. 732).

In the last case a claim by the ground landlord to be paid ground rent out of moneys in the hands of the receiver representing property of the mortgagor was disallowed (*Ibid.*). In another case where a mortgagee of leaseholds by sub-demise appointed a receiver under this Act, the payment of rent to such receiver by the occupying tenant did not under the circumstances create a tenancy by estoppel as between the tenant and the mortgagee (*Serjeant* v. *Nash*, [1903] 2 K. B. 304).

Sub-sect. 2 is a statutory recognition and approval of the previous practice in conveyancing of making the mortgagee's appointee the agent of the mortgagor (*Gaskell* v. *Gosling*, [1896] 1 Q. B. 693; [1897] A. C. 596). Such previous practice is stated, *Jefferys* v. *Dickson*, 1 Ch. 190. The effect of sub-sect. 2, however, may be modified by the provisions of the mortgage deed, as in *Richards* v. *Kidderminster*, [1896] 2 Ch. 220; compare *Robinson* v. *Chic*, [1905] 2 Ch. 123, where a receiver appointed under a power in debentures was held to be the agent of the debenture holders, and *Deyes* v. *Wood*, [1911] 1 K. B. 806, where a receiver so appointed was held entitled to sue the debenture holders for reasonable remuneration. *Secus*, where

15 Geo. 5, c. 20, s. 109.

the debenture provided that the holder was not to incur liability for his remuneration to the receiver (*Cully* v. *Parsons*, [1923] 2 Ch. 512).

Sub-sect. 3.

A receiver under the C. Act was permitted to sue for rent in the name of the mortgagor's heir on giving an indemnity (*Fairholme* v. *Kennedy*, 24 L. R. Ir. 498).

Sub-sect. 8.

As regards repairs executed by the receiver, the cost will not, on taking the accounts, be allowed against the mortgagee where he had not directed such repairs in writing (*White* v. *Metcalfe*, [1903] 2 Ch. 567). Having regard to sub-sect. 8, it seems that a payment by a receiver under this Act of an instalment of an unsecured debt of the mortgagor, would not keep such a debt alive as against the mortgagor's estate (*Re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 117; compare *Wandsworth* v. *Worthington*, [1906] 1 K. B. 420, where payments by a receiver in lunacy were held to have been authorised by the order appointing him and to keep a debt alive). As to accounts between a customer and his bankers, to whom he had mortgaged lands, and who had appointed a receiver, see *Yourell* v. *Hibernian Bank*, [1918] A. C. 372.

Effect of bankruptcy of the mortgagor on the power to sell or appoint a receiver.

110.—(1) Where the statutory or express power for a mortgagee either to sell or to appoint a receiver is made exercisable by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt, such power shall not be exercised only on account of the act of bankruptcy or adjudication, without the leave of the court.

(2) This section applies only where the mortgage deed is executed after the commencement of this Act; and in this section "act of bankruptcy" has the same meaning as in the Bankruptcy Act, 1914.

4 & 5 Geo. 5, c. 59.

See sect. 1 of that Act. The present section is new.

Effect of advance on joint account.

111.—(1) Where—

(a) in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account; or

(b) a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly;

the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, shall be a complete discharge for all money or money's

worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account. 15 Geo. 5, c. 20, s. 111.

(2) This section applies if and so far as a contrary intention is not expressed in the mortgage, obligation, or transfer, and has effect subject to the terms of the mortgage, obligation, or transfer, and to the provisions therein contained.

(3) This section applies to any mortgage obligation or transfer made after the thirty-first day of December, eighteen hundred and eighty-one.

This section re-enacts C. Act, 1881, s. 61, omitting " and not in shares " at the end of sub-sect. 1 (b).

The old joint account clause was usually inserted in the case of trustees investing on mortgage; and as between the trustees and a purchaser from them, or the mortgagor, the Court (in a case where the trusts were not disclosed) refused to go behind the clause (*Re Harman & Uxbridge R. Co.*, 24 Ch. D. 726). It may be different where the trusts are disclosed (*Re Blaiberg and Abrahams*, [1899] 2 Ch. 340). As between the mortgagees *inter se*, the Court has gone behind the clause, and on the evidence held the mortgagees to be tenants in common (*Re Jackson, Smith* v. *Sibthorpe*, 34 Ch. D. 732).

Notice of trusts on transfer of mortgage.

112.—(1) Where, on the transfer of a mortgage, the stamp duty, if payable according to the amount of the debt transferred, would exceed the sum of ten shillings, a purchaser shall not, by reason only of the transfer bearing a ten-shilling stamp, whether adjudicated or not, be deemed to have or to have had notice of any trust, or that the transfer was made for effectuating the discharge of a trustee or the appointment of a new trustee.

(2) This section applies to transfers made before as well as after the commencement of this Act.

Re-enacts C. Act, 1911, s. 13, adding in sub-sect. 1 " the discharge of a trustee or " before " the appointment."

Notice of trusts affecting mortgage debts.

113.—(1) A person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged released or postponed as to the whole or any part of the mortgaged property, shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not he has notice of the trust, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage—

(a) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account; and

(b) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of

15 Geo. 5, c. 20, s. 113.

the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof;

without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.

(2) This section applies to mortgages made before or after the commencement of this Act, but only as respects dealings effected after such commencement.

(3) This section does not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust.

Sects. 113—116 were first enacted by L. P. Acts, 1922 and 1924.

Transfers of mortgages.

114.—(1) A deed executed by a mortgagee purporting to transfer his mortgage or the benefit thereof shall, unless a contrary intention is therein expressed, and subject to any provisions therein contained, operate to transfer to the transferee—

(a) the right to demand, sue for, recover, and give receipts for, the mortgage money or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon; and

(b) the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee; and

(c) all the estate and interest in the mortgaged property then vested in the mortgagee subject to redemption or cesser, but as to such estate and interest subject to the right of redemption then subsisting.

(2) In this section "transferee" includes his personal representatives and assigns.

(3) A transfer of mortgage may be made in the form contained in the Third Schedule to this Act with such variations and additions, if any, as the circumstances may require.

(4) This section applies, whether the mortgage transferred was made before or after the commencement of this Act, but applies only to transfers made after the commencement of this Act.

(5) This section does not extend to a transfer of a bill of sale of chattels by way of security.

Reconveyances of mortgages by endorsed receipts.

115.—(1) A receipt endorsed on, written at the foot of, or annexed to, a mortgage for all money thereby secured, which states the name of the person who pays the money and is executed by the chargee by way of legal mortgage or the person in whom the mortgaged property is vested

and who is legally entitled to give a receipt for the mortgage money shall operate, without any reconveyance, surrender, or release— 15 Geo. 5, c. 20, s. 115.

(a) Where a mortgage takes effect by demise or sub-demise, as a surrender of the term, so as to determine the term or merge the same in the reversion immediately expectant thereon;

(b) Where the mortgage does not take effect by demise or sub-demise, as a reconveyance thereof to the extent of the interest which is the subject-matter of the mortgage, to the person who immediately before the execution of the receipt was entitled to the equity of redemption;

and in either case, as a discharge of the mortgaged property from all principal money and interest secured by, and from all claims under the mortgage, but without prejudice to any term or other interest which is paramount to the estate or interest of the mortgagee or other person in whom the mortgaged property was vested

(2) Provided that, where by the receipt the money appears to have been paid by a person who is not entitled to the immediate equity of redemption, the receipt shall operate as if the benefit of the mortgage had by deed been transferred to him; unless—

(a) it is otherwise expressly provided; or

(b) the mortgage is paid off out of capital money, or other money in the hands of a personal representative or trustee properly applicable for the discharge of the mortgage, and it is not expressly provided that the receipt is to operate as a transfer.

(3) Nothing in this section confers on a mortgagor a right to keep alive a mortgage paid off by him, so as to affect prejudicially any subsequent incumbrancer; and where there is no right to keep the mortgage alive, the receipt does not operate as a transfer.

(4) This section does not affect the right of any person to require a reassignment, surrender, release, or transfer to be executed in lieu of a receipt.

(5) A receipt may be given in the form contained in the Third Schedule to this Act, with such variations and additions, if any, as may be deemed expedient; and where it takes effect under this section, it shall (subject as hereinafter provided) be liable to the same stamp duty as if it were a reconveyance under seal.

(6) In a receipt given under this section the same covenants shall be implied as if the person who executes the receipt had by deed been expressed to convey the property as mortgagee, subject to any interest which is paramount to the mortgage.

15 Geo. 5, c. 20, s. 115.

(7) Where the mortgage consists of a mortgage and a further charge or of more than one deed, it shall be sufficient for the purposes of this section, if the receipt refers either to all the deeds whereby the mortgage money is secured or to the aggregate amount of the mortgage money thereby secured and for the time being owing, and is endorsed on, written at the foot of, or annexed to, one of the mortgage deeds.

(8) This section applies to the discharge of a charge by way of legal mortgage, and to the discharge of a mortgage, whether made by way of statutory mortgage or not, executed before or after the commencement of this Act, but only as respects discharges effected after such commencement.

(9) The provisions of this section relating to the operation of a receipt shall (in substitution for the like statutory provisions relating to receipts given by or on behalf of a building, friendly, industrial or provident society) apply to the discharge of a mortgage made to any such society, provided that the receipt is executed in the manner required by the statute relating to the society, but nothing in this section shall render a receipt given by or on behalf of any such society liable to any stamp duty which would not have been otherwise payable.

(10) This section does not apply to the discharge of a charge or incumbrance registered under the Land Registration Act, 1925.

(11) In this section "mortgaged property" means the property remaining subject to the mortgage at the date of the receipt.

Cesser of mortgage terms.

116. Without prejudice to the right of a tenant for life or other person having only a limited interest in the equity of redemption to require a mortgage to be kept alive by transfer or otherwise, a mortgage term shall, when the money secured by the mortgage has been discharged, become a satisfied term and shall cease.

See sect. 5, *ante*.

Forms of statutory legal charges.

117.—(1) As a special form of charge by way of legal mortgage, a mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in one of the forms (Nos. 1 or 4) set out in the FourthSchedule to this Act, with such variations and additions, if any, as circumstances may require, and if so made the provisions of this section shall apply thereto.

(2) There shall be deemed to be included, and there shall by virtue of this Act be implied, in such a mortgage deed—

First, a covenant with the mortgagee by the person therein expressed to charge as mortgagor to the effect following, namely: 15 Geo. 5, c. 20, s. 117.

> That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee (as well after as before any judgment is obtained under the mortgage) interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments the first thereof to be made at the end of six months from the day stated for payment of the mortgage money:

Secondly, a provision to the following effect (namely):

> That if the mortgagor on the stated day pays to the mortgagee the stated mortgage money, with interest thereon in the meantime at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall discharge the mortgaged property or transfer the benefit of the mortgage as the mortgagor may direct.

This sub-section applies to a mortgage deed made under section twenty-six of the Conveyancing Act, 1881, with a substitution of a reference to "the person therein expressed to convey as mortgagor" for the reference in this sub-section to "the person therein expressed to charge as mortgagor."

This section replaces C. Act, 1881, s. 26. The words at the opening of sub-sect. 1 from "as" to "mortgage" (for charges by way of legal mortgage see sect. 87, *ante*) are new, as are the bracketed words in sub-sect. 2, clause 1, and "charge" is substituted for "convey," and the concluding words of sub-sect. 2, clause 2, for "shall re-convey the mortgaged property to the mortgagor or as he shall direct." Sect. 26 of C. Act, 1881, was held not to impose any personal liability on an assignee of the equity of redemption (*Re Errington, Ex p. Mason*, [1894] 1 Q. B. 11).

Forms of statutory transfers of legal charges.

118.—(1) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (Nos. 2, 3 or 4) set out in the Fourth Schedule to this Act as may be appropriate to the case with such variations and additions, if any, as circumstances may require, and if so made the provisions of this section shall apply thereto.

(2) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):—

(i) There shall become vested in the person to whom

15 Geo. 5, c. 20, s. 118.

the benefit of the mortgage is expressed to be transferred (who, with his personal representatives and assigns, is in this section designated the transferee), the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii) All the term and interest, if any, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3) If a covenantor joins in the deed of transfer, there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):—

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money or any part thereof remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4) If the deed of transfer is made in the Form No. 4, it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

(5) This section applies to the transfer of a statutory mortgage created under any enactment replaced by this Act.

Sub-sects. 1 to 4 re-enact C. Act, 1881, s. 27, and sub-sect. 5 applies the section to statutory mortgages created under that Act. A transfer in the statutory form of a mortgage made before 1882 in ordinary form did not pass the legal estate (*Re Beachey, Heaton* v. *B.*, [1904] 1 Ch. 67). See as to transfers sect. 114, *ante*.

Implied covenants, joint and several.

119.—In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey or charge as mortgagors, or to join as

covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him. 15 Geo. 5, c. 20, s. 119.

This section re-enacts (adding "or charge" after "convey" C. Act, 1881, s. 28, and sect. 120 replaces sect. 29 of that Act.

120.—A statutory mortgage may be surrendered or discharged by a receipt in the form (No. 5) set out in the Fourth Schedule to this Act with such variations and additions, if any, as circumstances may require. Form of discharge of statutory mortgage or charge.

Rentcharges.

121.—(1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the annual sum shall have such remedies for recovering and compelling payment thereof as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further. Remedies for the recovery of annual sums charged on land.

(2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his

15 Geo. 5. c. 20, s. 121.

continuance in possession, and all costs and expenses occasioned by nonpayment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4) In the like case the person entitled to the annual sum, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by all or any of the means hereinafter mentioned, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by nonpayment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed:

Provided that this subsection shall not authorise the creation of a legal term of years absolute after the commencement of this Act, save where the annual sum is a rentcharge held for a legal estate.

The surplus, if any, of the money raised, or of the income received, under the trusts of the deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

The means by which such annual sum, arrears, costs, and expenses may be raised includes—

(a) the creation of a legal mortgage or a sale (effected by assignment or subdemise) of the term created in the land charged or any part thereof,

(b) the receipt of the income of the land comprised in the term.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and has effect subject to the terms of that instrument and to the provisions therein contained.

(6) The rule of law relating to perpetuities does not apply to any powers or remedies conferred by this section, nor to the same or like powers or remedies conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of this section.

(7) The powers and remedies conferred by this section apply where the instrument creating the annual sum comes into operation after the thirty-first day of December, eighteen hundred and eighty-one, and whether the instrument conferring the power under which the annual sum was authorised to be created came into operation before

or after that date, unless the instrument creating the power or under which the annual sum is created otherwise directs. 15 Geo. 5, c. 20, s. 121.

This section re-enacts C. Act, 1881, s. 44, and (in sub-sects. 6 and 7) C. Act, 1911, s. 6, the proviso in sub-sect. 4 being added and the statement of the means of raising substituted for "by mortgage, sale or demise." Cf. sect. 8, sub-s. 2, *ante*.

C. Act, 1881, s. 44, was extended to the rentcharges created under the Copyhold Acts, 1887, s. 16, and 1894, s. 27 (e), but an owner of such a rentcharge can still pursue his other remedies, *e.g.*, by action (*Searle* v. *Cooke*, 43 Ch. D. 533). That section also applied to rentcharges created under the Improvement of Land Acts (62 & 63 Vict. c. 46, s. 3). The present section applies to compensation rentcharges created under the Manorial Incidents (Extinguishment) Rules, 1925, on the extinguishment of copyhold tenure under L. P. Act, 1922, Part V. (see Rule 13, (1) (c)). As to the equitable jurisdiction to raise by sale or mortgage arrears of a rentcharge issuing out of rents and profits, see *Hambro* v. *H.*, [1894] 2 Ch. 564.

A lessee who had granted an underlease for a term exceeding his lease, and had therefore no reversion, had not in respect of the rent reserved by such underlease the powers of the section (*Lewis* v. *Baker*, [1905] 1 Ch. 46).

As to rentcharges and the remedies for receiving them, see *ante*, pp. 138, 139, 140.

Creation of rentcharges charged on another rentcharge and remedies for recovery thereof.

122.—(1) A rentcharge or other annual sum (not being rent incident to a reversion) payable half yearly or otherwise may be granted, reserved, charged or created out of or on another rentcharge or annual sum (not being rent incident to a reversion) charged on or payable out of land or on or out of the income of land, in like manner as the same could have been made to issue out of land.

(2) If at any time the annual sum so created or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum shall (without prejudice to any prior interest or charge) have power to appoint a receiver of the annual sum charged or any part thereof, and the provisions of this Act relating to the appointment, powers, remuneration and duties of a receiver, shall apply in like manner as if such person were a mortgagee entitled to exercise the power of sale conferred by this Act, and the annual sum charged were the mortgaged property and the person entitled thereto were the mortgagor.

(3) The power to appoint a receiver conferred by this section shall (where the annual sum is charged on a rentcharge) take effect in substitution for the remedies conferred, in the case of annual sums charged on land, by the last preceding section, but subsection (6) of that section shall apply and have effect as if herein re-enacted and in terms made applicable to the powers conferred by this section.

15 Geo. 5, c. 20, s. 122.

(4) This section applies to annual sums expressed to be created before as well as after the commencement of this Act, and, but without prejudice to any order of the court made before the commencement of this Act, operates to confirm any annual sum which would have been validly created if this section had been in force.

This section is taken from L. P. Act, 1922. *Cf.* p. 140, *ante*.

Powers of Attorney.

Execution under power of attorney.

123.—(1) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature, and under his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act, and operates without prejudice to any statutory direction that an instrument is to be executed in the name of an estate owner.

Re-enacts C. Act, 1881, s. 46, the concluding clause of sub-sect. 2 being new. See sect. 7, sub-sect. 4, and sect. 8, sub-sect. 1, *ante*. For the delegation of trusts by power of attorney see Trustee Act, 1925, s. 25, *post*.

Payment by attorney under power without notice of death, &c.

124.—(1) Any person making any payment or doing any act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become subject to disability or bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2) A statutory declaration by an attorney to the effect that he has not received any notice or information of the revocation of such power of attorney by death or otherwise shall, if made immediately before or within three months after any such payment or act as aforesaid, be taken to be conclusive proof of such non-revocation at the time when such payment or act was made or done.

Where the donee of the power of attorney is a corporation aggregate, the officer appointed to act for the corporation in the execution of the power may make the

statutory declaration in like manner as if that officer had been the donee of the power. 15 Geo. 5, c. 20, s. 124.

Where probate or letters of administration have been granted to any person, as attorney for some other person, this section applies as if the payment made or acts done under the grant had been made or done under a power of attorney.

(3) This section does not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(4) This section applies to payments and acts made and done before or after the commencement of this Act, and in this section "power of attorney" includes a power of attorney implied by statute.

Sub-sects. 1 and 3 re-enact C. Act, 1881, s. 47, "subject to disability" being substituted in sub-sect. 1 for "lunatic, of unsound mind." The remainder of the section is new, as is sect. 125. As to trustees see also Trustee Act, 1925, s. 29, *post*.

Powers of attorney relating to land to be filed.

125.—(1) Where an instrument creating a power of attorney confers a power to dispose of or deal with any interest in or charge upon land, the instrument or a certified copy thereof or of such portions thereof as refer to or are necessary to the interpretation of such power shall be filed at the Central Office pursuant to the statutory enactment in that behalf (*a*), unless the instrument only relates to one transaction and is to be handed over on the completion of that transaction:

Provided that, if the instrument relates to land or a charge registered under the Land Registration Act, 1925, the instrument or a certified copy thereof or of such portions thereof as aforesaid shall be filed at the Land Registry, and it shall not be necessary to file it at the Central Office unless it also relates to land or a charge not so registered, in which case the instrument or a certified copy thereof or of such portions thereof as aforesaid shall be filed at the Central Office and an office copy shall be filed at the Land Registry.

(2) Notwithstanding any stipulation to the contrary, a purchaser of any interest in or charge upon land (not being land or a charge registered as aforesaid) shall be entitled to have any instrument creating a power of attorney which affects his title, or a copy thereof or of the material portions thereof delivered to him free of expense.

(3) This section only applies to instruments executed after the commencement of this Act, and no right to rescind a contract shall arise by reason of the enforcement of the provisions of this section.

15 Geo. 5, c. 20, s. 125.

(*a*) See Jud. Act, 1925, s. 219, replacing C. Act, 1881, s. 48. "A copy" was substituted for "an office copy" by L. P. (Amdt.) Act, 1925, s. 7 (see p. 595, *ante*) in sub-sect. 2.

Effect of irrevocable power of attorney for value.

126.—(1) If a power of attorney given for valuable consideration is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, disability or bankruptcy of the donor of the power; and

(ii) Any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, disability or bankruptcy of the donor of the power, had not been done or happened; and

(iii) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power without the concurrence of the donee of the power, or of the death, disability or bankruptcy of the donor of the power.

(2) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.

This and the next section re-enact C. Act, 1882, ss. 8 and 9, substituting "disability" for "lunacy, unsoundness of mind," and omitting reference to marriage of the donor. See on the sections, *Mutual Provident Society* v. *Macmillan*, 14 App. Cas. 596; *Frith* v. *F.*, [1906] A. C. 260.

Effect of power of attorney irrevocable for a fixed time.

127.—(1) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i) The power shall not be revoked for and during that fixed time either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, disability or bankruptcy of the donor of the power; and

(ii) Any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, disability or bankruptcy of the donor of the power, had not been done or happened; and

(iii) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time without the concurrence of the donee of the power, or of the death, disability or bankruptcy of the donor of the power, within that fixed time. 15 Geo. 5, c. 20, s. 127.

(2) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.

Devolution of power of attorney given to a purchaser.

128.—(1) A power of attorney given for valuable consideration may be given, and shall be deemed to have been always capable of being given, to a purchaser of property or any interest therein, and to the persons deriving title under him thereto, and those persons shall be the duly constituted attorneys for all the purposes of the power, but without prejudice to any right to appoint substitutes given by the power.

(2) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.

(3) This section does not authorise the persons deriving title under the donee of the power to execute, on behalf of the registered proprietor, an instrument relating to registered land to which effect is to be given on the register, unless the power is protected by a caution or other entry on the register.

Taken from L. P. Acts, 1922 and 1924. See as to cautions, &c., Land Registration Act, 1925, ss. 53 *et seq.*, *post.*

Power of attorney granted by married woman.

129.—(1) A married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do, and the provisions of this Act relating to instruments creating powers of attorney apply thereto.

(2) This section applies to deeds executed after the thirty-first day of December, eighteen hundred and eighty-one.

Re-enacts C. Act, 1881, s. 40.

Under this section a married woman can appoint an attorney to receive her income even if she is restrained from anticipation (*Stewart* v. *Fletcher*, 38 Ch. D. 627). For the law before 1882, see *Oulds* v. *Samson* (3 Taunt. 261); *Graham* v. *Jackson* (6 Q. B. 811); *Kenrick* v. *Wood* (9 Eq. 377).

15 Geo. 5, c. 20, s. 130.

Part IV.

Equitable Interests and things in Action.

Creation of entailed interests in real and personal property.

130.—(1) An interest in tail or in tail male or in tail female or in tail special (in this Act referred to as "an entailed interest") may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land, and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee, and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property.

Personal estate so entailed (not being chattels settled as heirlooms) may be invested, applied, and otherwise dealt with as if the same were capital money or securities representing capital money arising under the Settled Land Act, 1925, from land settled on the like trusts.

(2) Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.

(3) Where personal estate (including the proceeds of sale of land directed to be sold and chattels directed to be held as heirlooms) is, after the commencement of this Act, directed to be enjoyed or held with, or upon trusts corresponding to trusts affecting, land in which, either before or after the commencement of this Act an entailed interest has been created, and is subsisting, such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate.

(4) In default of and subject to the execution of a disentailing assurance or the exercise of the testamentary power conferred by this Act, an entailed interest (to the extent of the property affected) shall devolve as an equitable interest, from time to time, upon the persons who would have been successively entitled thereto as the heirs of the body (either generally or of a particular class) of

the tenant in tail or other person, or as tenant by the curtesy, if the entailed interest had, before the commencement of this Act, been limited in respect of freehold land governed by the general law in force immediately before such commencement, and such law had remained unaffected. 15 Geo. 5, c. 20, s. 130.

(5) Where personal chattels are settled without reference to settled land on trusts creating entailed interests therein, the trustees, with the consent of the usufructuary for the time being if of full age, may sell the chattels or any of them, and the net proceeds of any such sale shall be held in trust for and shall go to the same persons successively, in the same manner and for the same interests, as the chattels sold would have been held and gone if they had not been sold, and the income of investments representing such proceeds of sale shall be applied accordingly.

(6) An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of this Act), or by an agreement for a settlement in which the trusts to affect the property are sufficiently declared.

(7) In this Act where the context so admits "entailed interest" includes an estate tail (now made to take effect as an equitable interest) created before the commencement of this Act.

Sects. 130—134 are taken from L. P. Acts, 1922 and 1924. An estate in fee simple absolute in possession and a term of years absolute are, since January 1, 1926, the only estates in land capable of subsisting or being created at law (sect. 1, sub-sect. 1, *ante*). Before this Act entails could not be created in personalty (see p. 308, *ante*, and as to provisions in settlements intended to prevent chattels from vesting in the first tenant in tail at birth, see *Re Chesham's Settlement*, [1909] 2 Ch. 329; *Re Beresford Hope's Trusts*, [1917] 2 Ch. 287; *Re Lewis' Trusts, Busk* v. *L.*, [1918] 2 Ch. 308; *Pole* v. *P.*, [1924] 1 Ch. 156). Apart from sub-sect. 4 of this section tenancy by the curtesy was abolished by Admon. of Estates Act, 1925, s. 45, sub-s. 1 (b), *ante*, as to deaths after 1925. For the law as to disentailing assurances see the Fines and Recoveries Act, 1833, *ante*, and s. 133, *post*, and for the testamentary power conferred by the present Act, s. 176, *post*. For the law of descent before 1926 see Inheritance Act, 1833, *ante*.

131. Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the Rule in Shelley's case, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate in equity as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case Abolition of the Rule in Shelley's Case.

15 Geo. 5, c. 20, s. 131.

of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act.

Limitation to heirs in an assurance.

Rule in *Shelley's Case*.

By the Rule in *Shelley's Case* (1 Rep. 93; see *Parker* v. *Clarke*, 3 Sm. & G. 161, 165), it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the determination of the preceding mesne estate (1 B. & C. 243). For the decisions on this rule, see Tudor's L. C. Conv. (4th ed.) 388; Fearne, Cont. Rem. (10th ed.) pp. 28—201; *Foxwell* v. *Van Grutten*, [1897] A. C. 658; *Re Youman*, [1901] 1 Ch. 720; *Re Buckton, B.* v. *B.*, [1907] 2 Ch. 406; *Re Clerke, Clowes* v. *Clerke*, [1915] 2 Ch. 301 (where the gift was to A " or his issue "); *Re Simcoe*, [1913] 1 Ch. 552; *Re Hobbs, H.* v. *H.*, [1917] 1 Ch. 569; *Re Hammond, Parry* v. *H.*, [1924] 2 Ch. 276. As to the law of descent before 1926, see Inheritance Act, 1833, *ante*.

As to heirs taking by purchase.

132.—(1) A limitation of real or personal property in favour of the heir, either general or special, of a deceased person which, if limited in respect of freehold land before the commencement of this Act, would have conferred on the heir an estate in the land by purchase, shall operate to confer a corresponding equitable interest in the property on the person who would, if the general law in force immediately before such commencement had remained unaffected, have answered the description of the heir, either general or special, of the deceased in respect of his freehold land, either at the death of the deceased or at the time named in the limitation, as the case may require.

(2) This section applies whether the deceased person dies before or after the commencement of this Act, but only applies to limitations or trusts created by an instrument coming into operation after such commencement.

As to devises to the heir see Inheritance Act, 1833, s. 3, *ante*, and that Act generally as to descent before 1926.

Abolition of enrolment of disentailing assurances, &c.

3 & 4 Will. 4, c. 74.

133.—(1) Every assurance or instrument executed or made after the commencement of this Act which, under the provisions of sections forty-one, forty-six, fifty-eight, fifty-nine, seventy-one, and seventy-two of the Fines and Recoveries Act, 1833, or otherwise under that Act (as amended by this Act), would have been required to be enrolled in the Central Office in England, shall be as

effectual for all purposes, without such enrolment, as if it had been duly enrolled within the time prescribed by the said Act for such enrolment. 15 Geo. 5, c. 20, s. 133.

(2) In this section "assurance" includes a vesting order operating as a disentailing assurance, whether made for barring an estate tail or enlarging a base fee or otherwise.

(3) This section applies to entailed interests authorised to be created by this Act as well as to estates tail created before the commencement of this Act.

The provisions mentioned in sub-sect. 1, with others, were repealed by L. P. Act, 1924. For the remainder of the Fines and Recoveries Act see *ante*, pp. 305-361.

Restriction on executory limitations.

134.—(1) Where there is a person entitled to—

(a) an equitable interest in land for an estate in fee simple or for any less interest not being an entailed interest, or

(b) any interest in other property, not being an entailed interest,

with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

(2) This section applies where the executory limitation is contained in an instrument coming into operation after the thirty-first day of December, eighteen hundred and eighty-two, save that, as regards instruments coming into operation before the commencement of this Act, it only applies to limitations of land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life.

This section replaces C. Act, 1882, s. 10, which applied to the limitations mentioned in the latter part of sub-s. 2. For a declaration defining the effect of an executory limitation over see *Re Booth, Pickard* v. *B.*, [1900] 1 Ch. 768. The section applied to an executory limitation in defeasance of an equitable fee (*Re Shrubb, S.* v. *S.*, [1910] W. N. 143).

Equitable waste.

135.—An equitable interest for life without impeachment of waste does not confer upon the tenant for life any right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such equitable interest.

This section re-enacts Jud. Act, 1873, s. 25 (3). See Bewes on Waste; *Garth* v. *Cotton*, 1 Wh. Tu. L. C. Eq.; *Baker* v. *Sebright*, 13 Ch. D. 179. In view of sect. 1, sub-sects. 1 and 3, *ante*, all life interests in land are now equitable.

15 Geo. 5, c. 20, s. 136.

Legal assignments of things in action.

136.—(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person claiming under him; or

(b) of any other opposing or conflicting claims to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act, 1925.

30 & 31 Vict. c. 144.

(2) This section does not affect the provisions of the Policies of Assurance Act, 1867.

Sub-sect. 1 re-enacts Jud. Act, 1873, s. 25 (6). See as to the effect of the section, *Tolhurst* v. *Associated Portland Cement Co.*, [1903] A. C. 414; *Brandt* v. *Dunlop Rubber Co.*, [1905] A. C. 454; *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239. A debtor paying the original creditor after notice of assignment of a debt is liable to pay the assignee also (*Brice* v. *Bannister*, 3 Q. B. D. 569; see *Western Wagon Co.* v. *West*, [1892] 1 Ch. 271). As to set-off of debts, see *Bennett* v. *White*, [1910] 2 K. B. 1. By sect. 1 of the Act named in sub-sect. 2 an assignee of a policy of life assurance may sue in his own name, and by sect. 3 an assignment does not confer on the assignee a right to sue for the amount until written notice has been given to the assurance company, the date of receipt regulating the priority of claims, and *bonâ fide* payments made before receipt of notice being valid against the assignee.

Dealings with life interests, reversions and other equitable interests.

137.—(1) The law applicable to dealings (*a*) with equitable things in action which regulates the priority of competing interests therein, shall, as respects dealings with equitable interests in land, capital money, and securities representing capital money effected after the commencement of this Act, apply to and regulate the priority of competing interests therein.

This subsection applies whether or not the money or securities are in court.

(2) (i) In the case of a dealing with an equitable interest in settled land, capital money or securities repre-

senting capital money, the persons to be served with notice of the dealing shall be the trustees of the settlement; and where the equitable interest is created by a derivative or subsidiary settlement, the persons to be served with notice shall be the trustees of that settlement.

(ii) In the case of a dealing with an equitable interest in the proceeds of sale of land or in the rents and profits until sale the persons to be served with notice shall, as heretofore, be the trustees for sale.

(iii) In any other case the person to be served with notice of a dealing with an equitable interest in land shall be the estate owner (*b*) of the land affected.

The persons on whom notice is served pursuant to this subsection shall be affected thereby in the same manner as if they had been trustees of personal property out of which the equitable interest was created or arose.

This subsection does not apply where the money or securities are in court.

(3) A notice, otherwise than in writing, given to, or received by, a trustee after the commencement of this Act as respects any dealing with an equitable interest in real or personal property, shall not affect the priority of competing claims of purchasers in that equitable interest (*c*).

(4) Where, as respects any dealing with an equitable interest in real or personal property—

(a) the trustees are not persons to whom a valid notice of the dealing can be given; or

(b) there are no trustees to whom a notice can be given; or

(c) for any other reason a valid notice cannot be served, or cannot be served without unreasonable cost or delay;

a purchaser may at his own cost require that—

(i) a memorandum of the dealing be endorsed, written on or permanently annexed to the instrument creating the trust;

(ii) the instrument be produced to him by the person having the possession or custody thereof to prove that a sufficient memorandum has been placed thereon or annexed thereto.

Such memorandum shall, as respects priorities, operate in like manner as if notice in writing of the dealing had been given to trustees duly qualified to receive the notice at the time when the memorandum is placed on or annexed to the instrument creating the trust.

(5) Where the property affected is settled land, the memorandum shall be placed on or annexed to the trust instrument and not the vesting instrument (*d*).

15 Geo. 5, c. 20, s. 137.

Where the property affected is land held on trust for sale, the memorandum shall be placed on or annexed to the instrument whereby the equitable interest is created.

(6) Where the trust is created by statute or by operation of law, or in any other case where there is no instrument whereby the trusts are declared, the instrument under which the equitable interest is acquired or which is evidence of the devolution thereof shall, for the purposes of this section, be deemed the instrument creating the trust.

In particular, where the trust arises by reason of an intestacy, the letters of administration or probate in force when the dealing was effected shall be deemed such instrument.

(7) Nothing in this section affects any priority acquired before the commencement of this Act.

(8) Where a notice in writing of a dealing with an equitable interest in real or personal property has been served on a trustee under this section, the trustees from time to time of the property affected shall be entitled to the custody of the notice, and the notice shall be delivered to them by any person who for the time being may have the custody thereof; and subject to the payment of costs, any person interested in the equitable interest may require production of the notice.

(9) The liability of the estate owner (*b*) of the legal estate affected to produce documents and furnish information to persons entitled to equitable interests therein shall correspond to the liability of a trustee for sale to produce documents and furnish information to persons entitled to equitable interests in the proceeds of sale of the land (*e*).

(10) This section does not apply until a trust has been created, and in this section "dealing" includes a disposition by operation of law.

This section (which, with sect. 138, is taken from L. P. (Amdt.) Act, 1924) applied for the first time to dealings with equitable interests in land and capital moneys the rule, applicable to dealings with equitable things in action, that the priority of assignees depends on the date at which notice is acquired. See Goodeve's Modern Law of Personal Property (5th ed.), 136, and *Dearle* v. *Hall*, 3 Russ. 1, and other authorities there referred to. The principle of the rule does not apply to a beneficiary who can only assert his claim through his trustee (*Hill* v. *Peters*, [1918] 2 Ch. 273).

(*a*) See sub-sect. 10.

(*b*) The owner of a legal estate (sect. 205, sub-sect. 1 (v), *post*).

(*c*) Before this Act notice might be informal (*Lloyd* v. *Banks*, 3 Ch. 488 (where the trustee saw an advertisement); *Alletson* v. *Chichester*, L. R. 10 C. P. 319; *Ipswich Club* v. *Arthy*, [1920] 2 Ch. 257 (where a trustee acquired knowledge of a mortgage before his appointment as trustee).

(*d*) See S. L. Act, 1925, s. 4, *post*.

(*e*) See as to the liability of trustees to answer inquiries as to

incumbrances, *Low* v. *Bouverie*, [1891] 3 Ch. 82, and as to trust corporations, sect. 138, *post*.

15 Geo. 5, c. 20, s. 137.

Power to nominate a trust corporation to receive notices.

138.—(1) By any settlement or other instrument creating a trust, a trust corporation (*f*) may be nominated to whom notices of dealings affecting real or personal property may be given, whether or not under the foregoing section, and in default of such nomination the trustees (if any) of the instrument, or the court on the application of any person interested, may make the nomination.

(2) The person having the possession or custody of any instrument on which notices under that section may be endorsed shall cause the name of the trust corporation to whom notices may be given to be endorsed upon that instrument.

(3) Notice given to any trust corporation whose name is so endorsed shall operate in the same way as a notice or endorsement under the foregoing section.

(4) Where a trust corporation is acting for the purposes of this section a notice given to a trustee of the trust instrument of a dealing relating to the trust property shall forthwith be delivered or sent by post by the trustee to the trust corporation, and until received by the corporation shall not affect any priority.

(5) A trust corporation shall not be nominated for the purposes of this section—

(a) unless that corporation consents to act; or

(b) where that corporation has any beneficial interest in or charge upon the trust property; or

(c) where a trust corporation is acting as the trustee or one of the trustees of the instrument creating the trust.

(6) Where a trust corporation acting for the purposes of this section becomes entitled to any beneficial interest in or charge upon the trust property, another trust corporation shall be nominated in its place and all documents relating to notices affecting the trust shall be delivered to the corporation so nominated.

(7) A trust corporation acting for the purposes of this section shall be bound to keep a separate register of notices of dealings in respect of each equitable interest and shall enter therein—

(a) the date of the notice;

(b) the name of the person giving the notice;

(c) short particulars of the equitable interest intended to be affected; and

(d) short particulars of the effect of the dealing if mentioned in the notice.

(8) The trust corporation may, before making any entry

15 Geo. 5, c. 20, s. 138.

in the register, require the applicant to pay a fee not exceeding the prescribed fee.

(9) Subject to the payment of a fee not exceeding the prescribed fee, the trust corporation shall permit any person who would, if the corporation had been the trustee of the trust instrument, have been entitled to inspect notices served on the trustee, to inspect and take copies of the register and any notices held by the corporation.

(10) Subject to the payment by the applicant of a fee not exceeding the prescribed fee, the trust corporation shall reply to all inquiries respecting notices received by the corporation in like manner and in the same circumstances as if the corporation had been the trustee of the trust instrument.

(11) In this section "prescribed fee" means the fee prescribed by the Treasury, with the sanction of the Lord Chancellor, in cases where the Public Trustee acts as a trust corporation for the purposes of this section.

(*f*) For definition of "trust corporation" see p. 794, *post*.

Part V. (*a*).

Leases and Tenancies.

Effect of extinguishment of reversion.

139.—(1) Where a reversion expectant on a lease of land is surrendered or merged, the estate or interest which as against the lessee for the time being confers the next vested right to the land, shall be deemed the reversion for the purpose of preserving the same incidents and obligations as would have affected the original reversion had there been no surrender or merger thereof.

(*a*) This part of the Act, except where otherwise expressly stated, applies to leases created before or after the commencement of the Act, and "lease" includes an under-lease or other tenancy (sect. 154, *post*; see also sects. 146 and 147).

(2) This section applies to surrenders or mergers effected after the first day of October, eighteen hundred and forty-five.

Re-enacts R. P. Act, 1845, s. 9.

Surrender of leasehold reversion.

Where A. leased to B., and B. sub-leased for a shorter term to C., and then surrendered to A., the result under the old law was that, the immediate reversion on C.'s sub-lease having been destroyed, C. could not be sued on his covenants, which were incident to that reversion (*Burton* v. *Barclay*, 7 Bing. 756). On the other hand, B.'s surrender did not affect C.'s right to hold under his sub-lease (*Walter* v. *Yalden*, [1902] 2 K. B. 310), or any right which C. might possess by covenant to compel B. to observe the covenants in the head lease (*Piggott* v. *Stratton*, 1 D. F. & J. 33).

A statutory remedy for this difficulty was in the first instance provided for those cases where the surrender was made with a view to a new lease. For by the Landlord and Tenant Act, 1730, s. 6 (see now sect. 150, *post*), a lessee could surrender his lease for the purpose of taking a new lease without a surrender of any sub-leases. **15 Geo. 5, c. 20, s. 139.**

The effect of the R. P. Act, 1845, s. 9 (which section was retrospective, *Upton* v. *Townend*, 17 C. B. 542), was to extend the statutory remedy to all cases of surrender. Thus the disclaimer of a trustee in bankruptcy under the Act of 1869 was a surrender within the above sect. 9 (*Smalley* v. *Hardinge*, 7 Q. B. D. 524; see *Re Roberts, Ex p. Brook*, 10 Ch. D. 110). As to the effect of a disclaimer under the Bankruptcy Act, 1883, see *Re Morgan* (22 Q. B. D. 592); *Re Baker*, [1901] 2 K. B. 628; *Re Britton*, 61 L. T. 52.

As regards merger, it was held under the old law that if a lessee granted a sub-lease, and then took a conveyance to himself of the fee whereby his former reversionary interest was merged, the covenants incident to such reversionary interest were extinguished (*Webb* v. *Russell*, 3 T. R. 393; *Thorn* v. *Woollcombe*, 3 B. & Ad. 586; compare the statement of the effect of the merger of a lease in the fee, a sub-lease remaining outstanding, *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 647). This difficulty was dealt with by the above sect. 9, which was applied in *Craig* v. *Greer*, [1899] 1 I. R. 258. See also, on questions of merger arising since the Jud. Act, 1873, the note to sect. 185 of the present Act, p. 772, *post*. Merger of leasehold reversion.

The protection of sub-lessees on the forfeiture of a head lease is provided for by sect. 146, sub-sect. 4, *post*, re-enacting sect. 4 of the Conv. Act, 1892.

A grantee of a tenancy by parol was held entitled to a reversion (*Plummer* v. *David*, [1920] 1 K. B. 326).

140.—(1) Notwithstanding the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in the part of the land as to which the term has not been surrendered, or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease. Apportionment of conditions on severance.

(2) In this section "right of re-entry" includes a right to determine the lease by notice to quit or otherwise; but where the notice is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within one month determine the lease in regard to the rest of the land by giving to the

15 Geo. 5, c. 20, s. 140.

owner of the reversionary estate therein a counter notice expiring at the same time as the original notice.

(3) This section applies to leases made before or after the commencement of this Act and whether the severance of the reversionary estate or the partial avoidance or cesser of the term was effected before or after such commencement:

Provided that, where the lease was made before the first day of January eighteen hundred and eighty-two nothing in this section shall affect the operation of a severance of the reversionary estate or partial avoidance or cesser of the term which was effected before the commencement of this Act.

Sub-sect. 1 re-enacts C. Act, 1881, s. 12 (which applied only to leases made after 1881), the remainder of the section being new (as to agricultural holdings see *infra*). The L. P. Amendment Act, 1859, s. 3, made a similar provision as to conditions of re-entry for non-payment of rent.

Apportionment of conditions of re-entry.

The rule of law before that Act was, that conditions were entire and could not be apportioned by the act of the parties (Co. Litt. 215 a; *Dumpor's Case*, 4 Rep. 119 b; see *Wetherall* v. *Geering*, 12 Ves. 511). Accordingly before the Act the severance of the reversion by a voluntary act of the lessor (*e.g.* by an assignment of the reversion in part, in space, of the premises) destroyed the whole condition of re-entry for non-payment of rent (*Knight's Case*, 5 Rep. 55 b). Where, however, the assignment was of part (in time) of the reversion of the whole (in space) of the premises, the assignee could avail himself of a condition of re-entry (*Wright* v. *Burroughes*, 3 C. B. 685 and see *Piggott* v. *Middlesex*, [1909] 1 Ch. 134). Sect. 3 related to the above rule and prevented the destruction of a condition of re-entry by the severance of the reversion in cases where the rent is legally apportioned.

Apportionment of rent.

Upon the question of apportionment of rent the following distinctions have been laid down:—Rent may be apportioned in the following amongst other ways. By law, as upon the death intestate of an owner of freeholds and leaseholds comprised in one lease. Or by act of the parties, as (1) upon a grant or devise of the reversion in part of the land (*West* v. *Lascelles*, Cro. Eliz. 851; but in such cases, before payment can be enforced, the apportioned amount must be fixed, either by the consent of the lessee or by a jury: *Bliss* v. *Collins*, 5 B. & Ald. 876; *Swansea* v. *Thomas*, 10 Q. B. D. 51); or (2) upon grant or devise of part of the rent (*Bliss* v. *Collins*, 5 B. & Ald. 882; *Ards* v. *Watkin*, Cro. Eliz. 637, 651); or (3) upon a surrender to the lessor of part of the land (Co. Litt. 148; see *Baynton* v. *Morgan*, 22 Q. B. D. 74); or (4) upon an eviction of the lessee from part of the land by title paramount to the lessor (*Neal* v. *Mackenzie*, 1 M. & W. 747; see *Doe* v. *Meyler*, 2 Maul. & S. 276; *Stevenson* v. *Lambard*, 2 East, 575; *Tomlinson* v. *Day*, 2 Brod. and B. 680; Co. Litt. 148 b). If, however, the lease be bad as to part of the land by act of the lessor, there will be no apportionment, and no rent will be payable in respect of any of the land (*Neal* v. *Mackenzie*, 1 M. & W. 747).

Statutory provisions for apportionment of rent.

Statutory provisions have been made for the apportionment of rent where land is taken for certain public purposes (see the Lands Clauses Consn. Act, 1845, s. 119, the School Sites Act, 1849; Church Building Act, 1854). As to the apportionment of rent service, see further, Foa (4th ed.), 125. And as to the apportionment of rentcharges, see the note to sect. 70, *ante*. See also sects. 190 and 191, *post*.

Sect. 2 of the L. P. (Amendment) Act, 1926 (see p. 594, *ante*), provides as follows:— **15 Geo. 5, c. 20, s. 140.**

Sect. one hundred and forty of the Law of Property Act, 1925 (which relates to the apportionment of conditions on severance), shall have effect as if at the end of sub-sect. 2 thereof the following proviso were inserted:— Agricultural holdings.

> Provided that where the land demised is an agricultural holding within the meaning of the Agricultural Holdings Act, 1923, the tenant on whom notice to quit is served by the person entitled to a severed part of the reversion may, at any time within twenty-eight days of the service of such notice to quit, serve on the persons severally entitled to the severed parts of the reversion a notice in writing to the effect that he accepts the notice to quit as a notice to quit the entire holding given by the persons so severally entitled to take effect at the same time as the original notice; and such acceptance shall have effect as if it were the acceptance of a notice to quit to which paragraph (d) of sub-sect. (7) of sect. twelve of the said Act applies. 13 & 14 Geo. 5, c. 9.

As to the meaning of "agricultural holding," see sect. 57, sub-sect. 1, of the Agri. Holdings Act, 1923.

Rent and benefit of lessee's covenants to run with the reversion.

141.—(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.

(2) Any such rent, covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(3) Where that person becomes entitled by conveyance or otherwise, such rent, covenant or provision may be recovered, received, enforced or taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable, but this subsection does not render enforceable any condition of re-entry or other condition waived or released before such person becomes entitled as aforesaid.

(4) This section applies to leases made before or after the commencement of this Act, but does not affect the operation of—

(a) any severance of the reversionary estate; or

(b) any acquisition by conveyance or otherwise of the right to receive or enforce any rent covenant or provision;

effected before the commencement of this Act.

Sub-sects. 1 and 2 re-enact C. Act, 1881, s. 10 (adding the concluding clause of sub-s. 1). Sub-s. 3 re-enacts C. Act, 1911, s. 2.

15 Geo. 5, c. 20, s. 141.

The section, coupled with sect. 140, relate to the transfer (where the reversion is dealt with) of the benefit of conditions, and of the lessee's covenants.

Earlier law as to transfer of benefit of conditions.

The transfer of the benefit of conditions had been previously dealt with by sect. 1 of 32 Hen. 8, c. 34 (repealed by this Act), which gave to assigns of the reversion the same advantages by re-entry against the lessees and their assigns as the lessors had. It had been further dealt with by sect. 3 of the Law of Property Amendment Act, 1859 (see note to sect. 140, *ante*); sect. 3, however, only applying conditions of re-entry for non-payment of rent where the rent had been legally apportioned.

Of benefit of lessee's covenants.

The transfer of the benefit of the lessee's covenants had also been previously dealt with by sect. 1 of 32 Hen. 8, c. 34, which gave to assigns of the reversion the same advantages by action against lessees and their assigns as the lessors had. The result of the last-mentioned section was that, notwithstanding the destruction of the condition of re-entry, the lessor or his assignee (see *Hastings* v. *N. E. R. Co.*, [1898] 2 Ch. 674; *Rogers* v. *Hosegood*, [1900] 2 Ch. 395; *Scaltock* v. *Harston*, 1 C. P. D. 106; *Hooper* v. *Clark*, L. R. 2 Q. B. 200) could either distrain for the rent (*Neal* v. *Mackenzie*, 1 M. & W. 758; see *Jacob* v. *Kirk*, 2 M. & Rob. 221), or sue on a covenant in the lease to pay rent (*Twynam* v. *Pickard*, 2 B. & Ald. 105; see Shepp. T. 176); whether the action was founded on privity of estate or of contract only (*Swansea* v. *Thomas*, 10 Q. B. D. 48).

Meaning of "lease."

With respect to the meaning of the word "lease" in sects. 140—142, a tenancy agreement has been held to be a "lease" within C. Act, 1881, s. 10 (replaced by this section) (*Rickett* v. *Green*, [1910] 1 K. B. 259; see *Walsh* v. *Lonsdale*, 21 Ch. D. 9). See, however, *Charrington* v. *Camp*, [1902] 1 Ch. 389; *Manchester* v. *Coombs*, [1901] 2 Ch. 619. It may be pointed out that the word "lease" in sect. 14 of C. Act, 1881 (see now sect. 146, *post*), was held not to include an agreement for a lease (*Swain* v. *Ayres*, 21 Q. B. D. 289); and see sect. 99, sub-sect. 17, *ante*. The Act 32 Hen. 8, c. 34, only applied to leases by deed (*Manchester* v. *Coombs*, [1901] 2 Ch. 613).

Covenants referred to in section.

With respect to the class of covenants to which this section refers, see the note to sect. 142, *post*. It is not necessary, having regard to the present section, that these covenants should be originally entered into with the owner of the legal reversion. Thus where a lease was granted by a mortgagor under sect. 18 of C. Act, 1881 (see sect. 99, *ante*), and the covenants were made with the mortgagor alone, the mortgagee (who had the legal reversion—*Robbins* v. *Whyte*, [1906] 1 K. B. 125) was entitled under this section to the benefit of the lessee's covenants on giving notice (*Municipal Society* v. *Smith*, 22 Q. B. D. 70), and see *Re Ind, Coope & Co.*, [1911] 2 Ch. 223. Sub-sect. 2 extends, it will be observed, the benefit of these covenants to persons beneficially entitled to the income. Having regard to these words, a mortgagor in possession where the mortgagee had given no notice of intention to take possession, was held entitled to sue on a covenant (*Turner* v. *Walsh*, [1909] 2 K. B. 484).

The assignee of a reversion could not before 1912 in respect of a breach committed before the assignment enforce either a covenant (*Martyn* v. *Williams*, 1 H. & N. 817) or a condition of re-entry (*Cohen* v. *Tannar*, [1900] 2 Q. B. 609).

With respect to the meaning of the words "severance of that reversionary estate"; distinguish between severance in point of space, and severance in point of time. See note to sect. 140, *ante*, and compare the language of that section and sect. 140. As regards severance, or possible severance, in point of space, it was held independently of this section that where the reversion on a lease became vested in several tenants in common, one of them could,

without joining the others, sue on a covenant which bound the successive assigns of the term (*Roberts* v. *Holland*, [1893] 1 Q. B. 665). But in the case of a condition of re-entry for breach of covenant, one of several coparceners to whom the reversion descended could not alone maintain ejectment for a breach (*Doe* v. *Lewis*, 5 Ad. & El. 277).

As to an implied covenant being "contained" in a lease see *Cole* v. *Kelly*, [1920] 2 K. B. 106.

A right of re-entry was held to have been waived (sub-sect. 3) in *Davenport* v. *Smith*, [1921] 2 Ch. 271. See also *Atkin* v. *Rose*, [1923] 1 Ch. 522.

Obligation of lessor's covenants to run with reversion.

142.—(1) The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2) This section applies to leases made before or after the commencement of this Act, whether the severance of the reversionary estate was effected before or after such commencement:

Provided that, where the lease was made before the first day of January eighteen hundred and eighty-two, nothing in this section shall affect the operation of any severance of the reversionary estate effected before such commencement.

This section takes effect without prejudice to any liability affecting a covenantor or his estate.

Re-enacts C. Act, 1881, s. 11, adding "under a condition or" before "of a covenant," and the provisions contained in sub-sect. 2.

Covenants referred to in the section.

The section relates to the transfer (where the reversion is dealt with) of the burden of a lessor's covenants. Provision as to this had been previously made by 32 Hen. 8, c. 34, s. 2, which gave lessees the like remedy in respect of covenants against grantees of the reversion as they had against the lessor. The present section in no way alters the old law as to the class of covenants the burden of which will bind the assigns of the reversion (*Davis* v. *Town Properties*, [1903] 1 Ch. 805). The Act 32 Hen. 8, c. 34 (repealed by this Act), applied to covenants which touched or concerned the thing demised but not to collateral covenants (*Vernon* v. *Smith*, 5 B. & Ald. 11). In view of the words "with reference to the subject matter of the lease," the present section appears to have the same application (see *Woodall* v. *Clifton*, arg., [1905] 2 Ch. 270). It does not apply to a covenant which is personal or collateral

15 Geo. 5, c. 20, s. 142.

(*Davis* v. *Town Properties*, [1903] 1 Ch. 797; compare *Dewar* v. *Goodman*, [1909] A. C. 72). See note to sect. 56, *ante*, p. 651. An undertaking by a lessor to provide a housekeeper at a fixed charge for her services was held to have reference "to the subject-matter" of the tenancy (*Barnes* v. *City of London Co.*, [1918] 2 Ch. 18).

Renewal covenants.

As regards covenants to renew leases, it has been held in Ireland that such a covenant entered into by A., holding a limited interest in land, does not bind the land beyond that interest; and if A.'s assign acquires the inheritance, it is not bound by the covenant (*Brereton* v. *Tuohey*, 8 Ir. C. L. R. 190; *Kent* v. *Stoney*, 9 Ir. Ch. R. 249; *Coey* v. *Pascoe*, [1899] 1 I. R. 125). And this has been followed in England (*Muller* v. *Trafford*, [1901] 1 Ch. 54; see *Woodall* v. *Clifton*, [1905] 2 Ch. 264).

Liability of lessor after assignment of reversion.

As regards the personal liability of a lessor upon express covenants which, where the reversion is assigned, bind the successive owners of the reversion, it has been held that this personal liability is not extinguished by the assignment (*Stuart* v. *Joy*, [1904] 1 K. B. 368). For a case where an attempt to enforce this personal liability failed by reason of the nature of alleged breach, see *Williams* v. *Gabriel*, [1906] 1 K. B. 155.

Effect of licences granted to lessees.

143.—(1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only—

(a) to the permission actually given; or

(b) to the specific breach of any provision or covenant referred to; or

(c) to any other matter thereby specifically authorised to be done;

and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.

(2) Notwithstanding any such licence—

(a) All rights under covenants and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and

(b) The condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.

(3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted—

(a) to any one of two or more lessees to do any act, or to deal with his equitable share or interest; or

(b) to any lessee, or to any one of two or more lessees to assign or underlet part only of the property, or to do any act in respect of part only of the property;

the licence does not operate to extinguish the right of entry in case of any breach of covenant or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property (as the case may be) in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence. 15 Geo. 5, c. 20, s. 143.

This subsection does not authorise the grant after the commencement of this Act of a licence to create an undivided share in a legal estate.

(4) This section applies to licences granted after the thirteenth day of August, eighteen hundred and fifty-nine.

Re-enacts (adding the concluding paragraph of sub-sect. 3—see sect. 1, sub-sect. 6, and sect. 34, *ante*) L. P. Amendment Act, 1859, ss. 1, 2.

Covenants and conditions not to assign or underlet without licence.

Before that Act, when, under a condition restraining assignment without licence, a licence had been once given, the condition was determined (*Dumpor's Case*, 4 Rep. 119 b); and the law was the same with respect to a covenant to the like effect, although it was said that there seemed to be no reason why such a covenant or condition should not be held to run with the land, and be binding on such persons as might become assigns with the consent of the landlord (see *Weatherall* v. *Geering*, 12 Ves. 511; 3 Real. Prop. Rep. 49).

Dumpor's Case.

So in the case of a lease to several lessees, upon condition that they or any of them should not assign without the lessor's licence, an alienation with licence by one of the lessees determined the condition as to all. And a condition not to alien the land or any part thereof without licence was determined as to the whole by the lessor's licence to alien part only (*Dumpor's Case*, 4 Rep. 119 b). The doctrine of *Dumpor's Case* was disapproved, but never overruled (*Brummell* v. *Macpherson*, 14 Ves. 175; see Dyer, 152, pl. 7; see further the note to *Dumpor's Case*, 1 Smith, L. C.; 1 Wms. Saund. 445 *et seq.* (ed. 1871); *Saunders* v. *Merryweather*, 13 W. R. 814). This doctrine appears on principle to have been equally applicable to all covenants and conditions by which the licence or consent of the lessor was made requisite for doing any particular act (see 3 Real Prop. Rep. 50; *Macher* v. *The Foundling Hospital*, 1 Ves. & B. 191). The doctrine had been restricted from applying to licences granted to tenants of Crown lands by the Crown Lands Act, 1845, s. 5.

The rule laid down in *Dumpor's Case*, so far as relates to conditions contained in leases, was done away with by sects. 1 and 2 of the Act of 1859.

As to the restriction of waiver of breaches see sect. 148, *post*, p. 742.

It is now ruled that as between landlord and tenant the burden of the lessee's covenant not to assign without licence runs with the land and binds assigns of the term. So held where the covenant was expressed to bind assigns (*McEacharn* v. *Colton*, [1902] A. C. 104). And it seems that the rule applies also where assigns are not named (see *Williams* v. *Earle*, L. R. 3 Q. B. 739; *Spencer's Case*, 1st Resolution, 1 Sm. L. C.). The covenant applies to a re-assignment to the original lessee (*McEacharn* v. *Colton*, *supra*). *Cf.* s. 79, *ante*.

Exacting fines for licences to assign is prohibited by sect. 144.

15 Geo. 5, c. 20, s. 144.

No fine to be exacted for licence to assign.

144.—In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

Re-enacts C. A. 1892, s. 3, which applied to leases made before its commencement (*West* v. *Gwynne*, [1911] 2 Ch. 1).

Effect of section.

The section does not make the payment of a fine illegal, but imports into the lease as between the parties a proviso that no fine shall be payable for a licence (*Waite* v. *Jennings*, [1906] 2 K. B. 11; *Andrew* v. *Bridgman*, [1908] 1 K. B. 598). This imported proviso is analogous to the common proviso that a licence shall not be unreasonably withheld (*Andrew* v. *Bridgman*, *supra*). Where a fine was in fact paid (not under protest) it could not be recovered back. The remedy of the lessee where consent is refused except on payment, is to ignore the covenant and assign without licence (*ibid.*; see *Evans* v. *Levy*, [1910] 1 Ch. 452), but see as to costs *West* v. *Gwynne*, [1911] 2 Ch. 1. And see *Willmott* v. *London Road Car Co.*, [1910] 1 Ch. 754.

What is a fine.

As to what is a fine, the word includes "premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift" (sect. 205, sub-sect. 1 (xxiii), *post*). Having regard to this definition, Moulton, L.J., laid down that a fine includes a benefit given to the landlord as the price of a licence, and accordingly included a covenant entered into by an intended assignee (on the occasion of the grant of the licence) to pay all future rent (*Waite* v. *Jennings*, [1906] 2 K. B. 18). The majority, however, of the C. A. considered that a covenant which only secured to the landlord the rent reserved by the lease was not a fine within the section (*ibid.* 11). In an earlier case it was said that the section pointed at money which was to go irrevocably into the pocket of the landlord (*Re Cosh*, [1897] 1 Ch. 14); and accordingly the requiring (as a condition of a licence) a deposit of money to secure the fulfilment of the lessee's obligations in regard to other property, was not requiring a fine within the section (*ibid.* 9).

Requiring an increased rent as a condition of consenting to an assignment was "requiring a fine" within the section and was contrary to the imported proviso (*Jenkins* v. *Price*, [1907] 2 Ch. 229; reversed on another point, [1908] 1 Ch. 10), and see as to costs, *West* v. *Gwynne*, *supra*. Where consent to an assignment was refused because increased rent was not promised, the consent was held to have been "unreasonably withheld" within the subsequent words of the lease (*ibid.*; see *Andrew* v. *Bridgman*, [1908] 1 K. B. 596).

Lessee to give notice of ejectment to lessor.

145. Every lessee to whom there is delivered any writ for the recovery of premises demised to or held by him, or to whose knowledge any such writ comes, shall forthwith give notice thereof to his lessor or his bailiff or receiver, and, if he fails so to do, he shall be liable to forfeit to the

person of whom he holds the premises an amount equal to the value of three years' improved or rack rent of the premises, to be recovered by action in any court having jurisdiction in respect of claims for such an amount. **15 Geo. 5, c. 20, s. 145.**

Re-enacts Common Law Procedure Act, 1852, s. 209. See as to the rent, *Crocker* v. *Fothergill*, 2 B. & Ald. 652.

Restrictions on and relief against forfeiture of leases and underleases.

146.—(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*a*).

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit (*b*).

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act (*c*).

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the

15 Geo. 5, c. 20, s. 146.

whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease (*d*).

(5) For the purposes of this section—

(a) "Lease" includes an original or derivative under-lease; also an agreement for a lease where the lessee has become entitled to have his lease granted; also a grant at a fee farm rent, or securing a rent by condition;

(b) "Lessee" includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;

(c) "Lessor" includes an original or derivative under-lessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;

(d) "Under-lease" includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted;

(e) "Under-lessee" includes any person deriving title under an under-lessee (*e*).

(6) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament (*f*).

(7) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach (*g*).

(8) This section does not extend—

(i) To a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased where the breach occurred before the commencement of this Act; or

(ii) In the case of a mining lease, to a covenant or condition for allowing the lessor to have access

to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof (*h*).

(9) This section does not apply to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest if contained in a lease of—

(a) Agricultural or pastoral land;

(b) Mines or minerals;

(c) A house used or intended to be used as a public-house or beershop;

(d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;

(e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(10) Where a condition of forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest is contained in any lease, other than a lease of any of the classes mentioned in the last subsection, then—

(a) if the lessee's interest is sold within one year from the bankruptcy or taking in execution, this section applies to the forfeiture condition aforesaid;

(b) if the lessee's interest is not sold before the expiration of that year, this section only applies to the forfeiture condition aforesaid during the first year from the date of the bankruptcy or taking in execution (*i*).

(11) This section does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (*k*).

(12) This section has effect notwithstanding any stipulation to the contrary (*l*).

This section re-enacts, with alterations and additions noted *infra*, C. A. 1881, s. 14, and C. A. 1892, ss. 2, 4, and 5.

(*a*) Before the C. A., 1881, it was held, in the case of an agreement to grant a lease subject to usual covenants, that the proviso for re-entry in the lease should only extend to the non-payment of rent (*Hodgkinson* v. *Crowe*, 10 Ch. 622); and this section has made no difference (*Re Anderton and Milner*, 45 Ch. D. 476). A covenant to pay the lessor's costs of notice is unusual and onerous (*Allen* v. *Smith*, [1924] 2 Ch. 308).

Sub-sect. 1.

This section does not take away the lessor's right of re-entry, but merely affords the lessee a *locus pœnitentiæ* (*Cresswell* v. *Davidson*, 56 L. T. 811). It has been said that a notice under this section is a condition precedent to the bringing of an action of ejectment (*North London Co.* v. *Jacques*, 49 L. T. 659; 32 W. R. 283; *Horsey* v. *Steiyer*, [1899] 2 Q. B. 92; see *Scott* v. *Brown*, 51 L. T. 746); but not, it seems, of an action for a receiver (*Charrington* v. *Camp*, [1902] 1 Ch. 386; see *Leney* v. *Callingham*, [1908] 1 K. B. 79).

15 Geo. 5, c. 20, s. 146.

A notice is also a necessary preliminary to re-entry without action, *e.g.*, by obtaining peaceable possession (*Re Riggs*, [1901] 2 K. B. 20; compare *Howard* v. *Fanshawe*, [1895] 2 Ch. 581). The form of the notice should comply with the particulars mentioned in sub-sect. 1 (*North London Co.* v. *Jacques*, *supra*; see *Jacques* v. *Harrison*, 12 Q. B. D. 136; *Greenfield* v. *Hanson*, 30 S. J. 650; *Cronin* v. *Rogers*, 1 Cab. & Ell. 348). The tenant should have full notice of the breach (*Penton* v. *Barnett*, [1898] 1 Q. B. 281; *New River Co.* v. *Crumpton*, [1917] 1 K. B. 762; *Horsey* v. *Steiger*, [1899] 2 Q. B. 91). And a notice was held bad where it referred to the wrong covenant (*Jacob* v. *Down*, [1900] 2 Ch. 156; *Guillemard* v. *Silverthorne*, 99 L. T. 584); also where it was not sufficiently specific (*Fletcher* v. *Nokes*, [1897] 1 Ch. 271); also where, there being several alleged breaches, the notice did not give sufficient particulars of one of the breaches, although it did of the others (*Re Serle, Gregory* v. *S.*, [1898] 1 Ch. 652). See also *Griffin* v. *Pillet*, [1926] 1 K. B. 17. The notice should enable the tenant to understand with reasonable certainty what he is required to do, but need not contain a detailed specification (*Fox* v. *Jolly*, [1916] 1 A. C. 1; and see *Piggott* v. *Middlesex*, [1909] 1 Ch. 147). In a case where several breaches were alleged, the notice was not invalid because it turned out the lessor could not rely on some of the breaches (*Pannel* v. *City of London Co.*, [1900] 1 Ch. 496). And where the notice referred to a continuing breach which was afterwards waived by a claim for rent up to a date later than the notice, a second notice in respect of the subsequent breach was not necessary (*Penton* v. *Barnett*, [1898] 1 Q. B. 276). Where notice had previously been given under a covenant to repair within three months after notice, a second notice under this subsection was valid (*Cove* v. *Smith*, 2 Times L. R. 778). As to alterations in premises amounting to breach of contract, see *Jackson* v. *Simons*, [1923] 1 Ch. 373. As to statutory tenants under the Rent, &c. Restriction Acts, see *Brewer* v. *Jacobs*, [1923] 1 K. B. 528. In a case where compensation is not desired, it is not necessary that the notice should require compensation (*Lock* v. *Pearce*, [1893] 2 Ch. 271). The compensation is, it seems, to be measured by the same rule as damages in an action for breach (*Skinners' Co.* v. *Knight*, [1891] 2 Q. B. 545). The question what is a reasonable time must go to a jury (*ibid.*; see *Horsey* v. *Steiger*, [1899] 2 Q. B. 79).

Mesne profits are payable only from the date of the writ (*Elliott* v. *Boynton*, [1924] 1 Ch. 236). As to service of the notice, see sect. 196, *post*, p. 783, and cases there quoted.

Sub-sect. 2.

(*b*) This sub-section re-enacts C. A., 1881, sect. 14 (2), which extended to breaches committed before that Act (*Quilter* v. *Mapleson*, 9 Q. B. D. 672). It does not apply to cases where, after giving a proper notice, the landlord has already entered (*ibid.* 675; *Rogers* v. *Rice*, [1892] 2 Ch. 170; *Lock* v. *Pearce*, [1893] 2 Ch. 274; *Jacques* v. *Harrison*, 12 Q. B. D. 136, 165; *Scott* v. *Brown*, 51 L. T. 746). Sub-sect. 2 gives jurisdiction to refuse relief against re-entry which is claimed on the ground of the absence of the notice mentioned in sub-sect. 1 (*Scott* v. *Brown*, 51 L. T. 746; see *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263). As to its application to a breach of covenant by a previous holder of an under-lessee's interest, see *Fleetwood* v. *Hull* (23 Q. B. D. 35). And as to the conditions on which relief will be granted, see *Quilter* v. *Mapleson* (9 Q. B. D. 672); *North London Land Co.* v. *Jacques* (49 L. T. 659; 32 W. R. 283); *Bond* v. *Freke* ((1884), W. N. 47); *Mitchison* v. *Thomson* (1 Cab. & Ell. 72). A lessee who subsequently refused to perform some of these conditions could not be compelled to do so, but was held to have abandoned the order (*Talbot* v. *Blindell*, [1908] 2 K. B. 114). If in a case of forfeiture relief is granted, the forfeiture is deemed never to have

taken place, and the original lease continues for all purposes (*Dendy* v. *Evans*, [1909] 2 K. B. 902; [1910] 1 K. B. 269). The discretion entrusted to the Court is a wide one, and should not be fettered by rigid rules (*Hyman* v. *Rose*, [1912] A. C. 623). 15 Geo. 5, c. 20, s. 146.

The lessee's application under sub-sect. 2 cannot be made by originating summons (*Lock* v. *Pearce*, [1893] 2 Ch. 271).

(*c*) Re-enacts C. A., 1892, s. 2, sub-s. 1, omitting "by writing under his hand" after "waived by the lessor."

Before C. A., 1892, it was held, under sect. 14, sub-sect. 2 of the Conv. Act, 1881, that payment by the lessee of the expenses of a solicitor, &c., might be made by the Court a condition of relief (*Bridge* v. *Quick*, 61 L. J. Q. B. 375). Sub-sect. 3.

An under-lessee was not as between himself and the lessor a "lessee" within C. A. 1892, sect. 2, and the lessor could not, therefore, recover costs from him under sub-sect. 1 (*Nind* v. *Nineteenth Century Society*, [1894] 2 Q. B. 226). In a case under the same sub-section an opinion was expressed in the C. A. that a lessee who by complying with the lessor's notice avoids a forfeiture is not "relieved" from forfeiture within the sub-section (*Nind* v. *Nineteenth Century Society*, [1894] 2 Q. B. 233; see *Dendy* v. *Evans*, [1910] 1 K. B. 270). If this be correct the operation of the sub-section would seem to be much narrowed.

(*d*) Re-enacts C. A., 1892, s. 4, adding "or for non-payment of rent." That section was passed in consequence of the decisions (*Cresswell* v. *Davidson*, 56 L. T. 811; *Burt* v. *Gray*, [1891] 2 Q. B. 98) 2nd ed. of this work, p. 577 that sect. 14 of the Conv. Act, 1881, did not apply as between ground landlord and under-lessee (*Nind* v. *Nineteenth Century Society*, [1894] 2 Q. B. 231). The section, however, is not a mere amendment of sect. 14 (*Gray* v. *Bonsall*, [1904] 1 K. B. 607). It enables the Court to grant relief to an under-lessee in cases where no relief would have been granted to the original lessee, *e.g.*, bankruptcy (*Cholmeley School* v. *Sewell*, [1894] 2 Q. B. 906), or breach of covenant not to assign or underlet (*Imray* v. *Oakshette*, [1897] 2 Q. B. 218; see *Cohen* v. *Tannar*, [1900] 2 Q. B. 609, 614); or non-payment of rent (*Gray* v. *Bonsall*, *supra*; see *London Bridge Co.* v. *Thompson*, 89 L. T. 50); and see now the added words in the present sub-section. But the jurisdiction will be exercised with caution (*Imray* v. *Oakshette*, *supra*; see *Keith* v. *Gancia*, [1904] 1 Ch. 783, 791), and relief will not be given where the sub-lessee has been negligent (*Matthews* v. *Smallwood*, [1910] 1 Ch. 777, *q.v.* for a review of the law). But a sub-lessee can obtain relief though guilty of similar breaches of covenant (*Hurd* v. *Whaley*, [1918] 1 K. B. 448). Trustees of an unregistered society were held not entitled to sue (*Jarrott* v. *Ackerley*, 113 L. T. 371). Sub-sect. 4.

The estate vested by an order under the section is a new estate (*Serjeant* v. *Nash*, [1903] 2 K. B. 313), and the Court has most ample discretion in fixing the terms of the new lease (*Ewart* v. *Fryer*, [1901] 1 Ch. 499; [1902] A. C. 187); which may be granted at an advanced rent ([1901] 1 Ch. 507; see *Cholmeley School* v. *Sewell*, [1894] 2 Q. B. 913), and may include part only of the premises demised by the forfeited head lease (*London Bridge Co.* v. *Thompson*, 89 L. T. 50).

The application of the under-lessee may be made by defence and counterclaim in an action for possession by the lessor (*Cholmeley's School* v. *Sewell*, [1893] 2 Q. B. 254). As to costs, see *Clare* v. *Dobson*, [1911] 1 K. B. 35.

Before 1892 the relation between a ground landlord and sub-lessee had been dealt with by sect. 6 of the Landlord and Tenant Act, 1730, and sect. 9 of the R. P. Act, 1845. See now sect. 150, *post*, and sect. 139, *ante*.

15 Geo. 5, c. 20, s. 146.

Sub-sect. 5.

(*e*) This sub-section replaces C. A., 1881, s. 14, sub-s. 3, and C. A., 1892, s. 5. A lease by estoppel is within the section (*Keith* v. *Gancia*, [1904] 1 Ch. 783, 791). But not a tenancy at will (*Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220). As to a tenancy agreement, see *Charrington* v. *Camp*, [1902] 1 Ch. 386. The word "lessee" includes an assignee of a lease (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348).

Sub-sect. 6.

(*f*) Re-enacts C. A., 1881, s. 14, sub-s. 4.

Sub-sect. 7.

(*g*) Re-enacts C. A., 1881, s. 14, sub-s. 5.

Sub-sect. 8.

(*h*) Re-enacts C. A., 1881, s. 14, sub-s. 6, omitting reference to bankruptcy (see sub-sect. 9, *infra*), but limits clause (i) to breaches occurring before 1926. A condition against disposing of the land leased within this sub-section must be a condition which on its face is against disposing of the land leased. The words accordingly did not include a condition against executing an assignment for the benefit of creditors (*Gentle* v. *Faulkner*, [1900] 2 Q. B. 267). As to sub-letting part of the premises, see *Russell* v. *Beecham*, [1924] 1 K. B. 525, and as to a proviso limiting the covenant to underlettings for more than a fixed period, *Roberts* v. *Enlayde*, [1924] 1 K. B. 335.

Having regard to this subsection, cases of "assignment, underletting, parting with the possession or disposing," &c., before 1926 are left to be dealt with according to the ordinary law (*Barrow* v. *Isaacs*, [1891] 1 Q. B. 430). Under such ordinary law it has been held that forgetfulness is no ground for relieving in respect of a breach of a covenant against underletting (*Barrow* v. *Isaacs*, *supra*; *Eastern Telegraph Co.* v. *Dent*, [1899] 1 Q. B. 835). As to what amounts to a breach of a covenant against assigning, see Woodfall, 21st ed., pp. 819 *et seq.*; Foa, 6th ed., pp. 317-320; *Gentle* v. *Faulkner*, *supra*; *Re Riggs*, *Ex p. Lovell*, [1901] 2 K. B. 16. As to exacting a fine for licence to assign where a lease contains a covenant of this nature, see sect. 144, *ante*.

Sub-sects. 9 & 10.

(*i*) Sub-sections 9 and 10 replace C. A., 1892, s. 2, sub-ss. 2 and 3, which ran as follows:—

(2) Subsection six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, subsection six shall cease to be applicable thereto.

(3) Subsection two of this section is not to apply to any lease of—

(a) Agricultural or pastoral land:

(b) Mines or minerals:

(c) A house used or intended to be used as a public-house or beershop:

(d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures:

(e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

15 Geo. 5, c. 20, s. 146.

Having regard to the definition of bankruptcy contained in sect. 2, sub-sect. (xv.), of C. A., 1881, the liquidation of a company was held within the word "bankruptcy" in sect. 14, sub-sect. 6 of that Act (*Horsey* v. *Steiger*, [1899] 2 Q. B. 91). See now sect. 205, sub-sect. 1 (i), *post*. A condition in a lease for forfeiture on liquidation was held broken by liquidation for the purposes of reconstruction (*Horsey* v. *Steiger*, *supra*; *Fryer* v. *Ewart*, [1902] A. C. 187; see *Ex p. Gould*, *Re Walker*, 13 Q. B. D. 454). See also *Civil Service Society* v. *McGrigor's Trustee*, [1923] 2 Ch. 347.

The effect of C. A., 1892, s. 2, sub-s. 2 was to take the case of forfeiture for bankruptcy or liquidation out of sub-sect. 6 of sect. 14 of Conv. Act, 1881, and to make a notice necessary for one year from the bankruptcy or liquidation (*Horsey Estate*, *Lim.* v. *Steiger*, [1899] 2 Q. B. 79, 91; where see also as to what is sufficient notice). Where, immediately after the bankruptcy, a lessor re-entered peaceably without giving notice, his re-entry was void against the bankruptcy trustee (*Re Riggs*, [1901] 2 K. B. 16). To come within the final words of the sub-section the sale must be completed by conveyance, or there must be an absolute contract for sale (*Re Castle*, *Mitchell* v. *C.*, 94 L. T. 396; *Ferguson* v. *F.*, [1924] 1 I. R. 22. Sub-sect. 3 prevented sub-sect. 2 of C. A., 1892, s. 2, from applying to a public-house (*Fryer* v. *Ewart*, [1902] A. C. 187).

(*k*) Re-enacts (adding "save as otherwise mentioned," see sub-sect. 4, *supra*), C. A., 1881, s. 14 (8).

Sub-sect. 11.

Formerly a tenant might at an indefinite time after he was ejected have been relieved in Chancery against the mere non-payment of rent (*Bowser* v. *Colby*, 1 Hare, 125); and the grant of a new lease would have been ordered (*Taylor* v. *Knight*, 4 Vin. Abr. ch. pl. 31). By the Common Law Proc. Act, 1852, s. 210 (substantially re-enacting 4 Geo. 2, c. 28, s. 11), relief can only be given if the tenant comes within six months after execution executed. Sect. 211 makes relief in equity conditional on certain payments of rent and costs (see *Bowser* v. *Colby*, 1 Hare, 125), and by sect. 212 the tenant may stay ejectment on payment of rent and costs. It is also provided that upon equity granting relief the tenant shall hold according to the old lease without any new lease. By the C. L. P. Act, 1860, s. 1, power was given to the Common Law Courts to give relief in a summary way, as in the Court of Chancery, upon the same terms and with the same results.

Where proceedings for relief were commenced within six months of the landlord's resumption of possession, relief was granted to the tenant, notwithstanding that such resumption was peaceable (*Howard* v. *Fanshawe*, [1895] 2 Ch. 581). In the last case the original lease was held to continue under sect. 212 of the C. L. P. Act, 1852 (*ibid.*). Relief was refused after ejectment when asked by a mortgagee by subdemise in the absence of the lessee (*Hare* v. *Elmes*, [1893] 1 Q. B. 604; see *Newbolt* v. *Bingham*, 72 L. T. 852); but was granted where sufficient reason was shown for not making the lessee party (*Humphreys* v. *Morten*, [1905] 1 Ch. 739). As to the costs payable on relief being granted, see *Humphreys* v. *Morten*, *supra*.

(*l*) Replaces C. A., 1881, s. 14 (9).

Relief against notice to effect decorative repairs.

147.—(1) After notice is served on a lessee relating to the internal decorative repairs to a house or other building, he may apply to the court for relief, and if, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), the court is satisfied that the notice is

15 Geo. 5, c. 20, s. 147.

unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs.

(2) This section does not apply:—

(i) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;

(ii) to any matter necessary or proper—

(a) for putting or keeping the property in a sanitary condition, or

(b) for the maintenance or preservation of the structure;

(iii) to any statutory liability to keep a house in all respects reasonably fit for human habitation;

(iv) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.

(3) In this section "lease" includes an underlease and an agreement for a lease, and "lessee" has a corresponding meaning and includes any person liable to effect the repairs.

(4) This section applies whether the notice is served before or after the commencement of this Act, and has effect notwithstanding any stipulation to the contrary.

This section is taken from L. P. (Amendment) Act, 1924.

Liability to keep working-class houses fit for habitation was imposed by sects. 14 and 15 of the Housing, &c., Act, 1909.

Waiver of a covenant in a lease.

148.—(1) Where any actual waiver by a lessor or the persons deriving title under him of the benefit of any covenant or condition in any lease is proved to have taken place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant or condition.

(2) This section applies unless a contrary intention appears and extends to waivers effected after the twenty-third day of July, eighteen hundred and sixty.

Re-enacts L. P. Amendment Act, 1860, s. 6.

As to waiver of forfeiture, see the notes to *Duppa* v. *Mayo* (1 Wms. Saund. 443 *et seq.*, ed. 1871).

Abolition of interesse termini, and as to reversionary leases and leases for lives.

149.—(1) The doctrine of interesse termini is hereby abolished (*a*).

(2) As from the commencement of this Act all terms of years absolute shall, whether the interest is created before or after such commencement, be capable of taking effect at law or in equity, according to the estate interest

or powers of the grantor, from the date fixed for commencement of the term, without actual entry. 15 Geo. 5, c. 20, s. 149.

(3) A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void; but this subsection does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes.

(4) Nothing in subsections (1) and (2) of this section prejudicially affects the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, as respects terms or interests created before the commencement of this Act, operates to vary any statutory or other obligations imposed in respect of such terms or interests.

(5) Nothing in this Act affects the rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term, which rule is hereby confirmed.

(6) Any lease or underlease, at a rent, or in consideration of a fine, for life or lives or for any term of years determinable with life or lives, or on the marriage of the lessee, or any contract therefor, made before or after the commencement of this Act, or created by virtue of Part V. of the Law of Property Act, 1922 (*b*), shall take effect as a lease, underlease or contract therefor, for a term of ninety years determinable after the death or marriage (as the case may be) of the original lessee, or of the survivor of the original lessees, by at least one month's notice in writing given to determine the same on one of the quarter days applicable to the tenancy, either by the lessor or the persons deriving title under him, to the person entitled to the leasehold interest, or if no such person is in existence by affixing the same to the premises, or by the lessee or other persons in whom the leasehold interest is vested to the lessor or the persons deriving title under him:

Provided that—

(a) this subsection shall not apply to any term taking effect in equity under a settlement or created out of an equitable interest under a settlement for mortgage, indemnity, or other like purposes;

(b) the person in whom the leasehold interest is vested by virtue of Part V. of the Law of

15 Geo. 5, c. 20, s. 149.

Property Act, 1922, shall, for the purposes of this subsection, be deemed an original lessee;

(c) if the lease, underlease, or contract therefor is made determinable on the dropping of the lives of persons other than or besides the lessees, then the notice shall be capable of being served after the death of any person or of the survivor of any persons (whether or not including the lessees) on the cesser of whose life or lives the lease, underlease, or contract is made determinable, instead of after the death of the original lessee or of the survivor of the original lessees;

(d) if there are no quarter days specially applicable to the tenancy, notice may be given to determine the tenancy on one of the usual quarter days.

This section is from L. P. Acts, 1922 and 1924.
(*a*) As to *interesse termini*, see Woodfall, 21st ed. 248.
(*b*) See L. P. Act, 1922, ss. 133, 145, and Sched. 15, para. 8 (2).

Surrender of a lease, without prejudice to underleases with a view to the grant of a new lease.

150.—(1) A lease may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any under-lease derived thereout.

(2) A new lease may be granted and accepted, in place of any lease so surrendered, without any such surrender of an under-lease as aforesaid, and the new lease operates as if all under-leases derived out of the surrendered lease had been surrendered before the surrender of that lease was effected.

(3) The lessee under the new lease and any person deriving title under him is entitled to the same rights and remedies in respect of the rent reserved by and the covenants, agreements and conditions contained in any under-lease as if the original lease had not been surrendered but was or remained vested in him.

(4) Each under-lessee and any person deriving title under him is entitled to hold and enjoy the land comprised in his under-lease (subject to the payment of any rent reserved by and to the observance of the covenants, agreements and conditions contained in the under-lease) as if the lease out of which the under-lease was derived had not been surrendered.

(5) The lessor granting the new lease and any person deriving title under him is entitled to the same remedies, by distress or entry in and upon the land comprised in any such under-lease for rent reserved by or for breach of any covenant, agreement or condition contained in the new lease (so far only as the rents reserved by or the covenants, agree-

ments or conditions contained in the new lease do not exceed or impose greater burdens than those reserved by or contained in the original lease out of which the under-lease is derived) as he would have had— 15 Geo. 5, c. 20, s. 150.

(a) If the original lease had remained on foot; or

(b) If a new under-lease derived out of the new lease had been granted to the under-lessee or a person deriving title under him;

as the case may require.

(6) This section does not affect the powers of the court to give relief against forfeiture.

Re-enacts the effect of the Landlord and Tenant Act, 1730, s. 6, repealed by this Act.

The intention of the section was to place all the parties in the same situation as if no surrender had taken place (*Doe* v. *Marchetti*, 1 B. & Ad. 721). The new lease, notwithstanding the outstanding sub-lease, takes effect in possession (*Re Ford*, 8 Eq. 309); and becomes in effect the reversion immediately expectant on the sub-lease (*Ecc. Commrs.* v. *Treemer*, [1893] 1 Ch. 174; *Cousins* v. *Phillips*, 3 H. & C. 892).

See also *Plummer* v. *David*, [1920] 1 K. B. 326.

Provision as to attornments by tenants.

151.—(1) Where land is subject to a lease—

(a) the conveyance of a reversion in the land expectant on the determination of the lease; or

(b) the creation or conveyance of a rentcharge to issue or issuing out of the land;

shall be valid without any attornment of the lessee:

Nothing in this subsection—

(i) affects the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to him by the person entitled thereunder; or

(ii) renders the lessee liable for any breach of covenant to pay rent, on account of his failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee.

(2) An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor, if made without the consent of the lessor, shall be void.

This subsection does not apply to an attornment—

(a) made pursuant to a judgment of a court of competent jurisdiction; or

(b) to a mortgagee, by a lessee holding under a lease from the mortgagor where the right of redemption is barred; or

(c) to any other person rightfully deriving title under the lessor.

15 Geo. 5, c. 20, s. 151.

Sub-sect. 1 re-enacts the effect of 4 & 5 Anne, c. 3, ss. 9, 10, and sub-sect. 2 that of 11 Geo. 2, c. 19, s. 11, repealed by this Act. As to attornment see Woodfall, 21st ed. 328.

Leases invalidated by reason of non-compliance with terms of powers under which they are granted.

152.—(1) Where in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease (in this section referred to as an invalid lease) is granted, which by reason of any failure to comply with the terms of the power is invalid, then—

(a) as against the person entitled after the determination of the interest of the grantor to the reversion; or

(b) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease;

the lease, if it was made in good faith, and the lessee has entered thereunder, shall take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power:

Provided that a lessee under an invalid lease shall not, by virtue of any such implied contract, be entitled to obtain a variation of the lease if the other persons who would have been bound by the contract are willing and able to confirm the lease without variation.

(2) Where a lease granted in the intended exercise of such a power is invalid by reason of the grantor not having power to grant the lease at the date thereof, but the grantor's interest in the land comprised therein continues after the time when he might, in the exercise of the power, have properly granted a lease in the like terms, the lease shall take effect as a valid lease in like manner as if it had been granted at that time.

(3) Where during the continuance of the possession taken under an invalid lease the person for the time being entitled, subject to such possession, to the land comprised therein or to the rents and profits thereof, is able to confirm the lease without variation, the lessee, or other person who would have been bound by the lease had it been valid, shall, at the request of the person so able to confirm the lease, be bound to accept a confirmation thereof, and thereupon the lease shall have effect and be deemed to have had effect as a valid lease from the grant thereof.

Confirmation under this subsection may be by a memorandum in writing signed by or on behalf of the persons respectively confirming and accepting the confirmation of the lease.

15 Geo. 5, c. 20, s. 152.

(4) Where a receipt or a memorandum in writing confirming an invalid lease is, upon or before the acceptance of rent thereunder, signed by or on behalf of the person accepting the rent, that acceptance shall, as against that person, be deemed to be a confirmation of the lease.

(5) The foregoing provisions of this section do not affect prejudicially—

(a) any right of action or other right or remedy to which, but for those provisions or any enactment replaced by those provisions, the lessee named in an invalid lease would or might have been entitled under any covenant on the part of the grantor for title or quiet enjoyment contained therein or implied thereby; or

(b) any right of re-entry or other right or remedy to which, but for those provisions or any enactment replaced thereby, the grantor or other person for the time being entitled to the reversion expectant on the termination of the lease, would or might have been entitled by reason of any breach of the covenants, conditions or provisions contained in the lease and binding on the lessee.

(6) Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the interest of the grantor or otherwise, cannot have effect and continuance according to the terms thereof independently of the power, the lease shall for the purposes of this section be deemed to have been granted in the intended exercise of the power although the power is not referred to in the lease.

(7) This section does not apply to a lease of land held on charitable, ecclesiastical or public trusts.

(8) This section takes effect without prejudice to the provision in this Act for the grant of leases in the name and on behalf of the estate owner of the land affected.

This section re-enacts the Leases Act, 1849, ss. 2, 4, 6, 5, and 7, and the Leases Act, 1850, ss. 3, 2. Both Acts are repealed by this Act. See also *Walsh* v. *Lonsdale*, 21 Ch. D. 9, and other cases quoted p. 649, *ante*.

Enlargement of residue of long terms into fee simple estates.

153.—(1) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof,—

(a) without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term; and

15 Geo. 5, c. 20, s. 153.

(b) without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released or has become barred by lapse of time, or has in any other way ceased to be payable;

the term may be enlarged into a fee simple in the manner, and subject to the restrictions in this section provided.

(2) This section applies to and includes every such term as aforesaid whenever created, whether or not having the freehold as the immediate reversion thereon; but does not apply to—

(i) Any term liable to be determined by re-entry for condition broken; or

(ii) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into fee simple.

(3) This section extends to mortgage terms, where the right of redemption is barred.

(4) A rent not exceeding the yearly sum of one pound which has not been collected or paid for a continuous period of twenty years or upwards shall, for the purposes of this section, be deemed to have ceased to be payable:

Provided that, of the said period, at least five years must have elapsed after the commencement of this Act.

(5) Where a rent incident to a reversion expectant on a term to which this section applies is deemed to have ceased to be payable for the purposes aforesaid, no claim for such rent or for any arrears thereof shall be capable of being enforced.

(6) Each of the following persons, namely—

(i) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term, and, in the case of a married woman without the concurrence of her husband, whether or not she is entitled for her separate use or as her separate property, or is subject to a restraint on anticipation;

(ii) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, so far as regards the land to which he is entitled,

15 Geo. 5, c. 20, s. 153.

or in which he is interested in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(7) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(8) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(9) But where—

(a) any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land, or, in the case of settlements coming into operation before the commencement of this Act, so as to go along with that other land as far as the law permits; and

(b) at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, free from charges or powers of charging created by a settlement;

the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed by means of a subsidiary vesting instrument and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(10) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right or in fact, or have not been severed or reserved by an inclosure Act or award.

This section re-enacts, with some alterations and additions, C. A., 1881, s. 65, and C. A., 1882, s. 11. Sect. 65, sub-sect. 2 required the concurrence of the husband of a married woman, unless entitled for her separate use. (See now sub-sect. 6 (i) of the present section.) In sub-sect. 9 the words "so as to go along with that other land as far as the law permits" are the words used in C. A., 1881, s. 65 (5), and in that sub-section the words used with regard to the fee simple

15 Geo. 5, c. 20, s. 153.

acquired were "conveyed and settled." As to subsidiary vesting instruments, see S. L. A., 1925, s. 10, *post*. Sub-sects. 3 to 5 of the present section are new.

A rent of three shillings has been held to be a rent "having money value" (*Re Smith and Stott*, 29 Ch. D. 1009, n.), and a rent of one shilling (*Blaiberg* v. *Keeves*, [1906] 2 Ch. 175); but not a rent of one silver penny (*Re Chapman and Hobbs*, 29 Ch. D. 1007). As to the barring of the right to recover rents not exceeding one pound, see now sub-sects. 4 and 5 (*supra*).

As regards the modes in which rents incident to a reversion may cease to be payable, it was settled that the right to recover proper arrears of such a rent is not barred by non-payment for however long a time, so long as the relation of landlord and tenant under a lease in writing subsists (*ante*, p. 148). But a release might be presumed from non-payment for 50 years of a rent of one shilling reserved by an old lease for a long term (*Blaiberg* v. *Keeves*, [1906] 2 Ch. 182). So from non-payment for 35 years of a rent secured by covenant in such a lease (*Tennent* v. *Neil*, I. R. 5 Ch. 418; see *Lefroy* v. *Walsh*, 1 Ir. C. L. R. 311). Compare the release of a restrictive covenant presumed from long continued breach (*Hepworth* v. *Pickles*, [1900] 1 Ch. 108; *Gibson* v. *Doeg*, 2 H. & N. 615; *Gibbon* v. *Payne*, 23 Times L. R. 250).

A similar question has been dealt with in the case of quitrents payable to the lord of a manor. Such a rent was barred by non-payment for the statutory period under the R. P. Lim. Act, 1874 (*Howitt* v. *Harrington*, [1893] 2 Ch. 497); and might have been barred by non-payment for 50 years under the earlier Stat. Lim. (*Eldridge* v. *Knott*, Cowper, 216; see *ante*, p. 141). In the last-mentioned case a release was not presumed from non-payment for 37 years. Where, however, a quitrent had for 120 years been paid by a person not apparently liable, a lost grant was presumed (*Bomford* v. *Neville*, [1904] 1 I. R. 474; compare *Adnam* v. *Sandwich*, 2 Q. B. D. 485; *Foley* v. *Dudley*, [1910] 1 K. B. 317).

Application of Part V. to existing leases.

154. This Part of this Act, except where otherwise expressly provided, applies to leases created before or after the commencement of this Act, and "lease" includes an under-lease or other tenancy.

Part VI. (*a*).

Powers.

Release of powers simply collateral.

155. A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

This section re-enacts C. A., 1881, s. 52. Before that Act powers simply collateral could not be released, but powers appendant or in gross might be (see *ante*, p. 354; and see on the effect of the section, Farwell on Powers, pp. 495-7 *et seq.*, 3rd ed.; *Re Radcliffe*, *R.* v. *Bewes*, [1892] 1 Ch. 231). Any power may now be released by deed under the above section, and may be disclaimed under sect. 156, *post*, p. 751. As to the release of a power by conduct, see *Foakes* v. *Jackson*, [1900] 1 Ch. 807; *Nottidge* v. *Dering*, [1910] 1 Ch. 305. The power to release, however, does not apply to powers given by the S. L. Act, 1925 (see sect. 104, sub-sect. 2 of that Act, *post*). Nor does it

apply to a power coupled with a duty (*Re Eyre, E.* v. *E.*, 49 L. T. 259; see *Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831; *Re Somes, Smith* v. *Somes*, [1896] 1 Ch. 250, 255).

A married woman may, under this section, by deed unacknowledged release her power over any property real or personal, and whether in possession or reversion; and, where the power is coupled with an interest, whether in respect of such interest she is restrained from anticipation or not (*Re Chisholm, Hemphill* v. *H.*, [1901] 2 Ch. 82; *Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361).

As to the release of a power of appointing among children or issue, see *Cunynghame* v. *Thurlow* (1 R. & M. 436, n.); *Smith* v. *Houblon* (26 Beav. 482); *Horner* v. *Swan* (T. & R. 430); *Re Little, Harrison* v. *H.* (40 Ch. D. 418). In a case since the Conv. Act, 1881, where a father released a power of appointment, in default of the exercise of which his children took equally, he was held absolutely entitled to the share of a deceased child (*Shirley* v. *Fisher*, 47 L. T. 109). In a similar case the release was held valid by the C. A., and the father was held entitled, on surrendering his life interest, to have the child's share transferred to him (*Re Radcliffe, R.* v. *Bewes*, [1892] 1 Ch. 227; and see *Re Somes, Smith* v. *Somes*, [1896] 1 Ch. 250). But a limited power cannot be released by the donee's trustee in bankruptcy (*Re Rose*, [1904] 2 Ch. 348; [1905] 1 Ch. 94).

Disclaimer of power.

156.—(1) A person to whom any power, whether coupled with an interest or not, is given may by deed disclaim the power, and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2) On such disclaimer, the power may be exercised by the other person or persons or the survivor or survivors of the other persons, to whom the power is given, unless the contrary is expressed in the instrument creating the power.

Re-enacts C. A. 1882, s. 6. See the notes to the Fines and Recoveries Act, 1833, sects. 77, 78, *ante*, pp. 350, 353. A renunciation of executorship was held to be a disclaimer of a power of sale (*Re Fisher and Haslett*, 13 L. R. Ir. 546). The power given by the Settled Land Acts cannot be disclaimed (S. L. Act, 1925, s. 104 (2), *post*).

Protection of purchasers claiming under certain void appointments.

157.—(1) An instrument purporting to exercise a power of appointment over property, which, in default of and subject to any appointment, is held in trust for a class or number of persons of whom the appointee is one, shall not (save as hereinafter provided) be void on the ground of fraud on the power as against a purchaser in good faith:

Provided that, if the interest appointed exceeds, in amount or value, the interest in such property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in his favour and to any hotchpot provision, the protection afforded by this section to a purchaser shall not extend to such excess.

(2) In this section "a purchaser in good faith" means a person dealing with an appointee of the age of not less than

15 Geo. 5, c. 20, s. 157.

twenty-five years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.

(3) Persons deriving title under any purchaser entitled to the benefit of this section shall be entitled to the like benefit.

(4) This section applies only to dealings effected after the commencement of this Act.

This section is from L. P. Act, 1922. In *Cloutte* v. *Storey* ([1911] 1 Ch. 18), it had been held that a fraudulent appointment under an equitable power not passing the legal estate or interest, as distinguished from one under a common law power or a power operating under the Statute of Uses, was void, and that a purchaser for value without notice could only rely on the equitable defences open to purchasers without the legal title who are subsequent in time against prior equitable titles. See *Farwell* (3rd ed.), pp. 457 *et seq.*, and as to frauds on powers note to sect. 37 of the Fines and Recoveries Act, 1833, p. 328, *ante*.

(*a*) This part of the Act applies to powers created or arising either before or after the commencement of the Act (sect. 160, *post*). See as to powers operating at law and in equity, sect. 1, sub-sect. 7, *ante*; and see sect. 205, sub-sect. 2, *post*.

Validation of appointments where objects are excluded or take illusory shares.

158.—(1) No appointment made in exercise of any power to appoint any property among two or more objects shall be invalid on the ground that—

(a) an unsubstantial, illusory, or nominal share only is appointed to or left unappointed to devolve upon any one or more of the objects of the power; or

(b) any object of the power is thereby altogether excluded;

but every such appointment shall be valid notwithstanding that any one or more of the objects is not thereby, or in default of appointment, to take any share in the property.

(2) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.

(3) This section applies to appointments made before or after the commencement of this Act.

Re-enacts the effect of the Illusory Appointments Act, 1830, and the Powers of Appointment Act, 1874, repealed by this Act. See as to illusory appointments, Sugden on Powers, 8th ed, p. 449; Farwell, 3rd ed. 424 *et seq.*; *Gainsford* v. *Dunn*, 17 Eq. 405. See also *Bulteel* v. *Plummer*, 6 Ch. 160; *Re Capon's Trusts*, 10 Ch. D. 484; *Re Galsworthy*, [1922] 2 Ch. 558. See on sub-sect. 1, *Re Deakin*, [1894] 3 Ch. 565; and as to provisions in instruments fixing the amount (sub-sect. 2), *Ward* v. *Tyrrell*, 25 Beav. 563.

Execution of powers not testamentary.

159.—(1) A deed executed in the presence of and attested by two or more witnesses (in the manner in which deeds are ordinarily executed and attested) is so far as

respects the execution and attestation thereof, a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is expressly required that a deed or instrument in writing, made in exercise of the power, is to be executed or attested with some additional or other form of execution or attestation or solemnity. 15 Geo. 5, c. 20, s. 159.

(2) This section does not operate to defeat any direction in the instrument creating the power that—

(a) the consent of any particular person is to be necessary to a valid execution;

(b) in order to give validity to any appointment, any act is to be performed having no relation to the mode of executing and attesting the instrument.

(3) This section does not prevent the donee of a power from executing it in accordance with the power by writing, or otherwise than by an instrument executed and attested as a deed; and where a power is so executed this section does not apply.

(4) This section applies to appointments by deed made after the thirteenth day of August, eighteen hundred and fifty-nine.

This section re-enacts L. P. Amendment Act, 1859, s. 12.

At common law signing was not essential to the validity of a deed, though sealing was. (See now sect. 73, *ante*.) And, accordingly, the common form of attestation to a deed used to be "sealed and delivered by the party in the presence of us." It was decided, however, in *Wright* v. *Wakeford* (17 Ves. 454; 4 Taunt. 213), where a power was required to be executed with a consent testified by writing under hand and seal attested by two or more credible witnesses, and the attestation clause did not express that the witnesses attested the signing as well as the sealing and delivery of the deed; that the power was not well executed. Preston's Act (54 Geo. 3, c. 168) was passed to cure the defect thus arising as to all instruments intended to exercise powers and executed before July 30, 1814. The above section was passed to provide a further remedy. See further, Sugden, Powers, 234 *et seq.*, 8th ed.; Farwell, 3rd ed. 155. *Wright* v. *Wakeford.* Preston's Act.

By Wills Act, 1837, s. 10 (*ante*, p. 504, where see note), an appointment by will is to be executed like other wills, and to be valid although other required solemnities are not observed. Appointments by will.

160. This Part of this Act applies to powers created or arising either before or after the commencement of this Act. Application of Part VI. to existing powers.

Part VII.

Perpetuities and Accumulations.

Perpetuities (a).

161.—(1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person Abolition of the double possibility rule.

15 Geo. 5, c. 20, s. 161.

is hereby abolished, but without prejudice to any other rule relating to perpetuities.

(2) This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

For the rule in question see *Whitby* v. *Mitchell*, 44 Ch. D. 85; *Re Clarke's Settlement*, *Wanklyn* v. *Streatfield*, [1916] 1 Ch. 467.

(*a*) Sects. 161-163 were first enacted by L. P. Act, 1922.

Restrictions on the perpetuity rule.

162.—(1) For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied—

(a) To any power to distrain on or to take possession of land or the income thereof given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or

(b) To any rentcharge created only as an indemnity against another rentcharge, although the indemnity rentcharge may only arise or become payable on breach of a condition or stipulation; or

(c) To any power, whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge; or

(d) To any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of—

(i) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals;

(ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;

(iii) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon;

(iv) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

(2) This section applies to instruments coming into operation before or after the commencement of this Act.

Validation of certain gifts void for for remoteness.

163.—(1) Where in a will, settlement or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of

beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift, is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument. 15 Geo. 5, c. 20, s. 163.

(2) This section applies to any instrument executed after the commencement of this Act and to any testamentary appointment (whether made in exercise of a general or special power), devise, or bequest contained in the will of a person dying after such commencement, whether the will is made before or after such commencement.

(3) This section applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained.

"Will" includes codicil (sect. 205, sub-sect. 1 (xxxi), *post*). For a gift of the kind referred to in sub-sect. 1, and before this Act void, see, *e.g.*, *Re Hume, Pub. Trustee* v. *Mabey*, [1912] 1 Ch. 693.

Accumulations.

General restrictions on accumulation of income.

164.—(1) No person may by any instrument (*a*) or otherwise settle or dispose of any property (*b*) in such manner that the income (*c*) thereof shall, save as hereinafter mentioned, be wholly or partially accumulated (*d*) for any longer period than one of the following, namely:—

(a) the life of the grantor or settlor (*e*); or (*f*)

(b) a term of twenty-one years from the death of the grantor, settlor or testator (*g*); or

(c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere (*h*) at the death of the grantor, settlor or testator; or

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

15 Geo. 5, c. 20, s. 164.

In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void (*i*); and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed (*k*).

(2) This section does not extend to any provision—

(i) for payment of the debts of any grantor, settlor, testator or other person (*l*);

(ii) for raising portions for—

(a) any child, children or remoter issue of any grantor, settlor or testator (*m*); or

(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited (*n*);

(iii) respecting the accumulation of the produce of timber or wood;

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

(3) The restrictions imposed by this section apply to instruments made on or after the twenty-eighth day of July, eighteen hundred, but in the case of wills only where the testator was living and of testamentary capacity after the end of one year from that date (*o*).

This section re-enacts, with alterations noted *infra*, the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), repealed by this Act. See further on that Act, Jarman (6th ed.), pp. 377 *et seq.*

As to directions for accumulation void apart from the Act, see *Wharton* v. *Masterman*, [1895] A. C. 186; *Curtis* v. *Lukin*, 5 Beav. 147. Accumulations during minority under statutory powers are not taken into account in determining the periods fixed by this section (sect. 165, *post*).

As to the right to stop accumulation, see *Re Deloitte*, [1926] 1 Ch. 56.

(*a*) See sect. 205, sub-sect. 1 (viii), *post*. The Act of 1800 referred to "any deed or deeds" (see *Re Rosslyn's Trust*, 16 Sim. 391), "surrender or surrenders, will, codicil."

(*b*) Real or personal: sect. 205, sub-sect. 1 (xx), *post*.

(*c*) See sect. 205, sub-sect. 1 (xix), *post*. The words in the Act of 1800 were "rents, issues, profits or produce," which were held to mean *qua* rents, profits, &c. (*Bassil* v. *Lister*, 9 Hare, 177, 181, where it was held that a direction to pay premiums on a policy was not within the Act). The same was held in *Re Gardiner*, [1901] 1 Ch. 697, and *Re Vaughan* (1883), W. N. 89. All improvements in substance of the nature of maintaining buildings are outside the Act; *secus* as to money laid out in building (*Vine* v. *Raleigh*, [1891] 2 Ch. 13; see also S. C., [1896] 1 Ch. 37, and *cf.* p. 322, *ante*). See also *Re Mason, M.* v. *M.*, [1891] 3 Ch. 467, where the effect of the

Act on a trust for repairs was discussed; *Re Hurlbatt, H.* v. *H.*, [1910] 2 Ch. 553. The Act did not prevent savings out of income: *Lindsay's Trustees Case*, [1911] S. C. 584.

(*d*) The Act extends to implied as well as express directions for accumulation: see *Tench* v. *Cheese*, 6 De G. M. & G. 453; *Macpherson* v. *Stewart*, 28 L. J. Ch. 177; *Morgan* v. *M.*, 4 De G. & Sm. 164; *Shaw* v. *Rhodes*, 1 Myl. & Cr. 135; S. C. *sub nom. Evans* v. *Hellier*, 5 Cl. & F. 114; *McDonald* v. *Bryce*, 2 Keen, 276; *Re Cox*, [1900] W. N. 89; *contra Elborne* v. *Goode*, 14 Sim. 165; *Bridgnorth Corporation* v. *Collins*, 15 Sim. 538. Where a decree directed the accumulation of the intermediate income of an executory bequest of personalty, the House of Lords varied the decree by a provision that the accumulation should be restricted to the term of twenty-one years from the testator's death allowed by this Act (*Bective* v. *Hodgson*, 10 H. L. C. 656, 664. See *per* Cozens-Hardy, J., in *Re Taylor, Smart* v. *T.*, [1901] 2 Ch. 134, 136).

(*e*) See *Heywood* v. *H.*, 29 Beav. 9.

(*f*) Only one of the four permitted periods can be taken: *Wilson* v. *W.*, 1 Sim. (N.S.) 288; and see *Re Rosslyn's Trust*, 16 Sim. 391; *Re Errington*, 76 L. T. 616.

(*g*) The period of twenty-one years is to be computed exclusively of the day of the testator's death: see *Gorst* v. *Lowndes*, 11 Sim. 434.

The commencement of the legal period for accumulation cannot be deferred, but must begin from the testator's death (*Shaw* v. *Rhodes*, 1 Myl. & Cr. 135, 154; *Webb* v. *W.*, 2 Beav. 493; *A.-G.* v. *Poulden*, 3 Hare, 555; *Nettleton* v. *Stephenson*, 3 De G. & Sm. 366).

(*h*) Accumulation can validly be directed during the minority of a person not born until after the testator's death (*Re Cattell, C.* v. *C.*, [1914] 1 Ch. 177). See also sect. 165, *post*.

(*i*) Dispositions directing an accumulation for a longer period than the Act allows are void only for the excess (*Griffiths* v. *Vere*, 9 Ves. 127; *Palmer* v. *Holford*, 4 Russ. 413; *Oddie* v. *Brown*, 4 De G. & J. 179).

(*k*) The Act does not accelerate the enjoyment of gifts in a will, nor alter the meaning of terms used in it (*Eyre* v. *Marsden*, 2 Keen, 564; *Green* v. *Gascoyne*, 3 De G. J. & S. 565; *Barrington* v. *Liddell*, 2 De G. M. & G. 480; *Jones* v. *Maggs*, 9 Hare, 605). A direction that after the expiration of a permitted period of accumulation the surplus income is to be added to capital is an accumulation prohibited by the Act. Where the surplus income in question is not income of residue, but of a fund or legacy given out of residue, the income on the expiration of the statutory period belongs as income to the persons entitled to the income of the residue (*Re Hawkins, White* v. *W.*, [1916] 2 Ch. 570, not following *Crawley* v. *C.*, 7 Sim. 427, and *Re Pope, Sharp* v. *Marshall*, [1901] 1 Ch. 64. See also *Re Garside, Wragg* v. *G.*, [1919] 1 Ch. 132). As to intestacy, see *Weatherall* v. *Thornburgh*, 8 Ch. D. 261; *Re Travis*, [1900] 2 Ch. 541; *Smith* v. *Glasgow*, [1909] S. C. 1231.

(*l*) *See Bateman* v. *Hotchkin* (1847), 10 Beav. 426; *Southampton* v. *Hertford*, 2 V. & B. 54, as to a trust for accumulation for payment of a testator's debts being valid, though exceeding the limits allowed by the rule against perpetuities (a life or lives in being and twenty-one years afterwards). See, however, also *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187.

As to the effect of the clause, see *Barrington* v. *Liddell*, 2 De G. M. & G. 480, 497-8; *Varlo* v. *Faden*, 1 De G. F. & J. 211; *Tewart* v. *Lawson*, L. R. 18 Eq. 490. A provision for accumulation to recoup capital applied in payment of debts is bad (*Re Heathcote*, [1904] 1 Ch. 826; see also *Mathews* v. *Keble*, 3 Ch. 691). The provision for

15 Geo. 5, c. 20, s. 164.

the payment of debts is not confined by the Act to those existing at the date of the will, or at the death of the testator, but may extend also to future debts and contingent liabilities (*Varlo* v. *Faden, sup.*; *Re Hurlbatt*, [1910] 2 Ch. 553, where a direction to invest a certain portion annually of the rents of leaseholds as a fund to protect trustees against uncertain claims for dilapidations was held valid).

A contingent liability under a covenant entered into but not broken by a testator is a debt within this clause (*Varlo* v. *Faden, sup.*).

(*m*) The words of the 1800 Act were "child or children." They were held not confined to children existing at the date of settlement, but extending to children that may come afterwards into existence (*Beech* v. *St. Vincent*, 3 De G. & S. 678; followed in *Re Stephens*, [1904] 1 Ch. 322).

The words as to portions include portions already created by another instrument as well as portions created by the instrument which contains the trust for accumulation (*Bourne* v. *Buckton*, 2 Sim. (N.S.) 91, 96; and see *Beech* v. *St. Vincent, sup.*). In *Halford* v. *Stains*, 16 Sim. 488, Shadwell, V.-C., appears to have thought that only portions charged on property by some prior instrument were intended. As to what are "portions," see *Barrington* v. *Liddell, sup.*; *Middleton* v. *Losh*, 1 Sm. & G. 61; *Colquhoun's Trustees* v. *C.*, [1907] S. C. 346; and *Re Elliott, Public Trustee* v. *Pinder*, [1918] 2 Ch. 150, where *Middleton* v. *Losh* was not followed, and it was held that a trust for accumulation, after a life interest to the testator's widow, for the benefit of his child and grandchild, was not "a provision for raising a portion."

See also *Re Clulow's Trust*, 1 J. & H. 639; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Re Walker*, 54 L. T. 792; *Jones* v. *Maggs*, 9 Hare, 605; *Willes* v. *Davies*, 1 Sm. & G. 475.

(*n*) In the Accumulations Act, 1800, the words used were "any person taking interest under such conveyance, settlement or devise." The concluding words (from "directing") of clause (ii) (b) are new. As to the interests held sufficient under the Act of 1800, see *Morgan* v. *M.*, 4 De G. & Sm. 171; *Barrington* v. *Liddell*, 2 De G. M. & G. 480; *Burt* v. *Sturt*, 10 Hare, 420; *Edwards* v. *Tuck*, 3 De G. M. & G. 40; *Shaw* v. *Rhodes*, 1 Myl. & Cr. 135, 159; on appeal, *sub nom. Evans* v. *Hellier*, 5 Cl. & F. 114.

(*o*) This sub-section re-enacts the effect of the Accumulations Act, 1800, s. 4. "Will" includes codicil (sect. 205, sub-sect. 1 (xxxi), *post*).

The Act of 1800, since it did not apply to Ireland, did not apply to Irish real estates (though it did to income from the accumulation of their rents) (*Ellis* v. *Maxwell*, 12 Beav. 104), or Irish settlements by domiciled Irishmen (*Heywood* v. *H.*, 29 Beav. 9). But as regards English leaseholds, the Act was held to apply to the will of a domiciled Irishman (*Freke* v. *Carbery*, 16 Eq. 461). The Act was extended to heritable property in Scotland by 11 & 12 Vict. c. 36, s. 41. The present Act extends to England and Wales only (sect. 209, sub-sect. 3, *post*).

Qualification of restrictions on accumulation.

165. Where accumulations of surplus income are made during a minority under any statutory power or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations were made before or after the commencement of this Act) to be taken into account in determining the periods for which accumulations are permitted to be made by the last

preceding section, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority. 15 Geo. 5, c. 20, s. 165.

From L. P. Act, 1922. See as to accumulations during minority Trustee Act, 1925, s. 31 (2), *post*.

Restriction on accumulation for the purchase of land.

166.—(1) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

(2) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purposes of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land.

(3) This section applies to settlements and dispositions made after the twenty-seventh day of June eighteen hundred and ninety-two.

Sub-sect. 1 of this section re-enacts the Accumulations Act, 1892 (repealed by this Act), which was passed on the date named in sub-sect. 3 and extended to wills made before that date and coming into operation after it (*Re Llanover, Herbert* v. *Freshfield*, [1903] 2 Ch. 330). For definition of "land," see sect. 205, sub-sect. 1 (ix), *post*; and for that applicable to the Act of 1892, *Re Clutterbuck, Fellowes* v. *F.*, [1901] 2 Ch. 285. Sub-sect. 2 confirms the decision in *Re Danson, Bell* v. *D.*, [1895] W. N. 102.

Part VIII.

Married Women and Lunatics.

Married Women.

Abolition of acknowledgments by married women.

3 & 4 Will. 4, c. 74.

20 & 21 Vict. c. 5.

167.—(1) Every disposition (including a disclaimer) of real or personal property or any interest therein which a married woman is under the Fines and Recoveries Act, 1833, or the Married Women's Reversionary Interests Act, 1857, or any other enactment authorised to make by deed acknowledged in the manner prescribed by any such Act as amended by any subsequent enactment, shall, from the date of execution of the deed of disposition, be effectual if

15 Geo. 5, c. 20, s. 167.

made by her with the concurrence of her husband, but without acknowledgment.

(2) The separate examination of a married woman shall not be necessary as a preliminary to any order of the court directing payment or transfer of any money or property to her or in accordance with her directions.

(3) Where the court, under any statutory power, dispenses in any case with the concurrence of the husband, and the court is satisfied that the wife is entitled for her separate use to the property to be dealt with, the court may by the order declare that the disposition shall have the same effect as if the husband had concurred therein and had disposed of his rights and interests, and the disposition by the wife alone shall take effect accordingly without acknowledgment.

(4) This section applies only to deeds executed and orders made after the commencement of this Act, and does not render necessary the concurrence of a husband in any deed where such concurrence would not have been requisite if this section had not been passed.

This section was first enacted by L. P. Act, 1922. See the Fines and Recoveries Act, 1833, ss. 77 and 91, *ante*, pp. 347, 359, and the Married Women's Reversionary Interests Act, 1857, s. 1, *ante*, p. 362. As to disclaimer, see sect. 168, *post*.

Disclaimer by married woman.

168.—(1) A married woman has power by deed to disclaim any estate or interest in land with or without the concurrence of her husband as the case may require.

(2) A husband is not a necessary party to any disclaimer by his wife where—

(a) the wife, if there were no disclaimer, would have been entitled to the property for her separate use or as her separate property; or

(b) the property consists of a trust estate.

Replaces R. P. Act, 1845, s. 7, which enabled a married woman to disclaim an estate or interest in realty by deed acknowledged (see now sect. 167, *ante*). For definition of "land," see sect. 205, subsect. 1 (ix), *post*, and as to disclaimer generally, pp. 350, 351, *ante*.

Power for Court to bind interest of married woman.

169. Where a married woman is restrained from anticipation or from alienation in respect of any property or any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in such property.

Re-enacts C. A. 1911, s. 7, which repealed and replaced C. A. 1881, s. 39. That section was as follows:—

"39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. 15 Geo. 5, c. 20, s. 169.

"(2.) This section applies only to judgments or orders made after the commencement of this Act."

The following cases were decided under it:

This section did not give the Court power to remove restraint generally, but only to make binding any particular disposition made by a married woman if the Court thinks it is for her benefit (*Re Warren*, 49 L. T. 696; 52 L. J. Ch. 928). What binds the property is the order of the Court, not the disposition of the married woman (*Paget* v. *P.*, [1898] 1 Ch. 476). As to the inference to be drawn from a mortgage of a wife's estate, see *Hall* v. *H.*, [1911] 1 Ch. 487. A strong case must be made before the jurisdiction will be exercised (*Re Little, Harrison* v. *H.*, 40 Ch. D. 424). As to considering the benefit of the husband and children, see *Re Wood, W.* v. *Kimber*, 29 S. J. 183. The Court requires to be satisfied that the application is in accordance with the married woman's free will (*Re Currey, Gibson* v. *Way*, 56 L. T. 80; *Musgrave* v. *Sandeman*, 48 L. T. 215); but will not always require a separate examination (*Harris* v. *Harford* (1888), W. N. 190; see *Hodges* v. *H.*, 20 Ch. D. 755). Where money is raised under this section to pay the debts of the husband, and the wife is under the circumstances entitled to an indemnity from him, the order may conveniently express this, but it is not essential (*Paget* v. *P.*, [1898] 1 Ch. 470). Where on a decree *nisi* being made the wife agreed to the annulment of the marriage settlement (whereby she was restrained from anticipation), and the decree was subsequently made absolute, the agreement was held invalid and this section did not apply (*Thomson* v. *T.*, [1896] P. 263).

Orders made.

Orders have been made binding the property of married women in the following cases:—Where a married woman was harassed by creditors (*Hodges* v. *H.*, 20 Ch. D. 749; *Re Little, Re Harrison*, 36 Ch. D. 701; *Re C.'s Settlement*, 56 L. T. 299; 56 L. J. Ch. 556; see *Re Wilson-Stewart, Keown-Boyd* v. *Gilmour*, 75 L. T. 381). To pay the debts of a married woman, the balance of the capital being invested in an annuity for her life (*Latham* v. *L.* (1889), W. N. 171). To pay the debts of the husband (*Paget* v. *P.*, [1898] 1 Ch. 470; see *Re S. G.* v. *C.*, [1893] W. N. 127; *Re Wilson-Stewart*, 75 L. T. 381). To enable land of the married woman to be sold (*Re Tippet and Newbould*, 37 Ch. D. 444; *Bates* v. *Kesterton*, [1896] 1 Ch. 159). To carry into effect a sale under the Settled Estates Act, 1877 (*Re Landfield, L.* v. *L.*, 46 L. T. 227; 30 W. R. 377; see *Re Segrave*, 17 L. R. Ir. 373); or a scheme for partition and resettlement (*Re Currey, Gibson* v. *Way*, 56 L. T. 80); or an exchange for the purpose of quieting the title (*Re Currey, Gibson* v. *Way*, 32 Ch. D. 365); or a sale by a tenant for life free from a jointure of the married woman (*Re Ailesbury and Iveagh*, [1893] 2 Ch. 345). To enable a profitable investment to be continued, which otherwise would have been unauthorised (*Re Wright*, 15 L. R. Ir. 331). To enable money to be raised for emigration (*Re Flood*, 11 L. R. Ir. 355); or for stocking a farm for a son (*Re Sawyer*, [1896] 1 Ir. R. 40). With a view to a mortgage (*Ex p. Thompson* (1884), W. N. 28). To enable a married woman to carry out a compromise (*Sedgwick* v. *Thomas*, 48 L. T. 100; *Musgrave* v. *Sandeman*, *ibid.* 215; *Tamplin* v. *Miller*, 30 W. R. 422; *Harris* v. *Harford* (1888), W. N. 190). To enable income to be applied in paying premiums on policies on the husband's life and interest on mortgages (*Re Milner*, [1891] 3 Ch. 547). The

15 Geo. 5, c. 20, s. 169.

restraint was released on terms in *Re A Marriage Settlement*, 30 S. J. 702.

Order refused.

An application under this section has been refused where the order might have caused a forfeiture (*Re Jordan, Kino* v. *Picard*, 54 L. T. 127; 55 L. J. Ch. 330); also where it was asked to enable a married woman to obtain a personal benefit by releasing a power of appointment (*Re Little, Harrison* v. *H.*, 40 Ch. D. 418); or to enable funds in Court to be paid out to trustees of a settlement with a view to re-investment, so as to produce a larger income (*Re Blundell*, [1901] 2 Ch. 221); or to pay debts incurred through extravagance, or due to money-lenders (*Re Pollard*, [1896] 1 Ch. 901; 2 Ch. 552; see, however, *Paget* v. *P.*, [1898] 1 Ch. 47); or to pay the husband's debts under the circumstances (*Re S. G.* v. *C.*, [1893] W. N. 127). See also *Re Warren*, 49 L. T. 696; 52 L. J. Ch. 928; *Thomson* v. *T.*, [1896] P. 263.

Practice.

The application under the section should, in general, be made by summons, not by petition (*Re Lillwall*, 30 W. R. 243; *Latham* v. *L.* (1889), W. N. 171; and see sect. 203, sub-sect. 2, *post*); but *semble* may be made on petition (*Re Blundell*, [1901] 2 Ch. 221). Orders have been made at the trial of an action (*Sedgwick* v. *Thomas*, 48 L. T. 100); on a petition to sanction the compromise of an action (*Harris* v. *Harford* (1888), W. N. 190); on a petition under the Settled Estates Act, 1877, to confirm a sale, in which case it was held unnecessary to entitle the petition in the matter of the Conv. Act, 1881 (*Re Landfield, L.* v. *L.*, 46 L. T. 227); on a summons under the Vendor and Purchaser Act, 1874 (*Re Tippet and Newbould*, 37 Ch. D. 444). For form of orders generally, see Seton, 7th ed. 866.

Service on the trustees of the settlement has been dispensed with (*Re Little, Re Harrison*, 36 Ch. D. 701).

Other statutory powers of releasing restraint.

Notwithstanding a restraint on anticipation, the costs of proceedings commenced by a married woman may be recovered out of her property (M. W. P. Act, 1893, s. 2, *ante*, p. 395), and the Court may charge costs on a fund preserved (Solicitors Act, 1860, s. 28; *Re Keane, Lumley* v. *Desborough*, 12 Eq. 115); and may impound a married woman's interest to indemnify trustees (Trustee Act, 1925, s. 62 (1), *post*, replacing Trustee Act, 1893, s. 45).

Acquisitions and dispositions of trust estates by married women.

170.—(1) A married woman is able to acquire as well from her husband as from any other person, and hold, any interest in property real or personal either solely or jointly with any other person (whether or not including her husband) as a trustee or personal representative, in like manner as if she were a feme sole; and no interest in such property shall vest or be deemed to have vested in the husband by reason only of the acquisition by his wife.

(2) A married woman is able, without her husband, to dispose of, or to join in disposing of, any interest in real or personal property held by her solely or jointly with any other person (whether or not including her husband) as trustee or personal representative, in like manner as if she were a feme sole.

(3) This section applies to a woman married after the thirty-first day of December, eighteen hundred and eighty-two, and to a woman married before the first day of January,

eighteen hundred and eighty-three, who became a trustee or personal representative on or after that date. 15 Geo. 5, c. 20, s. 170.

(4) This section operates to render valid and confirm all such acquisitions and dispositions made after the thirty-first day of December, eighteen hundred and eighty-two, whether before or after the commencement of this Act, but where any title or right has been acquired through or with the concurrence of the husband before the first day of January, nineteen hundred and eight, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section or any enactment which it replaces.

(5) This section does not prejudicially affect any beneficial interest of the husband of any such woman.

Sub-sects. 2 and 4 re-enact M. W. P. Act, 1907, s. 1, with the addition of the bracketed words in sub-sect. 2. The remainder of the section is new. Under M. W. P. Act, 1882, s. 18, *ante*, p. 389, it had been held that a married woman who was trustee for sale of land could not convey it to a purchaser, except with the concurrence of her husband and by deed acknowledged (*Re Harkness and Allsopp*, [1896] 2 Ch. 358).

Lunatics.

Power for Court to settle the beneficial interests of a lunatic or defective.

171.—(1) The court may direct a settlement to be made of the property of a lunatic or defective, or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the court may deem expedient, and in particular may give such directions—

(a) where the lunatic or defective is the holder of a title of honour, and the property would not devolve with such title either under a testamentary disposition executed by him, or on his intestacy if he died intestate; or

(b) where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired; or

(c) where by reason of any change in the law of intestacy or of any change in circumstances since the execution by the lunatic or defective of a testamentary disposition, or of any absence of information at the time of such execution, or on account of the former management of the property or the expenditure of money in improving or maintaining the same or for any other special reason the court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective or under any testamentary disposition executed by him.

15 Geo. 5, c. 20, s. 171.

(2) The court may direct the committee or receiver of the lunatic or defective, or any trustee for him, to execute any vesting instrument, trust instrument, conveyance (including a disentailing assurance) or other instrument, and to do any other act or thing which may be required for giving effect to the settlement, in the name and on behalf of the lunatic or defective, and, for that purpose, may make a vesting order or appoint a person to convey; and any settlement approved by the court shall be as effectual and binding on all persons interested as if the same had been made by the lunatic or defective while of full capacity.

(3) This section applies whether or not the lunatic or defective has executed a testamentary disposition and notwithstanding that it is not known whether he has executed such a disposition or not, but does not apply when he is an infant.

15 Geo. 5, c. 23.

(4) Any person who under the Administration of Estates Act, 1925, has, or if that Act, or any enactment which it replaces, had not been passed would have had, a spes successionis (whether under any testamentary disposition which is known to exist or in the event of the intestacy of the lunatic or defective) or an interest in the property of the lunatic or defective or in any part thereof, as well as the committee or receiver and any other person who may be authorised by rules made under this section, shall have power to apply to the court for an order under this section.

(5) Subject to making due provision for the maintenance of the lunatic or defective in accordance with his station in life, whether out of the capital or income of the property settled or other property or partly in one way and partly in another, and to providing, by means of a power of appointment or revocation, or otherwise, for the possibility of the lunatic or defective recovering full capacity, the court may, in making any order under this section, have regard to—

(i) the manner in which the property has been settled or dealt with on former occasions;

(ii) in the case of land, the welfare of the labourers and other persons employed thereon, and the expediency of settling personal estate to devolve therewith;

(iii) the continuation or provision of any pensions, and the application of any part of the income for charitable purposes;

(iv) the provisions of any testamentary disposition of the lunatic or defective;

(v) the expediency of providing for— 15 Geo. 5, c. 20, s. 171.

(a) jointures, portions, and other annual or capital charges and powers to create the same;

(b) discretionary trusts, trusts for effecting or maintaining policies of insurance, powers of appointment, sinking funds for making good loss by fire (in lieu of, or in addition to, insurance) or for any other purpose;

(c) the extension of any statutory powers of investment, management or otherwise;

(d) the manner in which any costs are to be raised and paid, whether out of the settled property or otherwise;

(e) any other matter or thing which, having regard to the nature of the settlement, or the property to be settled, and the management, development, and enjoyment thereof, and to the persons who are to take, either successively or otherwise, the court may consider material.

(6) In this section, "testamentary disposition" means an instrument executed by the lunatic or defective while of full testamentary capacity, which, if unrevoked, might, on his death, be proved as a will or codicil; and the court may act on such evidence as to the existence or absence of a testamentary disposition as it thinks fit.

(7) At any time before the death of the lunatic or defective, the court may, as respects any property remaining subject to the trusts of a settlement made under this section, on being satisfied that any material fact was not disclosed to the court when the settlement was made, or on account of any substantial change in circumstances, by order vary the settlement in such manner as it thinks fit, and give any consequential directions.

(8) For the purposes of this section, "the court" means the Judge in Lunacy, or, in such cases as may be prescribed by rules of court, the High Court.

(9) Rules in lunacy or, as respects cases within the jurisdiction of the High Court, rules of court, may be made for giving effect to the provisions of this section, and in particular for compelling information to be furnished respecting, and production of, testamentary dispositions, and the lodgment thereof in court, for prescribing what notices, if any, of the proceedings are to be served, for dispensing with such notices and, when necessary, for making representation orders.

This section is from L. P. Act, 1922. For definition of "defective," see sect. 205, sub-sect. 1 (xiii), *post*. As to vesting instruments (sub-sect. 2), see S. L. Act, 1925, s. 4 *et seq.*, *post*; and as to *spes successionis* (sub-sect. 4), cf. notes to sect. 4, *ante*, and to sect. 1 of the Wills Act, 1837, *ante*. It is not a title to property by English

15 Geo. 5, c. 20, s. 171.

law (*Re Parsons, Stockley* v. *P.*, 45 Ch. D. 51; and see *Re Mudge*, [1914] 1 Ch. 115). For the provisions (sub-sect. 4) of the Administration of Estates Act, 1925, on deaths intestate after 1925, see sect. 46 of that Act, *ante*. It replaces as to succession on intestacy the Inheritance Act, 1833, *ante*, and the Statutes of Distribution, 1670 and 1685. As to the law before 1670, under which the administrator could keep the residue for his own use, see *Carter* v. *Crawley*, T. Raym. 496. For the law of inheritance before the Act of 1833, see notes to that Act, *ante*.

As to the practice of the Court before the present Act as to enforcing, in the administration of estates, orders and directions made and given in lunacy, see *Re Merrall, Greener* v. *M.*, [1924] 1 Ch. 45; see also *Re Gist, G.* v. *Timbrill*, [1906] 2 Ch. 280.

Part IX.

Voidable Dispositions.

Voluntary conveyances to defraud creditors voidable.

172.—(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

(2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

This section replaces sects. 1 and 5 of 13 Eliz. c. 5 (1571) (repealed by this Act), which referred to feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions "devised and contrived of malice, fraud, covin, collusion or guile" to delay, hinder, or defraud creditors and others. The statute did not extend to estates or interests "upon good consideration and *bona fide* lawfully conveyed or assured" to parties "not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion." See, on the statute, May on Fraudulent and Voluntary Dispositions of Property, 3rd ed.; Williams' Bankruptcy Practice, 6th ed., pp. 6 *et seq.* For definition of "conveyance" in the present Act, see sect. 205, sub-sect. 1 (ii), *post*. Under 13 Eliz. c. 5, it was held that the Court must look at all the circumstances of the execution of the conveyance and see whether it was in fact executed to defeat creditors (*Re Holland, Gregg* v. *H.*, [1902] 2 Ch. 360). See also *Re Goldburg, Ex p. Silverstone*, [1912] 1 K. B. 384; *Re Fasey*, [1923] 2 Ch. 1. As to transfers of businesses to companies, see *Re Hirth*, [1899] 1 Q. B. 612; *Gonville's Trustee* v. *Patent Caramel Co.*, [1912] 2 K. B. 599; *Re David and Adlard*, [1914] 2 K. B. 694; and as to debentures, *Re Lloyd's Furniture Palace*, [1925] Ch. 853. If the conveyance be voluntary, to escape the imputation of fraud sufficient assets to pay debts must be left (see *Strathmore* v. *Bowes*, 1 Ves. 27; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Freeman* v. *Pope*, 5 Ch. 538; *Re Wise, Ex p.*

Intention to defraud.

Mercer, 17 Q. B. D. 290; *Re Butterworth, Ex p. Russell*, 19 Ch. D. 588). All debts need not have been paid (*Re Johnson*, 20 Ch. D. 389). A voluntary settlement with means outside it to pay present debts was not avoided, though it afterwards defeated or delayed creditors (*Re Lane Fox*, [1900] 2 Q. B. 508). See also *Denny's Trustee* v. *D.*, [1919] 1 K. B. 583. Nor was a covenant by a husband in an ante-nuptial settlement to settle all after-acquired property except business assets void (*Re Reis*, [1904] 2 K. B. 769). A deed might be executed in favour of a creditor with the intention of defeating other creditors (*Glegg* v. *Bromley*, [1912] 3 K. B. 474). See also *Maskelyne* v. *Smith*, [1903] 1 K. B. 671. A deed was not void against a purchaser of any interest, legal or equitable, under it (*Halifax, &c. Co.* v. *Gledhill*, [1891] 1 Ch. 31).

Property within section.

"Property" in the present Act includes any thing in action, and any interest in real or personal property (sect. 205, sub-sect. 1 (xx), *post*). Money and bank notes were held to be within 13 Eliz. c. 5 (*Barrack* v. *M'Culloch*, 3 K. & J. 110); as were a life policy (*Stokoe* v. *Cowan*, 29 Beav. 637); equitable reversionary interests in personalty (*Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157); things in action (*Edmunds* v. *E.*, [1904] P. 362).

Under 13 Eliz. c. 5, fraudulent conveyances might be set aside by creditors after the death of the debtor (*Lush* v. *Wilkinson*, 5 Ves. 384; *Re Maddever, Three Towns Co.* v. *M.*, 27 Ch. D. 532, where ten years had elapsed). The action should be brought by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased (*French* v. *F.*, 6 D. M. & G. 95; *Richardson* v. *Smallwood*, Jac. 552). And it seems that the plaintiff need not have obtained judgment for his debt (*Reese River Co.* v. *Atwell*, 7 Eq. 347). See the forms of order, Seton, 7th ed. 2280.

Voluntary disposition of land how far voidable as against purchasers.

173.—(1) Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

(2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after the twenty-eighth day of June, eighteen hundred and ninety-three.

Sub-sect. 1 replaces sect. 1 of the statute 27 Eliz. c. 4 (1584), wholly repealed by this Act, and sub-sect. 2, sect. 2 of the Voluntary Conveyances Act, 1893, also repealed.

For definition of "disposition" in this Act, see sect. 205, sub-sect. 1 (ii); for that of "land," *ibid.*, (ix); and for that of "purchaser," *ibid.*, (xxi), *post*.

Sub-sect. 1.

Under the statute of 1584 (on which see May on Fraudulent and Voluntary Dispositions of Property, 3rd ed.), it was held that a lessee without fine or rent was not a purchaser (*Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486); nor a judgment creditor (*Beavan* v. *Oxford*, 6 De G. M. & G. 507).

Unless the consideration were so small as to evidence fraud, the Court would not inquire into its adequacy, though it might be an important element in testing the *bona fides* of the transaction: *Bullock* v. *Sadlier*, Amb. 764. See also *Price* v. *Jenkins*, 5 Ch. D. 619; *Townend* v. *Toker*, 1 Ch. 446; *Bayspoole* v. *Collins*, 6 Ch. 228; *Rosher* v. *Williams*, 20 Eq. 210. As to assignments of leaseholds

15 Geo. 5, c. 20, s. 173.

with liabilities, see *Price* v. *Jenkins*, *supra*; *Harris* v. *Tubb*, 42 Ch. D. 79. See also as to conveyances held fraudulent under the statute, *Garrard* v. *Lauderdale*, 2 Russ. & M. 451; *Browne* v. *Cavendish*, 1 Jo. & Lat. 607; and as to voluntary endowments of charities not being defeated, *Newcastle* v. *Att.-Gen.*, 12 Cl. & F. 111; *Ramsay* v. *Gilchrist*, [1892] A. C. 412.

Sub-sect. 2.

The effect of the Voluntary Conveyances Act, 1893, replaced by this sub-section, was to cast the onus of showing that a deed was executed *mala fide* on the party alleging it (*Moore* v. *Kelly*, [1918] 1 I. R. 169).

Acquisitions of reversions at an under value.

174.—(1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.

In this subsection "reversionary interest" includes an expectancy or possibility.

(2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

This section re-enacts the Sales of Reversions Act, 1867, repealed by this Act. The words "acquisition" and "for money or money's worth" are substituted for "purchase," and the definition of "reversionary interest" is added, as is sub-sect. 2. It had been held under the Act of 1867 that the jurisdiction of the Court referred to was not affected (see *Beynon* v. *Cook*, 10 Ch. 389; *Aylesford* v. *Morris*, 8 Ch. 484; *Tyler* v. *Yates*, 6 Ch. 665) See also p. 239, *ante*.

Part X.

Wills (*a*).

Contingent and future testamentary gifts to carry the intermediate income.

175.—(1) A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of.

(2) This section applies only to wills coming into operation after the commencement of this Act.

See on this section notes to sect. 31, sub-sect. 3 of the Trustee Act, 1925, *post*.

(*a*) Sects. 175—179 are taken from the L. P. Act, 1922.

Power for tenant in tail in possession to dispose of property by specific devise or bequest.

176.—(1) A tenant in tail of full age shall have power to dispose by will, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally—

(a) of all property of which he is tenant in tail in possession at his death; and

(b) of money (including the proceeds of property directed to be sold) subject to be invested in the purchase of property, of which if it had been so invested he would have been tenant in tail in possession at his death; 15 Geo. 5, c. 20, s. 176.

in like manner as if, after barring the entail, he had been tenant in fee-simple or absolute owner thereof for an equitable interest at his death, but, subject to and in default of any such disposition by will, such property shall devolve in the same manner as if this section had not been passed.

(2) This section applies to entailed interests authorised to be created by this Act as well as to estates tail created before the commencement of this Act, but does not extend to a tenant in tail who is by statute restrained from barring or defeating his estate tail, whether the land or property in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services or not, or to a tenant in tail after possibility of issue extinct, and does not render any interest which is not disposed of by the will of the tenant in tail liable for his debts or other liabilities.

(3) In this section "tenant in tail" includes an owner of a base fee in possession who has power to enlarge the base fee into a fee-simple without the concurrence of any other person.

(4) This section only applies to wills executed after the commencement of this Act, or confirmed or republished by codicil executed after such commencement.

See as to entailed interests, sect. 130, *ante*; and as to the tenants in tail referred to in sub-sect. 2, S. L. Act, 1925, s. 20 (1) and notes, *post*, p. 876.

Wills in contemplation of marriage. 1 Will 4, & 1 Vict. c. 26

177.—(1) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.

(2) This section only applies to wills made after the commencement of this Act.

See sect. 18 of the Wills Act, 1837, and notes, *ante*, p. 511.

Power for persons having no issue to dispose of real estate by will.

178. Section three of the Wills Act, 1837, shall (without prejudice to the rights and interests of a personal representative) authorise and be deemed always to have authorised any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next of kin surviving him.

See the section and notes, *ante*, p. 491.

15 Geo. 5, c. 20, s. 179.

Prescribed forms for reference in wills.

179. The Lord Chancellor may from time to time prescribe and publish forms to which a testator may refer in his will, and give directions as to the manner in which they may be referred to, but, unless so referred to, such forms shall not be deemed to be incorporated in a will.

Forms were issued under this section, dated August 7, 1925.

Part XI.

Miscellaneous.

Miscellaneous.

Provisions as to corporations.

180.—(1) Where either after or before the commencement of this Act any property or any interest therein is or has been vested in a corporation sole (including the Crown), the same shall, unless and until otherwise disposed of by the corporation, pass and devolve to and vest in and be deemed always to have passed and devolved to or vested in the successors from time to time of such corporation.

(2) Where either after or before the commencement of this Act there is or has been a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at the time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall notwithstanding such vacancy vest and be deemed to have vested in the successor to such office on his appointment as a corporation sole, or in the corporation aggregate (as the case may be), but without prejudice to the right of such successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge.

(3) Any contract or other transaction expressed or purported to be made with a corporation sole, or any appointment of a corporation sole as a custodian or other trustee or as a personal representative, at a time (either after or before the commencement of this Act) when there was a vacancy in the office, shall on the vacancy being filled take effect and be deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect, and on the appointment of a successor shall be capable of being enforced, accepted, disclaimed or renounced by him.

This and the next section are from L. P. Acts, 1922 and 1924. Cf. Administration of Estates Act, 1925, s. 3 (5), *ante*.

15 Geo. 5, c. 20, s. 181.

Dissolution of a corporation.

181. Where, by reason of the dissolution of a corporation either before or after the commencement of this Act, a legal estate in any property has determined, the court may by order create a corresponding estate and vest the same in the person who would have been entitled to the estate which determined had it remained a subsisting estate.

See also notes to sect. 44 of the Trustee Act, 1925, *post*.

Protection of solicitor and trustees adopting Act.

182.—(1) The powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed to be included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction, and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2) But, save as expressly provided by this Act, nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4) Where such persons are acting without a solicitor, they shall also be protected in like manner.

Re-enacts C. A. 1881, s. 66, adding in sub-sect. 2 "save as expressly provided by this Act."

Fraudulent concealment of documents and falsification of pedigrees.

183.—(1) Any person disposing of property or any interest therein for money or money's worth to a purchaser, or the solicitor or other agent of such person, who—

(a) conceals from the purchaser any instrument or incumbrance material to the title; or

(b) falsifies any pedigree upon which the title may depend in order to induce the purchaser to accept the title offered or produced;

15 Geo. 5, c. 20, s. 183.

with intent in any of such cases to defraud, is guilty of a misdemeanour punishable by fine, or by imprisonment for a term not exceeding two years, or by both.

(2) Any such person or his solicitor or agent is also liable to an action for damages by the purchaser or the persons deriving title under him for any loss sustained by reason of—

(a) the concealment of the instrument or incumbrance; or

(b) any claim made by a person under such pedigree whose right was concealed by such falsification as aforesaid.

(3) In estimating damages, where the property or any interest therein is recovered from the purchaser or the persons deriving title under him, regard shall be had to any expenditure by him or them in improvements of any land.

(4) No prosecution for any offence under this section shall be commenced without the leave of the Attorney-General.

(5) Before leave to prosecute is granted there shall be given to the person intended to be prosecuted such notice of the application for leave to prosecute as the Attorney-General may direct.

This section re-enacts the effect of L. P. (Amdt.) Acts, 1859, s. 24, and 1860, s. 8. For definitions of "property" and "purchaser," see sect. 205, sub-sect. 1 (xx) and (xxi), *post*. Where no title is to be shown before a stipulated date, the provision does not apply to the concealment of any earlier matter (*Smith* v. *Robinson*, 13 Ch. D. 148).

Presumption of survivorship in regard to claims to property.

184.—In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

From L. P. Act, 1922. For the former law, see p. 181, *ante*.

Merger.

Merger.

185.—There is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

This section re-enacts Jud. Act, 1873, s. 25 (4). As to merger in connection with estates tail, see sect. 39 of the Fines and Recoveries Act, 1833, and note, *ante*.

Merger generally.

Merger of smaller in greater estate.

As to merger generally, the ordinary rule was settled that, whenever a greater estate and a smaller meet in the same person without any intermediate estate, the smaller estate merges in the greater (2 Black. Com. 177; Prest. Conv. vol. 3).

15 Geo. 5, c. 20, s. 185.

Before the Jud. Act, 1873, Courts of Law and Equity differed. The rule of the former was rigid that whenever a term of years and a freehold estate whether for life or in fee immediately expectant on the term vested in the same person in his own right, the term was merged in the freehold (*Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 652). If the sole owner of a term became joint tenant of the immediately expectant freehold, the term merged as to one moiety (*Sir Ralph Bovy's Case*, 1 Vent. 193). So where a term was vested in two trustees, and one trustee subsequently became tenant for life of the freehold (*White* v. *Greenish*, 11 C. B. (N.S.) 233). A term merged in a reversionary term even where the latter was for a less number of years (*Stephens* v. *Bridges*, 6 Mad. 66; see *Hughes* v. *Robotham*, Cro. Eliz. 302). But where a lessee granted to his sub-lessee the residue of his own interest from the termination of the sub-lease, the grant operated as an "interesse termini" (see now sect. 149, *ante*), and the sub-lease did not merge (*Hyde* v. *Warden*, 3 Ex. D. 72). Again, where a lessee who had sub-leased for a shorter term assigned to his lessor his own interest during the sub-lease, there was no merger by reason of the intermediate estate which remained outstanding (*Burton* v. *Barclay*, 7 Bing. 745). As to the merger of a lease in the case where a lessee has granted a sub-lease, see further the note to sect. 139, *ante*. The effect of the merger of a lease in the freehold reversion was to extinguish the lessee's covenants contained in the lease (*Dynevor* v. *Tennant*, 13 A. C. 279; see *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 647).

Rule at common law before the Jud. Act, 1873, as to merger of legal estates.

Merger of terms:

As regards estates for life, it was settled that where an estate for life and a greater estate immediately expectant on it met in the same person, the first estate *prima facie* merged (*Re Dunsany, Nott* v. *D.*, [1906] 1 Ch. 582). And for this purpose an estate for the party's own life was considered greater than an estate for another's life (see Co. Litt. 42 A). Where accordingly the first of two successive life tenants created a term out of his life interest and subject thereto granted such life interest to the second, it was said that before the Jud. Act, 1873, the first life interest would at law have merged in the second (*Re Barry Co.*, 76 L. T. 492). See further, *Re Radcliffe; R.* v. *Bewes*, [1892] 1 Ch. 231; *Re Munday & Roper*, [1899] 1 Ch. 296; *Re Barlow*, [1903] 1 Ch. 382.

merger of estates for life:

Again, a fee simple conditional was held to merge in the possibility of reverter on failure of such conditional fee (*Doe* v. *Simpson*, 4 Bing. N. C. 348; *Sodor & Man* v. *Derby*, 2 Ves. sen. 354; see *Pemberton* v. *Barnes*, [1899] 1 Ch. 548).

of conditional fee:

It was a condition at common law of the merger of the smaller in the greater estate that the two estates should have been held by the same person in his own right and not in the right of another (*Re Radcliffe, R.* v. *Bewes, sup.*). Accordingly there was no merger at law where one of the two estates was held by a husband in right of his wife (*Jones* v. *Davies*, 7 H. & N. 507; *Doe* v. *Pett*, 11 Ad. & Ell. 842; *Platt* v. *Shap*, Cro. Jac. 275; see *Hurley* v. *H.*, [1908] 1 I. R. 393). Or by an administrator (*Chambers* v. *Kingham*, 10 Ch. D. 746). Nor where a lessee died, having appointed the reversioner his executor (2 Black. Comm. 177). The case of a person who holds the term as executor purchasing the fee is discussed Sug. V. & P., 14th ed. 618. Inasmuch, however, as the common law did not recognise trusts, there was a merger of the smaller in the greater estate, notwithstanding that of two estates held by the same person, one might be held in trust and the other beneficially (*Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 653).

two estates must have been held by same person in his own right.

Courts of Equity before 1873 had regard to the intention of the parties; and in the absence of any direct evidence of intention, they

Rule in equity; before 1873.

15 Geo. 5, c. 20, s. 185.

presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place (*Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 652). These courts interfered, and if necessary decreed the execution of such deeds as replaced the parties in their proper position (*Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 653, referring to *Saunders* v. *Bournford*, Finch. 424; *Att.-Gen.* v. *Kerr*, 2 Beav. 420). As regards the merger of equitable estates, it was said before 1873 that *prima facie* the rule of law prevailed also in equity; but that a court of equity would not allow merger if it saw equitable reasons against it (*Brandon* v. *Brandon*, 31 L. J. Ch. 49; see *Thellusson* v. *Liddard*, [1900] 2 Ch. 643).

Rule in equity now prevails.

Jud. Act, 1873, sect. 25 (4).

The Judicature Act, 1873, s. 25 (4) is re-enacted by the present section, as above stated. Since this Act it has been laid down that the Court is guided by intention; and in the absence of express intention, either in the instrument or by parol, looks to the benefit of the person in whom the two estates become vested (*Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368; compare *Re Gibbon, Moore* v. *G.*, [1909] 1 Ch. 373). And this rule has been applied in the case of legal estates (*Snow* v. *Boycott*, [1892] 3 Ch. 110; *Re Barry Co.*, 76 L. T. 489; *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631; *Hurley* v. *H.*, [1908] 1 I. R. 393; *Re Fletcher, Reading* v. *F.*, [1917] 1 Ch. 339; see *Craig* v. *Creer*, [1899] 1 I. R. 258). Where a lessee acquires the freehold reversion and subsequently deals with the property, such subsequent dealings may be used as evidence of an intention against merger (*Lea* v. *Thursby*, [1904] 2 Ch. 57).

Merger of equitable in legal estates.

As regards the merger of equitable in legal estates, it is settled that wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former (*Selby* v. *Alston*, 3 Ves. 341; *Re Douglas; Wood* v. *D.*, 28 Ch. D. 331). The rule applies to a case where such estates unite in two or more persons (*Re Selous, Thomson* v. *S.*, [1901] 1 Ch. 921). And an equitable tenancy in common and a legal joint tenancy were held to be equal and co-extensive and to merge accordingly (*ibid.*). The rule does not apply where a person has the whole legal estate and a partial equitable estate (*Phillips* v. *Brydges*, 3 Ves. 126; see *Capel* v. *Girdler*, 9 Ves. 509). So an equitable estate tail in a copyhold did not merge by the descent to the copyholder of the legal fee (*Merest* v. *James*, 6 Madd. 118). Nor did an equitable leasehold interest merge in a legal estate for life subsequently acquired by the lessee (*Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368). As to estates not co-terminous, see *Re Chance's Trusts*, 62 S. J. 349. The taking effect of an executory gift over before the determination of a life interest did not prevent the merger of that interest in the fee (*Re Attkins, Life* v. *A.*, [1913] 2 Ch. 619).

Rights of pre-emption capable of release.

186.—All statutory and other rights of pre-emption affecting a legal estate shall be and be deemed always to have been capable of release, and unless released shall remain in force as equitable interests only.

Sects. 186—190 are from L. P. Acts, 1922 and 1924.

Legal easements.

187.—(1) Where an easement, right or privilege for a legal estate is created, it shall enure for the benefit of the land to which it is intended to be annexed.

(2) Nothing in this Act affects the right of a person to acquire, hold or exercise an easement, right or privilege

over or in relation to land for a legal estate in common with any other person, or the power of creating or conveying such an easement right or privilege. 15 Geo. 5, c. 20, s. 187.

See generally as to undivided shares in land, sect. 34, *ante*.

Power to direct division of chattels.

188.—Where any chattels belong to persons in undivided shares, the persons interested in a moiety or upwards may apply to the court for an order for division of the chattels or any of them, according to a valuation or otherwise, and the court may make such order and give any consequential directions as it thinks fit.

Indemnities against rents.

189.—(1) A power of distress given by way of indemnity against a rent or any part thereof payable in respect of any land, or against the breach of any covenant or condition in relation to land, is not and shall not be deemed ever to have been a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882, as amended by any subsequent enactment.

(2) The benefit of all covenants and powers given by way of indemnity against a rent or any part thereof payable in respect of land, or against the breach of any covenant or condition in relation to land, is and shall be deemed always to have been annexed to the land to which the indemnity is intended to relate, and may be enforced by the estate owner (*a*) for the time being of the whole or any part of that land, notwithstanding that the benefit may not have been expressly apportioned or assigned to him or to any of his predecessors in title.

(*a*) See sect. 205, sub-sect. 1 (v), *post*. See also as to the power of distress, sect. 162, sub-sect. 1 (a), *ante*.

Redemption and Apportionment of Rents, &c.

Apportionment of rentcharges.

190.—(1) Where in a conveyance for valuable consideration, other than a mortgage, of part of land which is affected by a rentcharge, such rentcharge or a part thereof is, without the consent of the owner thereof, expressed to be—

(a) charged exclusively on the land conveyed or any part thereof in exoneration of the land retained or other land; or

(b) charged exclusively on the land retained or any part thereof in exoneration of the land conveyed or other land; or

(c) apportioned between the land conveyed or any part thereof, and the land retained by the grantor or any part thereof;

then, without prejudice to the rights of the owner of the

15 Geo. 5, c. 20, s. 190.

rentcharge, such charge or apportionment shall be binding as between the grantor and the grantee under the conveyance and their respective successors in title.

(2) Where—

Default in payment or

(a) any default is made in payment of the whole or part of a rentcharge by the person who, by reason of such charge or apportionment as aforesaid, is liable to pay the same; or

breach of covenant.

(b) any breach occurs of any of the covenants (other than in the case of an apportionment the covenant to pay the entire rentcharge) or conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land retained or conveyed, as the case may be;

the owner for the time being of any other land affected by the entire rentcharge who—

(i) pays or is required to pay the whole or part of the rentcharge which ought to have been paid by the defaulter aforesaid; or

(ii) incurs any costs, damages or expenses by reason of the breach of covenant or condition aforesaid;

may enter into and distrain on the land in respect of which the default or breach is made or occurs, or any part of that land, and dispose according to law of any distress found, and may also take possession of the income of the same land until, by means of such distress and receipt of income or otherwise the whole or part of the rentcharge (charged or apportioned as aforesaid) so unpaid and all costs, damages and expenses incurred by reason of the non-payment thereof or of the breach of the said covenants and conditions, are fully paid or satisfied.

Leaseholds.

(3) Where in a conveyance for valuable consideration, other than a mortgage, of part of land comprised in a lease, for the residue of the term or interest created by the lease, the rent reserved by such lease or a part thereof is, without the consent of the lessor, expressed to be –

(a) charged exclusively on the land conveyed or any part thereof in exoneration of the land retained by the assignor or other land; or

(b) charged exclusively on the land retained by the assignor or any part thereof in exoneration of the land conveyed or other land; or

(c) apportioned between the land conveyed or any part thereof and the land retained by the assignor or any part thereof;

then, without prejudice to the rights of the lessor, such charge or apportionment shall be binding as between the assignor and the assignee under the conveyance and their respective successors in title.

15 Geo. 5, c. 20, s. 190.

(4) Where—

(a) any default is made in payment of the whole or part of a rent by the person who, by reason of such charge or apportionment as aforesaid, is liable to pay the same; or

(b) any breach occurs of any of the lessee's covenants (other than in the case of an apportionment the covenant to pay the entire rent) or conditions contained in the lease, so far as the same relate to the land retained or conveyed, as the case may be;

the lessee for the time being of any other land comprised in the lease, in whom, as respects that land, the residue of the term or interest created by the lease is vested, who—

(i) pays or is required to pay the whole or part of the rent which ought to have been paid by the defaulter aforesaid; or

(ii) incurs any costs, damages or expenses by reason of the breach of covenant or condition aforesaid;

may enter into and distrain on the land comprised in the lease in respect of which the default or breach is made or occurs, or any part of that land, and dispose according to law of any distress found, and may also take possession of the income of the same land until (so long as the term or interest created by the lease is subsisting) by means of such distress and receipt of income or otherwise, the whole or part of the rent (charged or apportioned as aforesaid) so unpaid and all costs, damages and expenses incurred by reason of the non-payment thereof or of the breach of the said covenants and conditions, are fully paid or satisfied.

(5) The remedies conferred by this section take effect so far only as they might have been conferred by the conveyance whereby the rent or any part thereof is expressed to be charged or apportioned as aforesaid, but a trustee, personal representative, mortgagee or other person in a fiduciary position has, and shall be deemed always to have had, power to confer the same or like remedies.

(6) This section applies only if and so far as a contrary intention is not expressed in the conveyance whereby the rent or any part thereof is expressed to be charged or apportioned as aforesaid, and takes effect subject to the terms of that conveyance and to the provisions therein contained.

(7) The remedies conferred by this section apply only where the conveyance whereby the rent or any part thereof is expressed to be charged or apportioned is made after the commencement of this Act, and do not apply where the rent is charged exclusively as aforesaid or legally apportioned with the consent of the owner or lessor.

15 Geo. 5, c. 20, s. 190.

(8) The rule of law relating to perpetuities does not affect the powers or remedies conferred by this section or any like powers or remedies expressly conferred, before or after the commencement of this Act, by an instrument.

For definitions of "conveyance" and "valuable consideration," see sect. 205, sub-sect. 1 (ii) and (xxi), *post*. See also as to apportionment of rent, notes to sect. 140, *ante*, p. 728.

Redemption and apportionment of rents.

191.—(1) Where there is a rent being either—

(a) a quit rent, chief rent or other annual or periodical sum issuing out of land; or

(b) a rent reserved on a sale, or made payable under a grant or licence (not operating as an agreement for a lease or tenancy) for building purposes; or

(c) a compensation rentcharge created as the consideration for the extinguishment of manorial incidents;

the Minister shall at any time, on the requisition of the owner of the land or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

Where the rent is not perpetual, the Minister may authorise the purchase of a Government annuity of an amount equal to the rent, payable during the residue of the period for which the rent would have been payable, in such names as he may think fit, and give directions as to the payment of the annuity, and the amount required to purchase that annuity shall be the redemption money.

(2) Where the rent is perpetual and was reserved on a sale, or was made payable under a grant or licence for building purposes, the redemption money shall be such sum as would (according to the average price, at the date of redemption, of such Government securities as may for the time being be prescribed by the Treasury) purchase sufficient of such Government securities to yield annual dividends equal to the amount of the yearly rent redeemed.

(3) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Minister.

(4) If the Minister is satisfied—

(a) that any person who has been in receipt of a rent, or claims to be entitled thereto, is unable or unwilling to prove his title either to dispose thereof absolutely, or to give an absolute dis-

charge for the capital value thereof, or neglects to apply to any competent body or person for any requisite order or consent; or

(b) that a person entitled to the rent or any part thereof cannot be found or ascertained; or

(c) that by reason of complications in the title to the rent, or the want of two or more trustees, or for any other reason a tender of the redemption money cannot be effected, or cannot be effected without incurring or involving unreasonable cost or delay;

the Minister may authorise the owner or other person interested in the land affected by the rent to pay the amount of the redemption money certified by the Minister or the Government annuity into court, to an account entitled in the matter of the rent and of the land affected.

(5) On proof to the Minister that such payment (whether into court or otherwise) or tender has been made, he shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(6) Any person claiming to be interested in the annuity or fund in court, or who would have been interested in the rent had it not been redeemed, may apply to the court for an order giving directions for the payment of the annuity or of the fund in court or any part thereof, or of the income thereof to the persons entitled to give a receipt therefor, and it shall not be necessary to serve the owner of the land or the Minister with notice of the proceedings.

(7) Where any person interested in the whole or any part of the land affected by the rent desires to effect a discharge of a part of the land, and the remainder of the land is not exonerated or indemnified from the rent by means of a charge on the aforesaid part, the Minister may, on his application, by a certificate, apportion the rent between the aforesaid part of the land and the remainder of the land affected (regard being had to the security which will be left for the payment of any part of the rent, and to any apportionment which is not binding on the owner of the rent), and any apportioned part of the rent shall be redeemable under this section, and, on such redemption, the part of the land to which the redemption applies shall be discharged from the entire rent.

(8) Every requisition under this section shall be in writing; and every certificate under this section may be in writing, sealed with the seal of the Minister.

(9) Rules may be made by the Minister for regulating proceedings to be taken under this section, and as to the

15 Geo. 5, c. 20, s. 191.

manner in which costs are to be borne by the respective parties.

(10) All decisions of the Minister made under this section shall (subject only to such appeal to the court as may be prescribed by rules of court) be final.

(11) This section applies whether or not the rent is settled or is held on trust for sale, or on trust for charitable, ecclesiastical, public or other purposes, or is subject to incumbrances, and whether the rent was created before or after the commencement of this Act.

(12) This section does not apply to tithe rentcharge or a charge or other payment redeemable under the Tithe Acts, 1836 to 1918, or to a rent reserved by a lease or tenancy.

This section replaces C. A. 1881, s. 45, which applied only to quit-rents, chief rents, rentcharges or other perpetual sums or payments issuing out of land and excluded the rents mentioned in sub-sect. 1 (b). "Minister" means the Minister of Agriculture and Fisheries (sect. 205, sub-sect. 1 (xv), *post*). As to compensation rentcharges, see L. P. Act, 1922, s. 139, and the Manorial Incidents (Extinguishment) Rules, 1925. For the rules issued under sub-sect. 9, see p. 850, *post*.

Local commissioners of sewers were held "absolutely entitled" to rentcharges under C. A., 1881, s. 45 (*Re Caldicott, &c. Act*, 1884, [1920] 2 Ch. 463).

Apportionment of charges payable for redemption of tithe rent-charge.

17 & 18 Vict. c. 97.

192. An order of apportionment of a charge on land by way of annuity for redemption of tithe rentcharge may be made by the Minister under sections ten to fourteen (inclusive) of the Inclosure Act, 1854, on the application of any person interested, according to the provisions of the Inclosure Acts, 1845 to 1882, in the land charged or any part thereof without the concurrence of any other person:

Provided that the Minister may, in any such case, on the application of any person interested in the annuity, require as a condition of making the order that any apportioned part of the annuity which does not exceed the yearly sum of two pounds shall be redeemed forthwith.

Sects. 192-194 are from L. P. Act, 1922.

The "Minister" is the Minister of Agriculture and Fisheries (sect. 205, sub-sect. 1 (xv), *post*).

Commons and Waste Lands.

Rights of the public over commons and waste lands.

193.—(1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste, or a common, which is wholly or partly situated within a borough or urban district, and to any land which at the commencement of this Act is subject to

rights of common and to which this section may from time to time be applied in manner hereinafter provided: 15 Geo. 5, c. 20, s. 193.

Provided that—

(a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and

(b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and

(c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; and

(d) the rights of access shall cease to apply—

(i) to any land over which the commonable rights are extinguished under any statutory provision;

(ii) to any land over which the commonable rights are otherwise extinguished if the council of the county or county borough in which the land is situated by resolution assent to its exclusion from the operation of this section, and the resolution is approved by the Minister.

(2) The lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies.

(3) Where limitations or conditions are imposed by the Minister under this section, they shall be published by such person and in such manner as the Minister may direct.

(4) Any person who, without lawful authority, draws or drives upon any land to which this section applies any

15 Geo. 5, c. 20, s. 193.

carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding forty shillings for each offence.

(5) Nothing in this section shall prejudice or affect the right of any person to get and remove mines or minerals or to let down the surface of the manorial waste or common.

(6) This section does not apply to any common or manorial waste which is for the time being held for Naval, Military or Air Force purposes and in respect of which rights of common have been extinguished or cannot be exercised.

Restrictions on inclosure of commons.

194.—(1) The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister thereto is obtained, and in giving or withholding his consent the Minister shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act, 1876, to be taken into consideration and held by the Minister before forming an opinion whether an application under the Inclosure Acts, 1845 to 1882, shall be acceded to or not.

(2) Where any building or fence is erected, or any other work constructed without such consent as is required by this section, the county court within whose jurisdiction the land is situated, shall, on an application being made by the council of any county or borough or district concerned, or by the lord of the manor or any other person interested in the common, have power to make an order for the removal of the work, and the restoration of the land to the condition in which it was before the work was erected or constructed, but any such order shall be subject to the like appeal as an order made under section thirty of the Commons Act, 1876.

(3) This section applies to any land which at the commencement of this Act is subject to rights of common:

Provided that this section shall cease to apply—

(a) to any land over which the rights of common are extinguished under any statutory provision;

(b) to any land over which the rights of common are otherwise extinguished, if the council of the county or county borough in which the land is situated by resolution assent to its exclusion from the operation of this section and the resolution is approved by the Minister.

(4) This section does not apply to any building or fence

erected or work constructed if specially authorised by Act of Parliament, or in pursuance of an Act of Parliament or Order having the force of an Act, or if lawfully erected or constructed in connexion with the taking or working of minerals in or under any land to which the section is otherwise applicable, or to any telegraphic line as defined by the Telegraph Act, 1878, of the Postmaster-General. 15 Geo. 5, c. 20, s. 194.

The "Minister" is the Minister of Agriculture and Fisheries (sect. 205, sub-sect. 1 (xv), *post*).

See as to rights of common pp. 43, *et seq.*, *ante*.

Sect. 195, which replaces sect. 13 of the Judgments Act, 1838, will be found at p. 553, *ante*.

Notices.

Regulations respecting notices.

196.—(1) Any notice required or authorised to be served or given by this Act shall be in writing.

(2) Any notice required or authorised by this Act to be served on a lessee (*a*) or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom (*b*) of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

(6) This section does not apply to notices served in proceedings in the court.

15 Geo. 5, c. 20, s. 196.

This section (sub-sect. 5 being new and "or given" added in sub-sect. 1) re-enacts C. A. 1881, s. 67.

(*a*) Where a lease had been assigned, a notice addressed to the original lessee and all others concerned and served on the occupier was sufficient (*Cronin* v. *Rogers*, 1 Cab. & El. 348). But where a lessee had executed an assignment for the benefit of his creditors, which contained a declaration of trust of his leaseholds for the benefit of the creditors' trustee, and such trustee had entered, a notice addressed to and served on such trustee alone, was insufficient (*Gentle* v. *Faulkner*, [1900] 2 Q. B. 267).

(*b*) Great Britain and Northern Ireland (sect. 205, sub-sect. 1 (xxx), *post*).

Notice of memorials registered in Middlesex and Yorkshire.

197.—(1) The registration in a local deeds registry (*c*) of a memorial of any instrument transferring or creating a legal estate or charge by way of legal mortgage (*d*), shall be deemed to constitute actual notice of the transfer or creation of the legal estate or charge by way of legal mortgage, to all persons and for all purposes whatsoever, as from the date of registration or other prescribed date, and so long as the registration continues in force.

(2) The registration of a memorial of an instrument not required to be registered does not operate to give notice of such instrument or of the contents thereof.

(3) This section operates without prejudice to the provisions of this Act respecting the making of further advances by a mortgagee (*e*), and only applies to land within the jurisdiction of the registry.

This and the following section are from L. P. Acts, 1922 and 1924.

(*c*) See Land Registration Act, 1925, s. 135, *post*.

(*d*) See sect. 87, *ante*.

(*e*) See sect. 94, sub-sect. 2, *ante*.

Registration under the Land Charges Act, 1925, to be notice.

198.—(1) The registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, in any register kept at the land registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force.

(2) This section operates without prejudice to the provisions of this Act respecting the making of further advances by a mortgagee, and applies only to instruments and matters required or authorised to be registered under the Land Charges Act, 1925.

See the Land Charges Act, 1925, *ante*.

Restrictions on constructive notice.

199.—(1) A purchaser shall not be prejudicially affected by notice of—

(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof;

(ii) any other instrument or matter or any fact or thing unless—

(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) Paragraph (ii) of the last subsection shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if that paragraph had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act.

Sub-sect. 1 (i) is new, but otherwise this section re-enacts C. A., 1882, s. 3, adding "or matter" at the beginning of sub-sect. 1 (ii). For definition of "purchaser," see sect. 205, sub-sect. 1 (xxi), *post*.

Before the C. A. 1882, the rule as to constructive notice was thus stated: Where a person has not actual notice of a matter of fact, he ought not to be treated as if he had notice unless the circumstances are such as enable the Court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question (*Ware* v. *Egmont*, 4 De M. & G. 473; *Bailey* v. *Barnes*, [1894] 1 Ch. 35). Under this section the law is substantially the same (*Molyneux* v. *Hawtrey*, [1903] 2 K. B. 493). But the negative form of the section shows that a restriction rather than an extension of the old doctrine was intended (*Bailey* v. *Barnes*, *sup.*; *Re Valletort Co.*, [1903] 2 Ch. 663). The words "ought reasonably

15 Geo. 5, c. 20, s. 199.

to have been made" mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances ([1894] 1 Ch. 35; see also Dart, 7th ed. 879).

The inquiry which ought reasonably to be made by an intending mortgagee is an investigation of the title; so a mortgagee was held entitled as a purchaser for value without notice, on the ground that such an investigation would have disclosed no flaw (*Gainsborough* v. *Watcombe Co.*, 53 L. T. 116; see *Taylor* v. *London and County Bank*, [1901] 2 Ch. 231). In a case where the same solicitor acted for mortgagor and mortgagee, the Court refused to impute to the mortgagee notice either of facts known to the mortgagor, or of facts which had come to the knowledge of the solicitor when acting in previous transactions for other mortgagees of the same property (*Re Cousins*, 31 Ch. D. 671; see *Taylor* v. *London and County Bank*, *sup.*).

A purchaser was not affected with constructive notice of impropriety in a previous sale by a mortgagee under which he claimed (*Bailey* v. *Barnes*, [1894] 1 Ch. 25). A sub-mortgagee was not affected with constructive notice where an independent solicitor, if he had been employed, would not have discovered the facts (*Bateman* v. *Hunt*, [1904] 2 K. B. 540). A purchaser of building lots was not affected with constructive notice of building stipulations which did not appear on the title (*Rowell* v. *Satchell*, [1903] 2 Ch. 221). And a purchaser of leaseholds was not affected with constructive notice of onerous covenants where it could not be said that his solicitor was reasonably bound to make further inquiry (*Molyneux* v. *Hawtrey*, [1903] 2 K. B. 497). A bank with whom a company's deeds were deposited was not affected with constructive notice of the contents of debentures previously issued (*Re Valletort Co.*, [1903] 2 Ch. 654).

On the other hand, a mortgagee was affected with constructive notice where a reasonable inquiry would have disclosed an existing charge (*Re Alms Corn Charity*, [1901] 2 Ch. 762). So a trustee paying over money (*Davis* v. *Hutchings*, [1907] 1 Ch. 356). Again, a purchaser who accepted a title shorter than forty years was affected with constructive notice of such equities as he would have ascertained by reasonable inquiries for forty years (*Re Nisbet and Potts*, [1906] 1 Ch. 408). A lessee was affected with constructive notice of restrictive covenants on the ground that they would have come to his knowledge had he made reasonable inquiries (*Holloway* v. *Hill*, [1902] 2 Ch. 620). The section, however, does not impose on a mortgagee the obligation of inquiring from a tenant as to the interest of his lessor (*Hunt* v. *Luck*, [1902] 1 Ch. 434).

Notice of restrictive covenants and easements.

200.—(1) Where land having a common title with other land is disposed of to a purchaser (other than a lessee or a mortgagee) who does not hold or obtain possession of the documents forming the common title, such purchaser, notwithstanding any stipulation to the contrary, may require that a memorandum giving notice of any provision contained in the disposition to him restrictive of user of, or giving rights over, any other land comprised in the common title, shall, where practicable, be written or indorsed on, or, where impracticable, be permanently annexed to some one document selected by the purchaser but retained in the possession or power of the person who makes the disposition, and being or forming part of the common title.

(2) The title of any person omitting to require an indorsement to be made or a memorandum to be annexed shall not, by reason only of this enactment, be prejudiced or affected by the omission. 15 Geo. 5, c. 20, s. 200.

(3) This section does not apply to dispositions of registered land.

(4) Nothing in this section affects the obligation to register a land charge in respect of—

(a) any restrictive covenant or agreement affecting freehold land; or

(b) any estate contract; or

(c) any equitable easement, liberty or privilege.

Sub-sects 1 to 3 re-enact C. A. 1911, s. 11, "written or" being added in sub-sect. 1 before "indorsed on."

Sub-sect. 4 is new. See as to registration of land charges Land Charges Act, 1925, s. 10, *ante*.

Part XII.

Construction, Jurisdiction, and General Provisions.

201.—(1) The provisions of this Act relating to freehold land apply to manors, reputed manors, lordships, advowsons, tithe and perpetual rentcharges, and other incorporeal hereditaments, subject only to the qualifications necessarily arising by reason of the inherent nature of the hereditament affected. Provisions of Act to apply to incorporeal hereditaments.

(2) This Act does not affect the special restrictions imposed on dealings with advowsons by the Benefices Act, 1898, or any other statute or measure (*a*), nor affect the limitation of, or authorise any disposition to be made of, a title or dignity of honour which in its nature is inalienable. 61 & 62 Vict. c. 48.

(3) This section takes effect subject to the express provisions of this Act relating to undivided shares (*b*).

(*a*) *I.e.*, of the National Assembly of the Church of England under the Church of England Assembly (Powers) Act, 1919 (9 & 10 Geo. 5, c. 76).

(*b*) See sect. 34, *ante*.

202. For giving effect to this Act, the enfranchisement of copyhold land, and the conversion into long terms of perpetually renewable leaseholds, and of leases for lives and of leases for years terminable with life or lives or on marriage, effected by the Law of Property Act, 1922, as amended by any subsequent enactment (*c*), shall be deemed to have been effected immediately before the commencement of this Act. Provisions as to enfranchisement of copyholds, &c.

(*c*) See L. P. Act, 1922, ss. 128-137, 145, and Scheds. XII. and XV., and L. P. (Amendt.) Act, 1924, Sched. II.

15 Geo. 5, c. 20, s. 203.

Payment into Court, jurisdiction and procedure.

203.—(1) Payment of money into court effectually exonerates therefrom the person making the payment.

(2) Subject to any rules of court to the contrary—

(a) Every application to the court under this Act shall, save as otherwise expressly provided, be by summons at chambers;

(b) On an application by a purchaser notice shall be served in the first instance on the vendor;

(c) On an application by a vendor notice shall be served in the first instance on the purchaser;

(d) On any application notice shall be served on such persons, if any, as the court thinks fit.

(3) In this Act, unless the contrary intention appears, "the court" means the High Court, and also the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham, or the county court, where those courts respectively have jurisdiction.

(4) All matters within the jurisdiction of the High Court under this Act shall, save as otherwise expressly provided, and subject to the enactments for the time being in force with respect to the Supreme Court of Judicature, be assigned to the Chancery Division of the court.

(5) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges and expenses of all or any of the parties to any application.

This section re-enacts C. A. 1881, s. 69. The powers of the Court were made exercisable by the Palatine Court of Durham by the Palatine Court of Durham Act, 1889, s. 10. As to applications, see *Re Lillwall* (1882), W. N. 6; 30 W. R. 243.

Orders of Court conclusive.

204.—(1) An order of the court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2) This section has effect with respect to any lease, sale, or other act under the authority of the court, and purporting to be in pursuance of any statutory power notwithstanding any exception in such statute.

(3) This section applies to all orders made before or after the commencement of this Act.

This section re-enacts C. A. 1881, s. 70, sub-sect. 2 of which, however, applied only to leases, &c., under the (repealed) Settled Estates Acts.

Having regard to this section, an order of the Court will be conclusive, even where the blot appears on the face of it (*Re Hall Dare*, 21 Ch. D. 41). The section prevented a purchaser of land sold in an administration action to whom a conveyance of the legal estate was offered from requiring an abstract of an equitable title

(*Re Witham, W.* v. *Davis*, [1901] W. N. 86); or (on a sale in a foreclosure action to which the administratrix of the mortgagor was a party) from requiring the concurrence in the conveyance of the mortgagor's heir (*Re Harrowby and Paine*, [1902] W. N. 137). On a sale in an administration action, it was held that the purchasers were entitled to the conveyance of the fee in an absolute form from mortgagor and first mortgagee, notwithstanding the existence of puisne mortgagees not parties to the action, and that as against such puisne mortgagees this section would protect the purchaser (*Mostyn* v. *M.*, [1893] 3 Ch. 376). Where, however, the order for sale was made on the assumption that the property belonged to A., whereas it in fact belonged to B., who was not a party to the action, this section did not give the purchaser a good title against B. (*Jones* v. *Barnett*, [1900] 1 Ch. 370; see *Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 627; see also *Woods* v. *Brown*, [1915] 1 Ir. R. 29). The Court will not, in reliance on this section, attempt to exercise a jurisdiction which it does not possess (*Re Montagu, Derbishire* v. *M.*, [1897] 2 Ch. 8).

General definitions.

205.—(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

(i) "Bankruptcy" includes liquidation by arrangement; also in relation to a corporation means the winding up thereof (*a*);

(ii) "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;

(iii) "Building purposes" include the erecting and improving of, and the adding to, and the repairing of buildings; and a "building lease" is a lease for building purposes or purposes connected therewith;

(iv) "Death duty" means estate duty, succession duty, legacy duty, and every other duty leviable or payable on a death;

(v) "Estate owner" means the owner of a legal estate, but an infant is not capable of being an estate owner;

(vi) "Gazette" means the London Gazette;

(vii) "Incumbrance" includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and "incumbrancer" has a meaning corresponding with that of incumbrance, and includes every per-

15 Geo. 5, c. 20, s. 205.

son entitled to the benefit of an incumbrance, or to require payment or discharge thereof;

(viii) "Instrument" does not include a statute, unless the statute creates a settlement;

(ix) "Land" includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; but not an undivided share in land; and "mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same but not an undivided share thereof; and "manor" includes a lordship, and reputed manor or lordship; and "hereditament" means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir (*b*);

(x) "Legal estates" mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates (*c*); "equitable interests" mean all the other interests and charges in or over land or in the proceeds of sale thereof; an equitable interest "capable of subsisting as a legal estate" means such as could validly subsist or be created as a legal estate under this Act;

(xi) "Legal powers" include the powers vested in a chargee by way of legal mortgage (*d*) or in an estate owner under which a legal estate can be transferred or created; and "equitable powers" mean all the powers in or over land under which equitable interests or powers only can be transferred or created (*e*);

(xii) "Limitation Acts" mean the Real Property Limitation Acts, 1833, 1837 and 1874, and "limitation" includes a trust;

(xiii) "Lunatic" includes a lunatic whether so found or not, and, in relation to a lunatic not so found, "committee" includes a person on whom the powers of a committee are conferred under section one of the Lunacy Act, 1908 (*f*);

"defective" includes every person affected by the provisions of section one hundred and sixteen of the Lunacy Act, 1890, as extended by section sixty-four of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed; 15 Geo. 5, c. 20, s. 205.

(xiv) A "mining lease" means a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes;

(xv) "Minister" means the Minister of Agriculture and Fisheries;

(xvi) "Mortgage" includes any charge or lien on any property for securing money or money's worth (*g*); "legal mortgage" means a mortgage by demise or subdemise or a charge by way of legal mortgage (*d*) and "legal mortgagee" has a corresponding meaning; "mortgage money" means money or money's worth secured by a mortgage; "mortgagor" includes any person from time to time deriving title under the original mortgagor (*h*) or entitled to redeem a mortgage according to his estate interest or right in the mortgaged property; "mortgagee" includes a chargee by way of legal mortgage and any person from time to time deriving title under the original mortgagee; and "mortgagee in possession" is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property; and "right of redemption" includes an option to repurchase only if the option in effect creates a right of redemption;

(xvii) "Notice" includes constructive notice;

(xviii) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court;

(xix) "Possession" includes receipt of rents and profits or the right to receive the same, if any; and "income" includes rents and profits;

15 Geo. 5, c. 20, s. 205.

(xx) "Property" includes any thing in action, and any interest in real or personal property;

(xxi) "Purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee (*i*) or other person who for valuable consideration acquires an interest in property except that in Part I. of this Act and elsewhere where so expressly provided "purchaser" only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal estate includes a chargee by way of legal mortgage (*d*); and where the context so requires "purchaser" includes an intending purchaser; "purchase" has a meaning corresponding with that of "purchaser"; and "valuable consideration" includes marriage but does not include a nominal consideration in money;

(xxii) "Registered land" has the same meaning as in the Land Registration Act, 1925 (*k*), and "Land Registrar" means the Chief Land Registrar under that Act;

(xxiii) "Rent" includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land, but does not include mortgage interest; "rentcharge" includes a fee farm rent; "fine" includes a premium or foregift and any payment, consideration, or benefit in the nature of a fine, premium or foregift (*l*); "lessor" includes an underlessor and a person deriving title under a lessor or underlessor; and "lessee" includes an underlessee and a person deriving title under a lessee or underlessee, and "lease" includes an underlease or other tenancy;

(xxiv) "Sale" includes an extinguishment of manorial incidents (*m*), but in other respects means a sale properly so called;

(xxv) "Securities" include stocks, funds and shares (*n*);

(xxvi) "Tenant for life," "statutory owner," "settled land," "settlement," "vesting deed," "subsidiary vesting deed," "vesting order," "vesting instrument," "trust instrument," "capital money," and "trustees of the settlement" have the same meanings as in the Settled Land Act, 1925 (*o*);

15 Geo. 5, c. 20, s. 205.

(xxvii) "Term of years absolute" means a term of years (taking effect either in possession or in reversion whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest); but does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created after the commencement of this Act, a term of years which is not expressed to take effect in possession within twenty-one years after the creation thereof where required by this Act to take effect within that period; and in this definition the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year;

(xxviii) "Trust Corporation" (*p*);

(xxix) "Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion;

(xxx) "United Kingdom" means Great Britain and Northern Ireland;

(xxxi) "Will" includes codicil.

(2) Where an equitable interest in or power over property arises by statute or operation of law, references to the creation of an interest or power include references to any interest or power so arising.

(3) References to registration under the Land Charges Act, 1925, apply to any registration made under any other statute which is by the Land Charges Act, 1925, to have effect as if the registration had been made under that Act (*q*).

(*a*) This was held under C. A. 1881 (*Horsey Estate* v. *Steiger*, [1899] 2 Q. B. 79).

(*b*) See Administration of Estates Act, 1925, s. 45, *antc.*

(*c*) See sect. 1, sub-sects. 1 and 2 of the present Act, *ante.*

(*d*) See sect. 87, *ante.*

15 Geo. 5, c. 20, s. 205.

(*e*) See sect. 1, sub-sects. 7 and 8, *ante*.

(*f*) A quasi-committee of a person mentioned in Lunacy Act, 1890, s. 116 (1).

(*g*) *E.g.*, the lien of a company on the shares of a shareholder (*Everitt* v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506).

(*h*) *E.g.*, a second mortgagee (*Teevan* v. *Smith*, 20 Ch. D. 730).

(*i*) *E.g.*, an equitable mortgagee (*Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 197).

(*k*) See sect. 3 (xxiv) of that Act, *post*.

(*l*) See sect. 144 and note, *ante*.

(*m*) See L. P. Act, 1922, s. 138.

(*n*) As to the primary and secondary meaning of "securities," see *Re Raynor, R.* v. *R.*, [1904] 1 Ch. 177; *Re Gent and Eason*, [1905] 1 Ch. 386; *Re Hutchinson, Crispin* v. *Hadden*, 88 L. J. Ch. 352.

(*o*) See sect. 117, sub-sect. 1 of that Act, *post*.

(*p*) Under sect. 205, sub-sect. 1 (xxviii), "trust corporation" meant the Public Trustee or a corporation appointed by the Court in any particular case to be a trustee or entitled by rules made under the Public Trustee Act, 1906, to act as custodian trustee, *i.e.*, any incorporated banking or insurance or guarantee or trust company or other body corporate for the time being empowered (by the Act of Parliament, charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers) to undertake trusts (see Public Trustee Rules, 1912, r. 30). By the Public Trustee (Custodian Trustee) Rules, 1925, a new rule was substituted for rule 30. But by sect. 3 of the L. P. (Amendment) Act, 1926 (as to which see p. 594, *ante*), the following provision was made:—

Meaning of trust corporation.

"3.—(1) For the purposes of the Law of Property Act, 1925, the Settled Land Act, 1925, the Trustee Act, 1925, the Administration of Estates Act, 1925, and the Supreme Court of Judicature (Consolidation) Act, 1925, the expression 'trust corporation' includes the Treasury Solicitor, the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor, and, in relation to the property of a bankrupt and property subject to a deed of arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom or any part thereof which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation.

"(2) For the purposes of this provision the expression 'Treasury Solicitor' means the solicitor for the affairs of His Majesty's Treasury, and includes the solicitor for the affairs of the Duchy of Lancaster."

The "United Kingdom" means Great Britain and Northern Ireland (section 205, sub-sect. 1 (xxx), *supra*).

(*q*) See sect. 24 of that Act. The interpretation section of C. A. 1881, was as follows:—

Interpretation of property, land, &c.

"2. In this Act—

"(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property,

real or personal, and any debt, and any thing in action, and any other right or interest: 15 Geo. 5, c. 20, s. 205.

"(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land: in C. A. 1881.

"(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

"(iv.) Manor includes lordship, and reputed manor or lordship:

"(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

"(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

"(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

"(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

"(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

"(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

"(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

"(xii.) Will includes codicil:

"(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

"(xiv.) Securities include stocks, funds, and shares:

"(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

"(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include

15 Geo. 5, c. 20, s. 205.

any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

"(xvii.) Person includes a corporation:

"(xviii.) Her Majesty's High Court '*of Justice*' is referred to as the court."

Forms of instruments and examples of abstracts.

206.—(1) Instruments in the form of, and using the expressions in the forms given in the Fifth Schedule to this Act, or in the like form or using expressions to the like effect, shall, in regard to form and expression be sufficient.

(2) Examples of abstracts of title framed in accordance with the enactments which will take effect at the commencement of this Act are contained in the Sixth Schedule to this Act.

Replaces C A. 1881, s. 57. Cf. sect. 182, *ante*.

Repeals as respects England and Wales.

52 & 53 Vict. c. 63.

207. The Acts mentioned in the Seventh Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule:

Provided that, without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889:—

(a) Nothing in this repeal shall affect the validity or legality of any dealing in property or other transaction completed before the commencement of this Act, or any title or right acquired or appointment made before such commencement, but, subject as aforesaid, this Act shall, except where otherwise expressly provided, apply to and in respect of instruments whether made or coming into operation before or after such commencement:

(b) Nothing in this repeal shall affect any rules, orders, or other instruments made under any enactment so repealed, but all such rules, orders and instruments shall continue in force as if made under the corresponding enactment in this Act:

(c) References in any document to any enactment repealed by this Act shall be construed as references to this Act or to the corresponding enactment in this Act.

Application to the Crown.

208.—(1) Nothing in this Act shall be construed as rendering any property of the Crown subject to distress, or liable to be taken or disposed of by means of any distress.

(2) This Act shall not in any manner (save as otherwise expressly provided and except so far as it relates to undivided shares, joint ownership, leases for lives or leases for years terminable with life or marriage) affect or alter the descent, devolution or tenure or the nature of the estates

and interests of or in any land for the time being vested in His Majesty either in right of the Crown or of the Duchy of Lancaster or of or in any land for the time being belonging to the Duchy of Cornwall and held in right or in respect of the said Duchy, but so nevertheless that, after the commencement of this Act, no estates, interests or charges in or over any such lands as aforesaid shall be conveyed or created, except such estates, interests or charges as are capable under this Act of subsisting or of being conveyed or created. 15 Geo. 5, c. 20, s. 208.

See sect. 1, *ante*.

(3) Subject as aforesaid the provisions of this Act bind the Crown.

209.—(1) This Act may be cited as the Law of Property Act, 1925. Short title, commencement, extent.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only.

The Conv. Acts, 1881, 1882, 1892, and 1911 extended to Ireland (see C. A. 1881, s. 72).

SCHEDULES.

FIRST SCHEDULE. Section 39.

Transitional Provisions.

Part I.

Conversion of Certain existing Legal Estates into Equitable Interests.

All estates, interests and charges in or over land, including fees determinable whether by limitation or condition, which immediately before the commencement of this Act were estates, interests or charges, subsisting at law, or capable of taking effect as such, but which by virtue of Part I. of this Act are not capable of taking effect as legal estates, shall as from the commencement of this Act be converted into equitable interests, and shall not fail by reason of being so converted into equitable interests either in the land or in the proceeds of sale thereof, nor shall the priority of any such estate, charge or interest over other equitable interests be affected.

15 Geo. 5, c. 20, Sch. 1.

Part II.

Vesting of Legal Estates.

1. Where the purposes of a term of years, created or limited out of leasehold land, are satisfied at the commencement of this Act, that term shall merge in the reversion expectant thereon and shall cease accordingly; but where the term was vested in the owner of the reversion, the merger and cesser shall take effect without prejudice to any protection which would have been afforded to the owner for the time being of that reversion had the term remained subsisting.

Where the purposes are satisfied only as respects part of the land comprised in a term, this provision has effect as if a separate term had been created in regard to that part of the land.

See sect. 5, *ante*.

2. Where immediately after the commencement of this Act any owner of a legal estate is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any other legal estate in the same land to be surrendered, released or conveyed to him so as to merge or be extinguished, the last-mentioned estate shall by virtue of this Part of this Schedule be extinguished, but without prejudice to any protection which would have been afforded to him had that estate remained subsisting.

3. Where immediately after the commencement of this Act any person is entitled, subject or not to the payment of the costs of tracing the title and of conveyance, to require any legal estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him, such legal estate shall, by virtue of this Part of this Schedule, vest in manner hereinafter provided. The divesting of a legal estate by virtue of this paragraph shall not, where the person from whom the estate is so divested was a trustee, operate to prevent the legal estate being conveyed, or a legal estate being created, by him in favour of a purchaser for money or money's worth, if the purchaser has no notice of the trust and if the documents of title relating to the estate divested are produced by the trustee or by persons deriving title under him.

This paragraph shall (without prejudice to any claim, in respect of fines, fees, and other customary payments) apply to a person who, under a surrender or any disposition having the effect of a surrender, or under a covenant to surrender or otherwise, was, immediately before the com-

mencement of this Act, entitled to require a legal customary estate of inheritance to be vested in him, or who, immediately after such commencement becomes entitled to enfranchised land. 15 Geo. 5, c. 20, Sch. 1.

The first portion of this paragraph from "The divesting of a legal estate" to "deriving title under him," was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

4. Any person who, immediately after the commencement of this Act, is entitled to an equitable interest capable of subsisting as a legal estate which has priority over any legal estate in the same land, shall be deemed to be entitled for the foregoing purposes to require a legal estate to be vested in him for an interest of a like nature not exceeding in extent or duration the equitable interest:

Provided that this paragraph shall not—

(a) apply where the equitable interest is capable of being over-reached by virtue of a subsisting trust for sale or a settlement;

(b) operate to prevent such person from acquiring any other legal estate under this Part of this Schedule to which he may be entitled.

5. For the purposes of this Part of this Schedule, a tenant for life, statutory owner or personal representative, shall be deemed to be entitled to require to be vested in him any legal estate in settled land (whether or not vested in the Crown) which he is, by the Settled Land Act, 1925. given power to convey.

6. Under the provisions of this Part of this Schedule, the legal estate affected (namely, any estate which a person is entitled to require to be vested in him as aforesaid) shall vest as follows:—

(a) Where at the commencement of this Act land is subject to a mortgage (not being an equitable charge unsecured by any estate), the legal estate affected shall vest in accordance with the provisions relating to mortgages contained in this Schedule;

(b) Where the land is at the commencement or by virtue of this Act or any Act coming into operation at the same time subject or is by virtue of any statute made subject to a trust for sale, the legal estate affected shall vest in the trustees for sale (including personal representatives holding land on trust for sale) but subject to any mortgage term subsisting or created by this Act;

(c) Where at the commencement of this Act or by virtue of any statute coming into operation at the same time the land is settled land, the legal estate

15 Geo. 5, c. 20, Sch. 1.

affected shall vest in the tenant for life or statutory owner entitled under the Settled Land Act, 1925, to require a vesting deed to be executed in his favour, or in the personal representative, if any, in whom the land may be vested or the Public Trustee, as the case may require but subject to any mortgage term subsisting or created by this Act;

(d) In any case to which the foregoing sub-paragraphs do not apply the legal estate affected shall vest in the person of full age who, immediately after the commencement of this Act, is entitled (subject or not to the payment of costs and any customary payments) to require the legal estate to be vested in him, but subject to any mortgage term subsisting or created by this Act.

See as to clause (c), S. L. Act, 1925, ss. 4 and 7, and Sched. 2, *post*.

7. Nothing in this Part of this Schedule shall operate—

(a) To vest in a mortgagee of a term of years absolute any nominal leasehold reversion which is held in trust for him subject to redemption; or

(b) To vest in a mortgagee any legal estate except a term of years absolute; or

(c) To vest in a person entitled to a leasehold interest, as respects such interest, any legal estate except a term of years absolute; or

(d) To vest in a person entitled to a rentcharge (either perpetual or held for a term of years absolute) as respects such rentcharge, any legal estate except a legal estate in the rentcharge; or

(e) To vest in a person entitled to an easement, right or privilege with reference thereto, any legal estate except a legal estate in the easement, right or privilege; or

(f) To vest any legal estate in a person for an undivided share; or

(g) To vest any legal estate in an infant; or

(h) To affect prejudicially the priority of any mortgage or other incumbrance or interest subsisting at the commencement of this Act; or

(i) To render invalid any limitation or trust which would have been capable of taking effect as an equitable limitation or trust; or

(j) To vest in a purchaser or his personal representatives any legal estate which he has contracted to acquire and in regard to which a contract, including an agreement to create a legal mort-

gage, is pending at the commencement of this Act, although the consideration may have been paid or satisfied and the title accepted, or to render unnecessary the conveyance of such estate; or

(k) To vest in the managing trustees or committee of management of a charity any legal estate vested in the Official Trustee of Charity Lands; or

(l) To vest in any person any legal estate which failed to pass to him by reason of his omission to be registered as proprietor under the Land Transfer Acts, 1875 and 1897, until brought into operation by virtue of the Land Registration Act, 1925; or

(m) To vest in any person any legal estate affected by any rent covenants or conditions if, before any proceedings are commenced in respect of the rent covenants or conditions, and before any conveyance of the legal estate or dealing therewith inter vivos is effected, he or his personal representatives disclaim it in writing signed by him or them.

Clause (m) was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

8. Any legal estate acquired by virtue of this Part of this Schedule shall be held upon the trusts and subject to the powers, provisions, rents, covenants, conditions, rights of redemption (as respects terms of years absolute) and other rights, burdens and obligations, if any, upon or subject to which the estate acquired ought to be held.

9. No stamp duty shall become payable by reason only of any vesting surrender or release effected by this Schedule.

Part III.

Provisions as to Legal Estate vested in Infant.

1. Where immediately before the commencement of this Act a legal estate in land is vested in one or more infants beneficially, or where immediately after the commencement of this Act a legal estate in land would by virtue of this Act have become vested in one or more infants beneficially if he or they had been of full age, the legal estate shall vest in the manner provided by the Settled Land Act, 1925.

See S. L. Act, Sched. 2.

15 Geo. 5, c. 20, Sch. 1.

2. Where immediately before the commencement of this Act a legal estate in land is vested in an infant jointly with one or more other persons of full age beneficially, the legal estate shall by virtue of this Act vest in that other person or those other persons on the statutory trusts, but not so as to sever any joint tenancy in the net proceeds of sale or in the rents and profits until sale:

Provided that, if by virtue of this paragraph the legal estate becomes vested in one person as trustee, then, if no other person is able and willing to do so, the parents or parent testamentary or other guardian of the infant, if respectively able and willing to act, (in the order named) may, and at the request of any person interested shall (subject to the costs being provided for) by writing appoint an additional trustee and thereupon by virtue of this Act the legal estate shall vest in the additional trustee and existing trustee as joint tenants.

3. Where, immediately before the commencement of this Act, a legal estate in land is vested solely in an infant as a personal representative, or a trustee of a settlement, or on trust for sale or on any other trust, or by way of mortgage, or where immediately after the commencement of this Act a legal estate in land would by virtue of any provision of this Act or otherwise have been so vested if the infant were of full age, the legal estate and the mortgage debt (if any) and interest thereon shall, by virtue of this Act, vest in the Public Trustee, pending the appointment of trustees as hereinafter provided—

(a) as to the land, upon the trusts, and subject to the equities affecting the same (but in the case of a mortgage estate for a term of years absolute in accordance with this Act); and

(b) as to the mortgage debt and interest, upon such trusts as may be requisite for giving effect to the rights (if any) of the infant or other persons beneficially interested therein:

Provided that—

(i) The Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner, unless and until requested in writing to act by or on behalf of the persons interested in the land or the income thereof, or in the mortgage debt or interest thereon (as the case may be), which request may be made on behalf of the infant by his parents or parent, or testamentary or other guardian (in the order named), and those persons may, in the order aforesaid (if no other person is able and willing to do so) appoint new trustees in the place of

the Public Trustee, and thereupon by virtue of this Act the land or term and mortgage money shall vest in the trustees so appointed upon the trusts and subject to the equities aforesaid: Provided that the Public Trustee may, before he accepts the trust, but subject to the payment of his costs, convey to a person of full age who becomes entitled;

(ii) After the Public Trustee has been so requested to act, and has accepted the trust, no trustee shall (except by an order of the court) be appointed in his place without his consent;

(iii) Any person interested in the land or the income thereof, or in the mortgage debt or in the interest thereon (as the case may be), may, at any time during the minority, apply to the court for the appointment of trustees of the trust, and the court may make such order as it thinks fit, and if thereby new trustees are appointed the legal estate (but in the case of a mortgage estate only for a term of years absolute as aforesaid) and the mortgage debt (if any) and interest shall, by virtue of this Act, vest in the trustees as joint tenants upon the trusts and subject to the equities aforesaid;

(iv) Neither a purchaser of the land nor a transferee for money or money's worth of the mortgage shall be concerned in any way with the trusts affecting the legal estate or the mortgage debt and interest thereon;

(v) The vesting in the Public Trustee of a legal estate or a mortgage debt by virtue of this Part of this Schedule shall not affect any directions previously given as to the payment of income or of interest on any mortgage money, but such instructions may, until he accepts the trust, continue to be acted on as if no such vesting had been effected.

4. Where, immediately before the commencement of this Act, a legal estate in land is vested in two or more persons jointly as personal representatives, trustees, or mortgagees, and anyone of them is an infant, or where immediately after the commencement of this Act a legal estate in land would, by virtue of this Act, or otherwise have been so vested if the infant were of full age, the legal estate in the land with the mortgage debt (if any) and the interest thereon shall, by virtue of this Act, vest in the other person or persons of full age—

(a) as to the legal estate, upon the trusts and subject

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to the equities affecting the same (but in the case of a mortgage estate only for a term of years absolute as aforesaid); and

(b) as to the mortgage debt and interest, upon such trusts as may be requisite for giving effect to the rights (if any) of the infant or other persons beneficially interested therein;

but neither a purchaser of the land nor a transferee for money or money's worth of the mortgage shall be concerned in any way with the trusts affecting the legal estate or the mortgage debt and interest thereon:

Provided that, if, by virtue of this paragraph, the legal estate and mortgage debt, if any, become vested in a sole trustee, then, if no other person is able and willing to do so, the parents or parent, testamentary or other guardian of the infant (in the order named) may, and at the request of any person interested shall, (subject to the costs being provided for) by writing appoint a new trustee in place of the infant, and thereupon by virtue of this Act the legal estate and mortgage money shall vest in the new and continuing trustees upon the trusts and subject to the equities aforesaid.

5. This Part of this Schedule does not affect the estate or powers of an administrator durante minore ætate, nor, where there is a tenant for life or statutory owner of settled land, operate to vest the legal estate therein in the Public Trustee.

Part IV.

Provisions subjecting Land held in Undivided Shares to a Trust for Sale.

By sect. 7 of L. P. (Amdt.) Act, 1926 (see p. 595, *ante*), the following alterations were made in this Part: In paragraph 1 (3) the words from "mortgage" to "undivided shares" were substituted for "term of years absolute." In paragraph 1 (4) (iii) the words from "thereupon" to "vest" were substituted for "vest the land." In paragraph 1 (11) "one-half or upwards" was substituted for "more than one-half." The words "within" to "Act" at the end of paragraph 1 (10), the words from "a legal" to "entirety" in paragraph 1 (12), and the whole of paragraph 4, were added.

1. Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:—

(1) If the entirety of the land is vested in trustees or personal representatives (whether subject or not to incumbrances affecting the entirety or an undivided

share) in trust for persons entitled in undivided shares, then—

(a) if the land is subject to incumbrances affecting undivided shares or to incumbrances affecting the entirety which under this Act or otherwise are not secured by legal terms of years absolute, the entirety of the land shall vest free from such incumbrances in such trustees or personal representatives and be held by them upon the statutory trusts; and

(b) in any other case, the land shall be held by such trustees or personal representatives upon the statutory trusts;

subject in the case of personal representatives, to their rights and powers for the purposes of administration.

For the "statutory trusts," see sect. 35, *ante.*

(2) If the entirety of the land (not being settled land) is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but subject or not to incumbrances affecting the entirety, it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts.

(3) If the entirety of the land is settled land (whether subject or not to incumbrances affecting the entirety or an undivided share) held under one and the same settlement, it shall, by virtue of this Act, vest, free from incumbrances affecting undivided shares, and from incumbrances affecting the entirety, which under this Act or otherwise are not secured by a legal mortgage, and free from any interests, powers, and charges subsisting under the settlement, which have priority to the interests of the persons entitled to the undivided shares, in the trustees (if any) of the settlement as joint tenants upon the statutory trusts.

Provided that if there are no such trustees, then—

(i) pending their appointment, the land shall, by virtue of this Act, vest (free as aforesaid) in the Public Trustee upon the statutory trusts;

(ii) the Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner, unless and until

15 Geo. 5, c. 20, Sch. 1.

requested in writing to act by or on behalf of persons interested in more than an undivided half of the land or the income thereof;

(iii) after the Public Trustee has been so requested to act, and has accepted the trust, no trustee shall (except by an order of the court) be appointed in the place of the Public Trustee without his consent;

(iv) if, before the Public Trustee has accepted the trust, trustees of the settlement are appointed, the land shall, by virtue of this Act, vest (free as aforesaid) in them as joint tenants upon the statutory trusts;

(v) if, before the Public Trustee has accepted the trust, the persons having power to appoint new trustees are unable or unwilling to make an appointment, or if the tenant for life having power to apply to the court for the appointment of trustees of the settlement neglects to make the application for at least three months after being requested by any person interested in writing so to do, or if the tenants for life of the undivided shares are unable to agree, any person interested under the settlement may apply to the court for the appointment of such trustees.

(4) In any case to which the foregoing provisions of this Part of this Schedule do not apply, the entirety of the land shall vest (free as aforesaid) in the Public Trustee upon the statutory trusts:

Provided that—

(i) The Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner, unless and until requested in writing to act by or on behalf of the persons interested in more than an undivided half of the land or the income thereof;

(ii) After the Public Trustee had been so requested to act, and has accepted the trust, no trustee shall (except by an order of the court) be appointed in the place of the Public Trustee without his consent;

(iii) Subject as aforesaid, any persons interested in more than an undivided half of the land or the income thereof may appoint new trustees in the place of the Public Trustee with the consent of any incumbrancers of undivided shares (but so that a purchaser shall not be concerned to see whether any such consent has

been given) and thereupon the land shall by virtue of this Act vest in the persons so appointed (free as aforesaid) upon the statutory trusts; or such persons may (without such consent as aforesaid), at any time, whether or not the Public Trustee has accepted the trust, apply to the court for the appointment of trustees of the land, and the court may make such order as it thinks fit, and if thereby trustees of the land are appointed, the same shall by virtue of this Act, vest (free as aforesaid) in the trustees as joint tenants upon the statutory trusts;

(iv) If the persons interested in more than an undivided half of the land or the income thereof do not either request the Public Trustee to act, or (whether he refuses to act or has not been requested to act) apply to the court for the appointment of trustees in his place, within three months from the time when they have been requested in writing by any person interested so to do, then and in any such case, any person interested may apply to the court for the appointment of trustees in the place of the Public Trustee, and the court may make such order as it thinks fit, and if thereby trustees of the land are appointed the same shall by virtue of this Act, vest (free as aforesaid) in the trustees upon the statutory trusts.

(5) The vesting in the Public Trustee of land by virtue of this Part of this Schedule shall not affect any directions previously given as to the payment of income or of interest on any mortgage money, but such instructions may, until he accepts the trust, continue to be acted on as if no such vesting had been effected.

(6) The court or the Public Trustee may act on evidence given by affidavit or by statutory declaration as respects the undivided shares without investigating the title to the land.

(7) Where all the undivided shares in the land are vested in the same mortgagees for securing the same mortgage money and the rights of redemption affecting the land are the same as might have been subsisting if the entirety had been mortgaged by an owner before the undivided shares were created, the land shall, by virtue of this Act, vest in the mortgagees as joint tenants for a legal term of years absolute (in accordance with this Act) subject to cesser on redemption by the trustees for sale in whom the

15 Geo. 5, c. 20, Sch. 1.

right of redemption is vested by this Act, and for the purposes of this Part of this Schedule the mortgage shall be deemed an incumbrance affecting the entirety.

(8) This Part of this Schedule does not (except where otherwise expressly provided) prejudice incumbrancers whose incumbrances affect the entirety of the land at the commencement of this Act, but (if the nature of the incumbrance admits) the land shall vest in them for legal terms of years absolute in accordance with this Act but not so as to affect subsisting priorities.

(9) The trust for sale and powers of management vested in persons who hold the entirety of the land on trust for sale shall, save as hereinafter mentioned, not be exercisable without the consent of any incumbrancer, being of full age, affected whose incumbrance is divested by this Part of this Schedule, but a purchaser shall not be concerned to see or inquire whether any such consent has been given, nor, where the incumbrancer is not in possession, shall any such consent be required if independently of this Part of this Schedule or any enactment replaced thereby the transaction would have been binding on him, had the same been effected by the mortgagor.

(10) This part of this Schedule does not apply to land in respect of which a subsisting contract for sale (whether made under an order in a partition action or by or on behalf of all the tenants in common or coparceners) is in force at the commencement of this Act if the contract is completed in due course (in which case title may be made in like manner as if this Act, and any enactment thereby replaced, had not been passed), nor to the land in respect of which a partition action is pending at such commencement if an order for a partition or sale is subsequently made in such action within eighteen months from the commencement of this Act.

(11) The repeal of the enactments relating to partition shall operate without prejudice to any proceedings thereunder commenced before the commencement of this Act, and to the jurisdiction of the court to make any orders in reference thereto, and subject to the following provisions, namely:—

(i) In any such proceedings, and at any stage thereof, any person or persons interested individually or collectively in one half or upwards of the land to which the proceedings

relate, may apply to the court for an order staying such proceedings;

(ii) The court may upon such application make an order staying the proceedings as regards the whole or any part, not being an undivided share, of the land;

(iii) As from the date of such order the said enactments shall cease to apply to the land affected by the order and the provisions of this Part of this Schedule shall apply thereto;

(iv) The court may by such order appoint trustees of the land and the same shall by virtue of this Act vest (free as aforesaid) in the trustees as joint tenants upon the statutory trusts;

(v) The court may order that the costs of the proceedings and of the application shall be raised by the trustees, by legal mortgage of the land or any part thereof, and paid either wholly or partially into court or to the trustees;

(vi) The court may act on such evidence as appears to be sufficient, without investigating the title to the land.

(12) In this Part of this Schedule "incumbrance" does not include a legal rentcharge affecting the entirety, land tax, tithe rentcharge, or any similar charge on the land not created by an instrument.

2. Where undivided shares in land, created before the commencement of this Act, fall into possession after such commencement, and the land is not settled land when the shares fall into possession, the personal representatives (subject to their rights and powers for purposes of administration) or other estate owners in whom the entirety of the land is vested shall, by an assent or a conveyance, give effect to the foregoing provisions of this Part of this Schedule in like manner as if the shares had fallen into possession immediately before the commencement of this Act, and in the meantime the land shall be held on the statutory trusts.

3. This Part of this Schedule shall not save as hereinafter mentioned apply to party structures and open spaces within the meaning of the next succeeding Part of this Schedule.

4. Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and, after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and

15 Geo. 5, c. 20, Sch. 1.

the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act.

Part V.

Provisions as to Party Structures and Open Spaces.

1. Where, immediately before the commencement of this Act, a party wall or other party structure is held in undivided shares, the ownership thereof shall be deemed to be severed vertically as between the respective owners, and the owner of each part shall have such rights to support and of user over the rest of the structure as may be requisite for conferring rights corresponding to those subsisting at the commencement of this Act.

Cf. sect. 38, *ante*.

2. Where, immediately before the commencement of this Act, an open space of land (with or without any building used in common for the purposes of any adjoining land) is held in undivided shares, in right whereof each owner has rights of access and user over the open space, the ownership thereof shall vest in the Public Trustee on the statutory trusts which shall be executed only with the leave of the court, and, subject to any order of the court to the contrary, each person who would have been a tenant in common shall, until the open space is conveyed to a purchaser, have rights of access and user over the open space corresponding to those which would have subsisted if the tenancy in common had remained subsisting.

3. Any person interested may apply to the court for an order declaring the rights and interests under this Part of this Schedule, of the persons interested in any such party structure or open space, or generally may apply in relation to the provisions of this Part of this Schedule, and the court may make such order as it thinks fit.

Part VI.

Conversion of Tenancies by entireties into Joint Tenancies.

Every tenancy by entireties existing immediately before the commencement of this Act shall, but without prejudice to any beneficial interest, as from such commencement be converted into a joint tenancy.

Part VII.

Conversion of existing Freehold Mortgages into Mortgages by Demise.

1. All land, which immediately before the commencement of this Act, was vested in a first or only mortgagee for an estate in fee simple in possession, whether legal or equitable, shall, from and after the commencement of this Act, vest in the first or only mortgagee for a term of three thousand years from such commencement, without impeachment of waste, but subject to a provision for cesser corresponding to the right of redemption which, at such commencement, was subsisting with respect to the fee simple.

2. All land, which immediately before the commencement of this Act, was vested in a second or subsequent mortgagee for an estate in fee simple in possession, whether legal or equitable, shall, from and after the commencement of this Act, vest in the second or subsequent mortgagee for a term one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of such second or subsequent mortgagee, without impeachment of waste, but subject to the term or terms vested in such first or other prior mortgagee and subject to a provision for cesser corresponding to the right of redemption which, at such commencement, was subsisting with respect to the fee simple.

3. The estate in fee simple which, immediately before the commencement of this Act, was vested in any such mortgagee shall, from and after such commencement, vest in the mortgagor or tenant for life, statutory owner, trustee for sale, personal representative, or other person of full age who, if all money owing on the security of the mortgage and all other mortgages or charges (if any) had been discharged at the commencement of this Act, would have been entitled to have the fee simple conveyed to him, but subject to any mortgage term created by this Part of this Schedule or otherwise and to the money secured by any such mortgage or charge.

4. If a sub-mortgage by conveyance of the fee simple is subsisting immediately before the commencement of this Act, the principal mortgagee shall take the principal term created by paragraphs 1 or 2 of this Part of this Schedule (as the case may require) and the sub-mortgagee shall take a derivative term less by one day than the term so created, without impeachment of waste, subject to a provision for cesser corresponding to the right of redemption subsisting under the sub-mortgage.

5. This Part of this Schedule applies to land enfran-

15 Geo. 5, c. 20, Sch. 1.

chised by statute as well as to land which was freehold before the commencement of this Act, and (save where expressly excepted) whether or not the land is registered under the Land Registration Act, 1925, or the mortgage is made by way of trust for sale or otherwise.

6. A mortgage affecting a legal estate made before the commencement of this Act which is not protected, either by a deposit of documents of title relating to the legal estate or by registration as a land charge, shall not, as against a purchaser in good faith without notice thereof, obtain any benefit by reason of being converted into a legal mortgage by this Schedule, but shall, in favour of such purchaser, be deemed to remain an equitable interest.

This paragraph does not apply to mortgages or charges registered or protected under the Land Registration Act, 1925, or to mortgages or charges registered in a local deeds register.

See Land Registration Act, 1925, s. 135, *post*.

7. Nothing in this Part of this Schedule shall affect priorities or the right of any mortgagee to retain possession of documents, nor affect his title to or rights over any fixtures or chattels personal comprised in the mortgage.

8. This Part of this Schedule does not apply unless a right of redemption is subsisting immediately before the commencement of this Act.

Part VIII.

Conversion of existing Leasehold Mortgages into Mortgages by subdemise.

1. All leasehold land, which immediately before the commencement of this Act, was vested in a first or only mortgagee by way of assignment of a term of years absolute shall, from and after the commencement of this Act, vest in the first or only mortgagee for a term equal to the term assigned by the mortgage, less the last ten days thereof, but subject to a provision for cesser corresponding to the right of redemption which at such commencement was subsisting with respect to the term assigned.

2. All leasehold land, which immediately before the commencement of this Act, was vested in a second or subsequent mortgagee by way of assignment of a term of years absolute (whether legal or equitable) shall, from and after the commencement of this Act, vest in the second or subsequent mortgagee for a term one day longer than the term vested in the first or other mortgagee whose security ranks

immediately before that of such second or subsequent mortgagee if the length of the last-mentioned term permits, and in any case for a term less by one day at least than the term assigned by the mortgage, but subject to the term or terms vested in such first or other prior mortgagee, and subject to a provision for cesser corresponding to the right of redemption which, at the commencement of this Act, was subsisting with respect to the term assigned by the mortgage.

3. The term of years absolute which was assigned by any such mortgage shall, from and after the commencement of this Act, vest in the mortgagor or tenant for life, statutory owner, trustee for sale, personal representative, or other person of full age who, if all the money owing on the security of the mortgage and all other mortgages or charges, if any, had been discharged at the commencement of this Act, would have been entitled to have the term assigned or surrendered to him, but subject to any derivative mortgage term created by this Part of this Schedule or otherwise and to the money secured by any such mortgage or charge.

4. If a sub-mortgage by assignment of a term is subsisting immediately before the commencement of this Act, the principal mortgagee shall take the principal derivative term created by paragraphs 1 or 2 of this Part of this Schedule or the derivative term created by his mortgage (as the case may require), and the sub-mortgagee shall take a derivative term less by one day than the term so vested in the principal mortgagee, subject to a provision for cesser corresponding to the right of redemption subsisting under the sub-mortgage.

5. A mortgage affecting a legal estate made before the commencement of this Act which is not protected, either by a deposit of documents of title relating to the legal estate or by registration as a land charge shall not, as against a purchaser in good faith without notice thereof, obtain any benefit by reason of being converted into a legal mortgage by this Schedule, but shall, in favour of such purchaser, be deemed to remain an equitable interest.

This paragraph does not apply to mortgages or charges registered or protected under the Land Registration Act, 1925, or to mortgages or charges registered in a local deeds register.

See Land Registration Act, 1925, ss. 106 and 135, *post*.

6. This Part of this Schedule applies to perpetually renewable leaseholds, and to leaseholds for lives, which are by statute converted into long terms, with the following variations, namely:—

(a) The term to be taken by a first or only mortgagee

15 Geo. 5, c. 20, Sch. 1.

shall be ten days less than the term created by such statute:

(b) The term to be taken by a second or subsequent mortgagee shall be one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of the second or subsequent mortgagee, if the length of the last-mentioned term permits, and in any case for a term less by one day at least than the term created by such statute:

(c) The term created by such statute shall, from and after the commencement of this Act, vest in the mortgagor or tenant for life, statutory owner, trustee for sale, personal representative, or other person of full age, who if all the money owing on the security of the mortgage and all other mortgages or charges, if any, had been discharged at the commencement of this Act, would have been entitled to have the term assigned or surrendered to him, but subject to any derivative mortgage term created by this Part of this Schedule or otherwise and to the money secured by any such mortgage or charge.

7. This Part of this Schedule applies (save where expressly excepted) whether or not the leasehold land is registered under the Land Registration Act, 1925, or the mortgage is made by way of trust for sale or otherwise.

8. Nothing in this Part of this Schedule shall affect priorities or the right of any mortgagee to retain possession of documents, nor affect his title to or rights over any fixtures or chattels personal comprised in the mortgage, but this Part of this Schedule does not apply unless a right of redemption is subsisting at the commencement of this Act.

Sections 76 and 77.

SECOND SCHEDULE.

Implied Covenants.

Part I.

Covenant implied in a Conveyance for valuable Consideration, other than a Mortgage, by a Person who Conveys and is expressed to Convey as Beneficial Owner.

That, notwithstanding anything by the person who so conveys or any one through whom he derives title otherwise

than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made), through whom the person who so conveys derives title, otherwise than by purchase for value:

Right to convey.

Quit enjoyment.

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands, other than those subject to which the conveyance is expressly made, as, either before or after the date of the conveyance, have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value:

Freedom from incumbrance.

And further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and

Further assurance.

15 Geo. 5, c. 20, Sch. 2.

to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage.

Part II.

Further Covenant implied in a Conveyance of Leasehold Property for valuable Consideration, other than a Mortgage, by a Person who Conveys and is expressed to Convey as Beneficial Owner.

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage.

Part III.

Covenant implied in a Conveyance by way of Mortgage by a Person who Conveys and is expressed to Convey as Beneficial Owner.

Right to convey.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed:

And also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed

to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made):

15 Geo. 5, c. 20, Sch. 2.

Quiet enjoyment.

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made:

Freedom from incumbrance.

And further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

Further assurance.

The above covenant in the case of a charge shall have effect as if for references to "conveys," "conveyed" and "conveyance" there were substituted respectively references to "charges," "charged" and "charge."

Part IV.

Covenant implied in a Conveyance by way of Mortgage of Freehold Property subject to a rent or of Leasehold Property by a Person who Conveys and is expressed to Convey as Beneficial Owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and

Validity of lease.

15 Geo. 5, c. 20, Sch. 2.

is in full force, unforfeited, and unsurrendered and has in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

Payment of rent and performance of covenants.

And also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains owing on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them.

The above covenant in the case of a charge shall have effect as if for references to "conveys," "conveyed" and "conveyance" there were substituted respectively references to "charges," "charged" and "charge."

Part V.

Covenant implied in a Conveyance by way of Settlement, by a Person who Conveys and is expressed to Convey as Settlor.

For further assurance, limited.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, as by them or any of them shall be reasonably required, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made.

15 Geo. 5, c. 20, Sch. 2.

Part VI.

COVENANT IMPLIED IN ANY CONVEYANCE, BY EVERY PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS TRUSTEE OR MORTGAGEE, OR AS PERSONAL REPRESENTATIVE OF A DECEASED PERSON, OR AS COMMITTEE OF A LUNATIC OR AS A RECEIVER OF A DEFECTIVE OR UNDER AN ORDER OF THE COURT.

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

The foregoing covenant may be implied in an assent in like manner as in a conveyance by deed.

Part VII.

COVENANT IMPLIED IN A CONVEYANCE FOR VALUABLE CONSIDERATION, OTHER THAN A MORTGAGE, OF THE ENTIRETY OF LAND AFFECTED BY A RENTCHARGE.

Payment of rentcharge and performance of covenants.

That the grantees or the persons deriving title under them will at all times, from the date of the conveyance or other date therein stated, duly pay the said rentcharge and observe and perform all the covenants, agreements and conditions contained in the deed or other document creating the rentcharge, and thenceforth on the part of the owner of the land to be observed and performed:

Indemnity.

And also will at all times, from the date aforesaid, save harmless and keep indemnified the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said rentcharge or any part thereof, or any breach of any of the said covenants, agreements and conditions.

Part VIII.

COVENANTS IMPLIED IN A CONVEYANCE FOR VALUABLE CONSIDERATION, OTHER THAN A MORTGAGE, OF PART OF LAND AFFECTED BY A RENTCHARGE, SUBJECT TO A PART (NOT LEGALLY APPORTIONED) OF THAT RENTCHARGE.

Payment of apportioned rent and per-

(i) That the grantees, or the persons deriving title under them, will at all times, from the date of the conveyance or

15 Geo. 5, c. 20, Sch. 2.

formance of covenants.

other date therein stated, pay the apportioned rent and observe and perform all the covenants (other than the covenant to pay the entire rent) and conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land conveyed:

Indemnity.

And also will at all times, from the date aforesaid, save harmless and keep indemnified the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said apportioned rent, or any breach of any of the said covenants and conditions, so far as the same relate as aforesaid.

Payment of balance of rentcharge and performance of covenants.

(ii) That the conveying parties, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, pay the balance of the rentcharge (after deducting the apportioned rent aforesaid, and any other rents similarly apportioned in respect of land not retained), and observe and perform all the covenants, other than the covenant to pay the entire rent, and conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land not included in the conveyance and remaining vested in the covenantors:

Indemnity.

And also will at all times, from the date aforesaid, save harmless and keep indemnified the grantees and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the aforesaid balance of the rentcharge, or any breach of any of the said covenants and conditions so far as they relate as aforesaid.

Part IX.

Covenant in a Conveyance for valuable Consideration, other than a Mortgage, of the Entirety of the Land comprised in a Lease for the Residue of the Term or Interest created by the Lease.

Payment of rent and performance of covenants.

That the assignees, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, duly pay all rent becoming due under the lease creating the term or interest for which the land is conveyed, and observe and perform all the covenants, agreements and conditions therein contained and thenceforth on the part of the lessees to be observed and performed:

Indemnity.

And also will at all times, from the date aforesaid, save harmless and keep indemnified the conveying parties and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to

pay the said rent or any breach of any of the said covenants, agreements and conditions. 15 Geo. 5, c. 20, Sch. 2.

Part X.

Covenants implied in a Conveyance for Valuable Consideration, other than a Mortgage, of Part of the Land comprised in a Lease, for the Residue of the Term or Interest created by the Lease, subject to a Part (not legally apportioned) of that Rent.

(i) That the assignees, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, pay the apportioned rent and observe and perform all the covenants, other than the covenant to pay the entire rent, agreements and conditions contained in the lease creating the term or interest for which the land is conveyed, and thenceforth on the part of the lessees to be observed and performed, so far as the same relate to the land conveyed: Payment of apportioned rent and performance of covenants.

And also will at all times from the date aforesaid save harmless and keep indemnified, the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said apportioned rent or any breach of any of the said covenants, agreements and conditions so far as the same relate as aforesaid. Indemnity.

(ii) That the conveying parties, or the persons deriving title under them, will at all times, from the date of the conveyance, or other date therein stated, pay the balance of the rent (after deducting the apportioned rent aforesaid and any other rents similarly apportioned in respect of land not retained) and observe and perform all the covenants, other than the covenant to pay the entire rent, agreements and conditions contained in the lease and on the part of the lessees to be observed and performed so far as the same relate to the land demised (other than the land comprised in the conveyance) and remaining vested in the covenantors: Payment of balance of rent and performance of covenants.

And also will at all times, from the date aforesaid, save harmless and keep indemnified, the assignees and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the aforesaid balance of the rent or any breach of any of the said covenants, agreements and conditions so far as they relate as aforesaid. Indemnity.

The covenants contained in Parts I. to VI. of this Schedule repeat those in C. A. 1881, s. 7, with the addition of the italicised passages and of reference to receivers of defectives (see sect. 205, subsect. 1 (xiii), *ante*). The remaining covenants are new. As to

15 Geo. 5, c. 20, Sch. 2.

assents (Part VI.) see Administration of Estates Act, 1925, s. 36, *ante*, and Sched. 5, Forms 8 and 9, *post*. A previous assent to a bequest by personal representatives was held a breach of the implied covenant against incumbrances (*Wise* v. *Whitburn*, [1924] 1 Ch. 460).

It has been said that the covenants included by virtue of C. A. 1881, s. 7, are express, not implied, covenants (*L. & N. W. Ry. Co.* v. *Boulton*, 62 L. T. 398). The four covenants set out in Part I. are not separate covenants, but parts of one entire covenant controlled throughout by the opening words, "notwithstanding anything," &c. (*David* v. *Sabin*, [1893] 1 Ch. 531). A. granted a lease to B. for ninety-nine years, and B. afterwards granted sub-leases by way of mortgage. B. subsequently surrendered the term to A. without disclosing the sub-leases. Afterwards A. for value conveyed the fee simple "as beneficial owner" to B., who subsequently conveyed to C. In an action by C. against A. for breach of his implied covenants for right to convey quiet enjoyment and freedom from incumbrances, A. was held liable (*David* v. *Sabin*, [1893] 1 Ch. 523). Damages were granted for breach of a covenant implied by virtue of this section (*May* v. *Platt*, [1900] 1 Ch. 616; *Turner* v. *Moon*, [1901] 2 Ch. 825; *G. W. Ry.* v. *Fisher*, [1905] 1 Ch. 316). See also *Booth* v. *Thomas*, [1926] Ch. 397 (non-repair of culvert).

The committee of a lunatic may be authorised to convey "as beneficial owner" (*Re Ray*, [1896] 1 Ch. 468). It seems that where a tenant for life selling under the S. L. Acts conveys "as beneficial owner," this section applies (*ibid.* 474, 475).

The contribution to the expense of paving a new street, apportioned under sect. 77 of the Metropolitan Management Act, 1862, is not a charge on the land, and therefore not an incumbrance within this section (*Egg* v. *Blayney*, 21 Q. B. D. 107). As to paving expenses under the Public Health Act, 1875, see *Re Bettesworth and Richer*, 37 Ch. D. 535; *Hornsey Local Board* v. *Monarch, &c. Society*, 24 Q. B. D. 1; *Re Allen and Driscoll*, [1904] 2 Ch. 226. The words "beneficial owner" in a bill of sale introduce the covenants in clause C., and make the bill void under the Bills of Sale Act, 1882, s. 9 (*Ex p. Stanford, Re Barber*, 17 Q. B. D. 259).

See as to rectification of implied covenants, *Stait* v. *Fenner*, [1912] 2 Ch. 504.

Omission to prevent the acquiring of a title by adverse possession is a breach of the implied covenant for right to convey (*Eastwood* v. *Ashton*, [1915] A. C. 900).

Sections 114 and 115.

THIRD SCHEDULE.

Forms of Transfer and Discharge of Mortgages.

Form No. 1.

Form of Transfer of Mortgage.

This Transfer of Mortgage made the day of 19 , between *M.* of [&c.] of the one part and *T.* of [&c.] of the other part, supplemental to a Mortgage dated [&c.], and made between [&c.], and to a Further Charge dated

[&c.], and made between [&c.] affecting &c. (*here state short particulars of the mortgaged property*). WITNESSETH that in consideration of the sums of £ and £ (for interest) now paid by *T.* to *M.*, being the respective amounts of the mortgage money and interest owing in respect of the said mortgage and further charge (the receipt of which sums *M.* hereby acknowledges) *M.*, as mortgagee, hereby conveys and transfers to *T.* the benefit of the said mortgage and further charge.

In witness, &c.

FORM NO. 2.

FORM OF RECEIPT ON DISCHARGE OF A MORTGAGE.

I, *A.B.*, of [&c.] hereby acknowledge that I have this day of 19 , received the sum of £ representing the [aggregate] [balance remaining owing in respect of the] principal money secured by the within [above] written [annexed] mortgage [and by a further charge dated, &c., *or otherwise as required*] together with all interest and costs, the payment having been made by *C.D.* of [&c.] and *E.F.* of [&c.]

As witness, &c.

Note.—If the persons paying are not entitled to the equity of redemption state that they are paying the money out of a fund applicable to the discharge of the mortgage.

FOURTH SCHEDULE.

FORMS RELATING TO STATUTORY CHARGES OR MORTGAGES OF FREEHOLD OR LEASEHOLD LAND.

FORM NO. 1.

Section 117.

STATUTORY CHARGE BY WAY OF LEGAL MORTGAGE.

This Legal Charge made by way of Statutory Mortgage the day of 19 , between *A.* of [&c.] of the one part and *M.* of [&c.] of the other part Witnesseth that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt.

As Mortgagor and as Beneficial Owner hereby charges by way of legal mortgage All That [&c.] with the payment to *M.* on the day of 19 , of the principal sum of

15 Geo. 5, c. 20, Sch. 4.

£ as the mortgage money with interest thereon at the rate of per centum per annum.

In witness, &c.

Note.—Variations in this and the subsequent forms in this Schedule to be made, if required, for leasehold land or for giving effect to special arrangements. *M.* will be in the same position as if the Charge had been effected by a demise of freeholds or a subdemise of leaseholds.

Section 118.

Form No. 2.

Statutory Transfer, Mortgagor not Joining.

This Transfer of Mortgage made by way of statutory transfer the day of 19 , between *M.* of [&c.] of the one part and *T.* of [&c.] of the other part supplemental to a legal charge made by way of statutory mortgage dated [&c.] and made [&c.] Witnesseth that in consideration of the sum of £ now paid to *M.* by *T.* (being the aggregate amount of £ mortgage money and £ interest due in respect of the said legal charge of which sum *M.* hereby acknowledges the receipt) *M.* as Mortgagee hereby conveys and transfers to *T.* the benefit of the said legal charge.

In witness, &c.

Note.—This and the next two forms also apply to a transfer of a statutory mortgage made before the commencement of this Act, which will then be referred to as a mortgage instead of a legal charge.

Section 118.

Form No. 3.

Statutory Transfer, A Covenantor Joining.

This Transfer of Mortgage made by way of statutory transfer the day of 19 , between *A.* of [&c.] of the first part *B.* of [&c.] of the second part and *C.* of [&c.] of the third part Supplemental to a Legal Charge made by way of statutory mortgage dated [&c.] and made [&c.] Witnesseth that in consideration of the sum of £ now paid by *A.* to *C.* (being the mortgage money due in respect of the said Legal Charge no interest being now due or payable thereon of which sum *A.* hereby acknowledges the receipt)

A. as Mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said Legal Charge.

In witness, &c.

15 Geo. 5, c. 20, Sch. 4.

Sections 117 and 118.

Form No. 4.

Statutory Transfer and Mortgage Combined.

This Transfer and Legal Charge is made by way of statutory transfer and mortgage the day of 19 , between *A.* of [&c.] of the first part *B.* of [&c.] of the second part and *C.* of [&c.] of the third part Supplemental to a Legal Charge made by way of statutory mortgage dated [&c.] and made [&c.] Whereas a principal sum of £ only remains due in respect of the said Legal Charge as the mortgage money and no interest is now due thereon And Whereas *B.* is seised in fee simple of the land comprised in the said Legal Charge subject to that Charge.

Now this Deed Witnesseth as follows:—

1. In consideration of the sum of £ now paid to *A.* by *C.* (the receipt and payment of which sum *A.* & *B.* hereby respectively acknowledge)* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said Legal Charge.

2. For the consideration aforesaid *B.*† as beneficial owner hereby charges by way of legal mortgage All the premises comprised in the said Legal Charge with the payment to *C.* on the day of 19 of‡ the sum of £ as the mortgage money with interest thereon at the rate of per centum per annum In Witness &c. [or in the case of a further advance after "acknowledge" *at* * *insert* "and of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt" *also at* † *before* "as beneficial owner" *insert* "as mortgagor and" *as well as where B. is not the original mortgagor. And after* "of" *at* ‡ *insert* "the sums of £ and £ making together"].

Note.—Variations to be made, as required, in case of the deed being by indorsement, or in respect of any other thing.

Section 120.

Form No. 5.

Receipt on Discharge of Statutory Legal Charge or Mortgage.

I, *A.B.* of [&c.] hereby acknowledge that I have this day of 19 , received the sum of £ representing the [aggregate] [balance remaining owing in respect of the] mortgage money secured by the [annexed] within [above] written statutory legal charge [*or* statutory mortgage] [and by the further statutory charge dated &c. *or otherwise as required*] together with all interest and costs

15 Geo. 5, c. 20, Sch. 4.

the payment having been made by *C.D.* of [&c.] and *E.F.* of [&c.]

As witness &c.

Note.—If the persons paying are not entitled to the equity of redemption state that they are paying the money out of a fund applicable to the discharge of the statutory legal charge or mortgage.

FIFTH SCHEDULE.

Forms of Instruments.

Section 206.

Form No. 1.

Charge by way of Legal Mortgage.

This Legal Charge is made [&c.] between *A.* of [&c.] of the one part and *B.* of [&c.] of the other part.

[*Recite the title of A. to the freeholds or leaseholds in the Schedule and agreement for the loan by B.*]

Now in consideration of the sum of pounds now paid by *B.* to *A.* (the receipt &c.) this Deed witnesseth as follows:—

1. *A.* hereby covenants with *B.* to pay [*Add the requisite covenant to pay principal and interest.*]

2. *A.* as Beneficial Owner hereby charges by way of legal mortgage All and Singular the property mentioned in the Schedule hereto with the payment to *B.* of the principal money, interest, and other money hereby covenanted to be paid by *A.*

3. [*Add covenant to insure buildings and any other provisions desired.*]

In witness [&c.] [*Add Schedule*].

Note.—*B.* will be in the same position as if a mortgage had been effected by a demise of freeholds or a subdemise of leaseholds.

Form No. 2.

Further Charge by way of Legal Mortgage.

This Further Charge made [&c.] between [&c.] [*same parties as foregoing legal charge*] Supplemental to a Legal Charge (hereinafter called the Principal Deed) dated [&c.] and made between the same parties as are parties hereto and in the same order for securing the sum of £ and

interest at per centum per annum on [freehold] [leasehold] land at [&c.].

Witnesseth as follows:—

1. In consideration of the further sum of £ now paid to *A.* by *B.* [*add receipt and covenant to pay the further advance and interest*].

2. For the consideration aforesaid *A.* as Beneficial Owner hereby charges by way of legal mortgage the premises comprised in the Principal Deed with the payment to *B.* of the principal money and interest hereinbefore covenanted to be paid as well as the principal money, interest, and other money secured by the Principal Deed.

In witness [&c.].

Form No. 3.

Conveyance on Sale, Legal Chargees or Mortgagees concurring.

This Conveyance is made [&c.] between *A.* of [&c.] (hereinafter called the Vendor) of the first part *B.* of [&c.] and *C.* of [&c.] (hereinafter called the Mortgagees) of the second part and *D.* of [&c.] (hereinafter called the Purchaser) of the third part [*Recite the Charge by way of legal mortgage, the state of the debt, the agreement for sale and for the mortgagees to concur.*]

Now in the consideration of the sum of £ paid by the Purchaser by the direction of the Vendor to the Mortgagees (*the receipt &c.*) and of the sum of £ paid by the Purchaser to the Vendor (*the receipt &c.*) this Deed witnesseth as follows:—

1. The Vendor As Beneficial Owner hereby conveys and the Mortgagees As Mortgagees hereby [surrender and] release unto the Purchaser All That &c.

To Hold unto the Purchaser [in fee simple] discharged from all claims under the recited Legal Charge [Mortgage and to the intent that the term subsisting thereunder shall as respects the premises conveyed merge and be extinguished].

2. [*Add any necessary acknowledgments and undertakings with respect to documents not handed over which relate to the title and any other special provisions.*]

In witness &c.

Form No. 4.

Conveyance on Sale by Legal Chargees or Mortgagees.

This Conveyance is made [&c.] between *A.* of [&c.] and *B.* of [&c.] (hereinafter called the Vendors) of the one part and *C.* of [&c.] (hereinafter called the Purchaser) of the

15 Geo. 5, c. 20, Sch. 5.

other part [*Recite the Legal Charge or the Mortgage, with or without a deed converting the Mortgage into a legal charge and the agreement for sale.*]

Now in consideration of the sum of £ paid by the Purchaser to the Vendors (the receipt &c.) this Deed witnesseth as follows:—

1. The Vendors As Mortgagees in exercise of the power for this purpose conferred on them by the Law of Property Act, 1925, and of all other powers hereby convey unto the Purchaser All Those &c.

To Hold unto the Purchaser [in fee simple] discharged from all right of redemption and claims under the recited Legal Charge [Mortgage].

2. [*Add any necessary acknowledgments as to documents retained and any other special provisions.*]

In witness &c.

Form No. 5.

Conveyance by Personal Representatives of a Fee Simple reserving thereout a Term of Years absolute for giving Legal Effect to a Mortgage.

This Conveyance is made [&c.] between *James Cook* of [&c.] and *Harry Cook* of [&c.] of the first part, *L.* of [&c.] and *M.* of [&c.] of the second part, and *Thomas Wilson* of [&c.] of the third part.

Whereas on the first day of October 1927 Letters of Administration to the real and personal estate of *Henry Wilson*, late of [&c.], who died [&c.], were granted by the principal probate registry to *James Cook* and *Harry Cook*

And whereas *Henry Wilson* was at his death solely entitled to the hereditaments hereinafter conveyed for an estate in fee simple.

Now this Deed witnesseth that *James Cook* and *Harry Cook*, as Personal Representatives of the said *Henry Wilson* deceased, hereby convey unto the said *Thomas Wilson*

All that [&c.]

Reserving out of the premises nevertheless unto *L.* and *M.* a term of eight hundred years, without impeachment of waste, to commence from the date hereof but subject to cesser on redemption by *Thomas Wilson* under a Mortgage dated [&c.] and made between [&c.] on payment of the sum of five thousand pounds, and interest thereon at the rate of five pounds per centum per annum.

To hold the premises subject to the said term unto *Thomas Wilson* [in fee simple].

In witness [&c.]

Note.—The reservation will be valid at law, though the deed may not be executed by *Thomas Wilson*.

15 Geo. 5, c. 20, Sch. 5.

Form No. 6.

Conveyance on Sale reserving Minerals and Right to Work and a Perpetual Rentcharge.

This Conveyance made [&c.] between *A.* of [&c.] of the one part and *B.* of [&c.] of the other part.

Witnesseth that in consideration of the sum of pounds now paid by *B.* to *A.* (the receipt, &c.) and of the rentcharge hereinafter reserved *A.* as Beneficial Owner hereby conveys unto *B.*

All those [&c.] except and reserving unto *A.* in fee simple all mines and minerals Together with full power to work [&c.]

To hold (except and reserved as aforesaid) unto *B.* in fee simple reserving out of the premises to *A.* in fee simple a perpetual yearly rentcharge of pounds, to be for ever charged upon and issuing out of the premises hereby conveyed clear of all deductions (except landlord's property tax), and payable by equal half-yearly payments on [&c.], the first payment to be made on [&c.]

And *B.* hereby covenants with *A.*, and the persons deriving title under him to pay [&c.]

In witness [&c.]

Note.—The reservations will be valid at law even if the deed is not executed by *B.*

Form No. 7.

Deed for confirming Legal Estates which have not been validly created.

To All to whom this Further Assurance shall come *A.B.* of &c. sends greeting this day of 19 .

[*Recite the invalid dealings, giving short particulars in schedules of the Conveyances, Grants and Leases which purport to transfer or create legal estates, that A.B. is entitled in fee simple or for a term of years absolute in the land affected and desires to confirm the dealings.*]

Now these presents witness and the said *A.B.* hereby declares that his legal estate in the premises affected to which he is entitled as aforesaid shall go and devolve in such manner as may be requisite for legally confirming the interests capable of subsisting as legal estates expressed to have been transferred or created by the documents mentioned in the schedules hereto or any of those documents and any dealings with the interests so confirmed which would have been legal if those interests had in the first instance been validly transferred or created:

15 Geo. 5, c. 20, Sch. 5.

Provided always that subject to such confirmation of interests and dealings nothing herein contained shall affect the legal estate of the said *A.B.* in the premises.

In witness, &c. [*Add Schedules.*]

Note.—This form takes the place of a conveyance to uses for confirming past transactions and is applicable to a term of years absolute as well as a fee simple.

Form No. 8.

Assent by Personal Representative in Favour of a Person absolutely entitled free from Incumbrances.

I, *A.B.* of [&c.] as the personal representative of *X.Y.*, late of [&c.] deceased, do this day of 19 hereby, As Personal Representative, assent to the vesting in *C.D.* of [&c.] of [All that farm &c.] *or* [All the property described in the Schedule hereto] for all the estate or interest of the said *X.Y.* at the time of his death [*or*, for an estate in fee simple].

As witness, &c.

Note.—The expression "conveyance" includes an assent, but an assent will relate back to the death unless a contrary intention appears. An assent may be properly given though duties remain to be paid if the personal representative is satisfied in regard to the arrangements made for payment.

Form No 9.

Assent by Personal Representatives in Favour of Trustees for Sale.

We, *A.B.*, of [&c.] and *C.D.*, of [&c.] as the Personal Representatives of *X.Y.*, late of [&c.] deceased do this day of 19 hereby:—

1. As Personal Representatives assent to the vesting in [ourselves *or*] *T.A.* of [&c.] and *T.B.* of [&c.] of All Those &c. To Hold unto [ourselves *or*] the said *T.A.* and *T.B.* in fee simple Upon trust to sell the same or any part thereof with full power to postpone the sale and to stand possessed of the net proceeds of sale and other money applicable as capital and the net rents and profits until sale upon the trusts respectively declared concerning the same [*or* the proceeds of sale and the rents and profits of certain property at] by the Will dated [&c.] of [&c.] [*or* by the Settlement dated &c. *or otherwise as the case may require*].

2. And declare that *F.* of [&c.] and *M.* of [&c.] during their joint lives and the survivor of them during his or her

life have or has power to appoint new trustees of this Assent [*or* "that the statutory power to appoint new trustees applies to this Assent" *or otherwise as the case requires to correspond with the power applicable to the Will or Settlement*]. **15 Geo. 5, c. 20, Sch. 5.**

As Witness, &c.

SIXTH SCHEDULE.

Epitomes of Abstracts of Title.

Specimen No. 1.

Of the Title of John Williams to Blackacre.

Where the Title commences before the Commencement of this Act.

The italics show how the abstract is to be framed and what documents are to be abstracted. After the commencement of this Act, the parts not in italics may be ignored.

Will of H. Jones, appointing Maria Jones and W. Jones executors and Settled Land Act trustees. June 10, 1897.

Devises, Blackacre.

To the use that Maria Jones may receive a yearly rentcharge of five hundred pounds for her life, and, subject thereto,

To the use of W. Jones for life with remainder,

To the use of *X.* and *Y.*, for a term of one thousand years, and subject thereto,

To the use of the first and other sons of W. Jones in tail with remainders over.

Trusts of term of one thousand years declared for raising ten thousand pounds for portions for younger children of W. Jones, as he shall appoint, and in default equally.

Hotchpot Clause. Power to appoint new trustees.

Death of H. Jones. June 4, 1898.

Will of H. Jones proved. August 1, 1898.

[Note.—After the execution of the Vesting Deed the will only takes effect in equity and can be withdrawn from the abstract when not required as a root of title].

Conveyance by the executors to the uses of the Will. August 20, 1899.

15 Geo. 5, c. 20, Sch. 6.

Appointment of R. and S. to be Settled Land Act trustees of the will in place of Maria Jones and W. Jones who retire.

September 2, 1915.

January 1, 1926.

The Settled Land and Law of Property Acts, 1925, come into operation.

[NOTE.—The legal estate in fee simple will vest in W. Jones in fee simple, but he cannot deal with it till the vesting deed is executed.]

January 20, 1926. *Deed by the Settled Land Act trustees declaring the fee simple is vested in W. Jones on the trusts of the Will and stating that they are the trustees of the settlement.*

February 2, 1926. Appointment by W. Jones of five thousand pounds, part of the ten thousand pounds, to his daughter, Ann Jones.

February 3, 1926. Assignment by Ann Jones of her five thousand pounds, part of the ten thousand pounds raisable for portions, to trustees *F.* and *G.* on her marriage to J. Robinson.

February 4, 1926. Will of W. Jones, appointing T. Brooks his executor.

March 6, 1926. Death of W. Jones leaving three children, Frederick Jones, his eldest son, and E. Jones and Ann Robinson.

April 2, 1926. Disentail by Frederick Jones in trust for himself in fee simple.

May 3, 1926. *Will of W. Jones proved by R. and S. in regard to the settled land.*

June 6, 1926. Mortgage by E. Jones of his one-half of the ten thousand pounds to *K.*

December 1, 1926. Death of Maria Jones, jointress.

January 2, 1927. Release by *F.* and *G.* on payment to them of the five thousand pounds of Ann Robinson.

Same date. Release by E. Jones and *K.*, his mortgagee, of the five thousand pounds raisable for E. Jones.

January 3, 1927. *Assent by R. and S., as personal representatives to Frederick Jones in fee, without nominating Settled Land Act trustees.*

[NOTE.—If the Assent had been made before the family charges had been cleared, the personal representatives would have nominated themselves as being the trustees of the settlement, and a discharge from them would have been required when the charges were cleared.]

February 6, 1927. *Mortgage either by charge by way of legal mortgage or for a term of one thousand years by Frederick Jones to the Estate Trustees of the C. Assurance Society to secure five thousand pounds and interest.*

March 20, 1927. Second mortgage either by charge by way of legal mortgage or for a term of two thousand years by Frederick

Jones to *D.*, to secure three thousand pounds and interest. **15 Geo. 5, c. 20, Sch. 6.**

Third mortgage either by charge by way of legal mortgage or for a term of three thousand years by Frederick Jones to *E.*, to secure two thousand pounds and interest. June 1, 1927.

Conveyance by Frederick Jones on his marriage (subject to above mortgages) to *M.* and *N.* upon trust for sale, the proceeds of sale being settled by a deed of even date. August 8, 1927.

Death of *M.* November 12, 1927.

Appointment of *F.* as trustee of the conveyance on trust for sale in the place of *M.*, and jointly with *N.* December 20, 1927.

Conveyance by the then Estate Trustees of the C. Assurance Society, under their power of sale as first mortgagees, to John Williams in fee. June 10, 1928.

[NOTE.—The title being made under the power of sale of the Estate Trustees, the fee simple passes and not merely the mortgage term. They can if desired convey the fee in the names of *M.* and *N.* It is unnecessary to disclose the second and third mortgages or the conveyance on trust for sale. It would have been necessary to disclose them if title had been made by the trustees for sale, as the mortgages and the conveyance all dealt with legal estates. The right to vest the debt and mortgaged property in Estate Trustees by memorial enrolled under a Private Act is preserved.

No evidence of deaths, births, &c., is required. Probate of the will of H. Jones is conveyancing evidence of his death.]

John Williams leaves Great Britain and Northern Ireland is believed to be alive but cannot be found. January 12, 1929.

Private Act passed authorising the X. Company to acquire Blackacre under compulsory powers. August 10, 1929.

Statutory declaration as to facts known with reference to John Williams. June 15, 1930.

Deed Poll by X. Company (who by their agent also execute in the name of John Williams) under section seventy-seven of the Lands Clauses Consolidation Act, 1845, vesting the land in themselves. June 16, 1930.

[NOTE.—This is an example of an exercise of a power over a legal estate the operation of which is expressly preserved.]

15 Geo. 5, c. 20, Sch. 6.

Specimen No. 2.

Of the Title of the Trustees of Frank Smithers to Greenacre.

Relating to undivided Shares.

January 2, 1910. *Mortgage by James Smith of Greenacre to M. Coy., Lim. in fee to secure* £1,000 *and interest.*

February 4, 1910. *Will of James Smith devising Greenacre to his ten children named therein in equal shares and appointing E. to be his executor.*

March 1, 1910. *Death of James Smith, leaving the ten children surviving.*

April 3, 1910. *Probate by E.*

December 4, 1910. *Assent by E. to the devise to the ten children.*

January 5, 1911. Mortgage by one of the sons of his tenth share.

April 15, 1911. Conveyance by one of the daughters on her marriage of a tenth share to trustees on trust for sale, the net proceeds to be held on the trusts of her settlement of even date.

May 20, 1911. Settlement by another of the sons of his tenth share and appointing Settled Land Act trustees.

June 8, 1913. Will of another daughter devising her tenth to her husband and appointing him executor.

June 20, 1913. Death of the testatrix.

August 4, 1913. Probate by her husband.

May 2, 1918. Death of another son intestate.

July 30, 1918. Letters of administration granted to two of his brothers.

January 1, 1926. The Law of Property Act, 1925, comes into operation and vests Greenacre, subject only to the mortgage of 1910 affecting the entirety (which is converted into a mortgage for a term of three thousand years), in the Public Trustee, pending the appointment of new trustees, on trust for sale.

June 4, 1926. *Order of the court (Chancery Division) made on the application of persons entitled to six tenths, appointing M. and N. to be trustees of the trust affecting Greenacre in place of the Public Trustee.*

May 7, 1927. *Conveyance on sale to Walter Robinson by M. and N., the M. Company, Limited, being paid off out of part of the purchase money, and joining to surrender the three thousand years term.*

[Note.—The balance of the purchase money is available in the hands of the trustees to answer the claims of the mortgagee and other persons interested in undivided shares.]

Will of Walter Robinson devising and bequeathing Greenacre and his residuary real and personal estate to *X.* and *Y.* upon trust for his son John Robinson for life with remainder upon trust for his first and other sons successively according to seniority in tail male with remainder upon trust for the same sons in tail general with remainder upon trust for all the daughters of John Robinson as tenants in common in tail with cross remainders in tail between them in equal shares. Appointment of *X.* and *Y.* to be executors and Settled Land Act trustees.	**15 Geo. 5, c. 20, Sch. 6.** June 4, 1927.
Death of testator.	December 1, 1927.
Probate by X. and Y.	April 20, 1928.
Assent by X. and Y. vesting the settled land in John Robinson upon the trusts of the will of Walter Robinson, and stating that they are the trustees of the settlement.	May 3, 1928.
Will of John Robinson appointing his daughters Mary Robinson and Jane Robinson his executors.	July 14, 1928.
Death of John Robinson without having had a son and leaving five daughters.	March 16, 1930.
Probate by X. and Y. in regard to the settled land.	June 12, 1930.
Assent by X. and Y. to the vesting of the settled land in themselves on trust for sale, the net proceeds to be held on the trusts of the will of Walter Robinson.	July 25, 1930.
Conveyance on sale by X. and Y. of Greenacre to Frank Smithers in fee.	January 7, 1931.
Equitable charge by Frank Smithers to James Montagu by way of indemnity and agreement to vest Greenacre in a trust corporation on trust for sale to raise the money when the amount is ascertained and for other purposes. [NOTE.—A mere equitable charge not secured by deposit of documents can be overridden when the land is made subject to a trust for sale without joining the chargee.]	January 8, 1931.
Lease by Frank Smithers of part of Greenacre to his wife for life at a rent. [NOTE.—A lease for life is made to take effect as a demise for a term of ninety years determinable by notice after the death of the lessee by his representatives or by the lessor.]	January 9, 1932.
Conveyance by Frank Smithers, of Greenacre, to a trust corporation on trust for sale subject to the lease. The net proceeds to be held on the trusts of a deed of even date, under which effect is given to the Agreement of 1931.	June 23, 1933.

15 Geo. 5, c. 20, Sch. 6.

SPECIMEN No. 3.

OF THE TITLE OF R. HORNE TO WHITEACRE.

WHERE THE TITLE COMMENCES AFTER THE COMMENCEMENT OF THIS ACT.

July 4, 1926. *Settlement by John Wilson, being a deed declaring that Whiteacre is vested in himself in fee upon the trusts of a deed of even date.*

Appointment of R. and S. to be trustees for the purposes of the Settled Land Act, 1925.

Provisions extending the powers conferred by the Settled Land Act, so far as they relate to dealings with land, and giving power for John Wilson during his life to appoint new trustees.

Same date. Trust Instrument.

Trusts declared for John Wilson for life, with remainder.

Upon trust that Elizabeth Wilson, if she survives him shall have a rentcharge of £200 during the residue of her life, and subject thereto.

Upon trust for *R.* and *S.* for a term of five hundred years to raise five thousand pounds portions for younger children of John Wilson, with remainder.

Upon trust for Henry Wilson for life, with remainder.

Upon trust for *H.* and *K.* for a term of one thousand years to raise five thousand pounds portions for younger children of Henry Wilson, with remainder.

Upon trust for the first and other sons of Henry Wilson successively in tail, with further remainders over. Appointment of *R.* and *S.* to be Settled Land Act trustees. Extension of Settled Land Act powers by reference to the Vesting Deed of even date or otherwise. Power for tenant for life of full age to appoint new trustees.

September 4, 1926. Appointment of new trustee of the Trust Instrument and of the five hundred years' term.

Recites that *S.* is incapable of acting. Appointment by John Wilson of *P.* to be trustee of the term of five hundred years and for the purposes of the Trust Deed in the place of *S.* and jointly with *R.* Declaration (express or implied) vesting the equitable term of five hundred years in *R.* and *P.*

Same date. *Deed stating that R. and P. are the trustees of the settlement. Memorandum of the deed endorsed on the Vesting Deed.*

January 7, 1927. Will of John Wilson appointing Isaac James and Joseph James executors.

Death of John Wilson, leaving younger children and his widow. September 3, 1927.

Will of John Wilson proved by R. and P. in regard to the settled land. April 4, 1928.

Assignment by *R.* and *P.* to *B.* of term of five hundred years by way of mortgage for securing five thousand pounds and interest. October 1, 1928.

[Note.—As money has been raised on the term the mortgagee could call on the executors to create a legal term for securing it in priority to the settlement.]

Assent by R. and P., as personal representatives, to the vesting of the settled land in Henry Wilson in fee upon the trusts of the Trust Deed. December 2, 1928.

Statement that R. and P. are the trustees of the settlement. Power for Henry Wilson during his life to appoint new trustees.

The same provisions for extending powers conferred by the Settled Land Act as are contained in the Vesting Deed.

[Note.—These may be inserted either expressly if short, or by reference to the former Vesting Deed, if long.]

Appointment of James Cook and Harry Cook to be trustees of the Trust Deed. June 2, 1929.

Deed stating that they are the trustees of the settlement. June 2, 1929.
Endorsement of notice on the Vesting Deed.

Transfer of the mortgage for five thousand pounds by *B.* to *C.* November 4, 1929.

Death of Henry Wilson, leaving Thomas Wilson, his eldest son, and two younger children. July 10, 1930.

Letters of Administration to the settled land of Henry Wilson granted to James Cook and Harry Cook. October 1, 1930.

Disentail by Thomas Wilson. November 3, 1930.

Release by *C.* on payment off of his mortgage debt of five thousand pounds and surrender of the equitable term of five hundred years. November 4, 1930.

Death of Elizabeth Wilson. November 10, 1930.

[Note.—Though her jointure took effect in equity only she has power to create a term of years absolute for raising arrears of the jointure, and the estate owner would be bound to give legal effect to a mortgage of the term.]

Release by two younger children of Henry Wilson of their portions. November 20, 1930.

15 Geo. 5, c. 20, Sch. 6.	Demise by Thomas Wilson to *L.* and *M.* for an equitable term of eight hundred years, subject to cesser on payment of five thousand pounds and interest.
Same date.	*Demise by James Cook and Harry Cook to L. and M. for the term of eight hundred years, subject to cesser on redemption or charge by way of legal mortgage.*
Same date.	*Assent by them to the vesting of the settled land, subject to the term or legal charge, in Thomas Wilson in fee, without nominating Settled Land Act trustees.*
March 10, 1931.	*Conveyance by Thomas Wilson and L. and M. to R. Horne in fee.*

Specimen No. 4.

Of the Title of the Administrators of M. Curtis to Rich and Middle Farms.

Relating to Infants.

January 2, 1922.	Will of James Wilcox devising Rich Farm and Middle Farm to the use of his elder son John Wilcox (an infant) for his life with remainders over for the issue of John Wilcox which failed with remainder to the use of his younger son Gilbert Wilcox (an infant) for his life with remainders over. Appointment of *X.* and *Y.* to be executors and Settled Land Act trustees.
February 4, 1922.	Death of testator, leaving his two sons, giving dates of their births.
May 12, 1922.	*Probate by X. and Y.*
December 15, 1922.	Assent to the devise, John Wilcox being still an infant.
January 1, 1926.	The Settled Land Act, 1925, and The Law of Property Act, 1925, come into force and vest the settled land in *X.* and *Y.* as Settled Land Act trustees by reason of John Wilcox being an infant.
January 4, 1926.	*Instrument declaring that the settled land is vested in X. and Y.*
June 3, 1926.	Death of John Wilcox a bachelor and an infant.
September 29, 1926.	*Conveyance on sale of Rich Farm by X. and Y. to M. Curtis.*
October 12, 1927.	*Conveyance by X. and Y. vesting Middle Farm in Gilbert Wilcox (who had attained full age) on the trusts of the will of James Wilcox with a statement that they are the trustees of the settlement.*
November 10, 1927.	*Conveyance on sale of Middle Farm by Gilbert Wilcox to M. Curtis, X. and Y. joining to receive the purchase money.*
February 1, 1928.	Will of M. Curtis purporting to appoint his infant son John Curtis executor.

Death of M. Curtis. April 3, 1928.

Letters of administration with the will annexed granted to M. and N. September 5, 1928.

[Note.—Administration will either be granted to a trust Corporation or to not less than two individuals, if there are Settled Land Act trustees, it will, as respects the settled land, be granted to them.]

Specimen No. 5.

Of the Title of George Smith to Houses in John Street.

Relating to Leasehold Property.

Lease by Charles Robinson to Henry Chubb, of 10 *to* 16 *(even numbers) John Street, in the city of X., for* 99 *years from date at a yearly rent of* £5 *for each house.* March 25, 1921.

First Mortgage (by subdemise) by Henry Chubb to A. for the residue of the term less 3 *days for securing* £3,000 *and interest. Declaration by Henry Chubb that he holds the head term in trust for A. subject to redemption.* March 26, 1921.

Second Mortgage (by subdemise) to B. for the residue of the term less 2 *days for securing* £1,000 *and interest. Declaration by Henry Chubb that (subject to the First Mortgage) he holds the head term in trust for B. subject to redemption.* Same date.

Third Mortgage (by subdemise) to *C.* for residue of term less 1 day for securing £500 and interest. Same date.

Transfer of First Mortgage by A. to T. in trust for Henry Chubb, who pays off the First Mortgage debt. December 24, 1924.

The Law of Property Act, 1925, comes into operation. January 1, 1926.

[Note.—It extinguishes the first mortgage term, because Henry Chubb was not entitled to keep it alive to the prejudice of his mesne incumbrancers.]

Order of Court directing Henry Chubb to hand over the Lease, First Mortgage, and Transfer of that Mortgage to *B.* July 1, 1926.

Assignment on sale by B., under his power, to George Smith. July 20, 1926.

[Note.—This conveys the head term created by the Lease and extinguishes all the mortgage terms. The head term may, if desired, be conveyed in the name of Henry Chubb.]

15 Geo. 5, c. 20, Sch. 7.

Section 207.

SEVENTH SCHEDULE.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeals.
27 Hen. 8, c. 10.	The Statute of Uses.	The whole Act.
32 Hen. 8, c. 34.	Graunties of reversions.	The whole Act.
13 Eliz. c. 5.	An Acte against fraudulent deedes, giftes, alienations, &c.	The whole Act.
27 Eliz. c. 4.	An Act against covenous and fraudulent conveyances.	The whole Act.
29 Car. 2, c. 3.	The Statute of Frauds.	Sections one, two and three. In section four the words "or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them." Sections seven, eight, nine and twenty-four.
4 Will. & Mar. c. 16.	An Act to prevent frauds by clandestine mortgages.	The whole Act.
4 & 5 Anne c. 3.	An Act for the amendment of the law and the better Advancement of Justice.	Sections nine and ten.
4 Geo. 2, c. 28.	The Landlord and Tenant Act, 1730.	Section six.
11 Geo. 2, c. 19.	The Distress for Rent Act, 1737.	Section eleven.
39 & 40 Geo. 3, c. 98.	The Accumulations Act, 1800.	The whole Act.
11 Geo. 4, and 1 Will. 4, c. 46.	The Illusory Appointments Act, 1830.	The whole Act.
3 & 4 Will. 4, c. 74.	The Fines and Recovery Act, 1833.	Section thirty-two as respects settlements made or coming into operation after the commencement of this Act.
1 & 2 Vict. c. 110.	The Judgments Act, 1838.	Section thirteen.
8 & 9 Vict. c. 106.	The Real Property Act, 1845.	Sections two, three, four, five, six, seven and nine.
8 & 9 Vict. c. 112.	The Satisfied Terms Act, 1845.	The whole Act.

SEVENTH SCHEDULE—*continued.*

15 Geo. 5, c. 20, Sch. 7.

Session and Chapter.	Title or Short Title.	Extent of Repeals.
12 & 13 Vict. c. 26.	The Leases Act, 1849.	The whole Act.
12 & 13 Vict. c. 110.	An Act for suspending until the first day of June one thousand eight hundred and fifty, the operation of an Act passed this Session intituled an Act for granting relief against defects in leases under powers of leasing in certain cases.	The whole Act.
13 & 14 Vict. c. 17.	The Leases Act, 1850.	The whole Act.
15 & 16 Vict. c. 76.	The Common Law Procedure Act, 1852.	Section two hundred and nine.
17 & 18 Vict. c. 97.	The Inclosure Act, 1854.	The proviso to section eleven, and in section thirteen the words "so far as the same has been apportioned upon the lands of persons interested and making applications as aforesaid."
18 & 19 Vict. c. 15.	The Judgments Act, 1855.	In section eleven the words "nor shall any such judgment, decree, order, or rule, or the money thereby secured be a charge upon such lands tenements or hereditaments so vested in purchasers or mortgagees."
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections one, two, three, ten, eleven, twelve, twenty-one and twenty-four.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Sections six and eight.
31 & 32 Vict. c. 4.	The Sales of Reversions Act, 1867.	The whole Act.
31 & 32 Vict. c. 40.	The Partition Act, 1868.	The whole Act without prejudice to proceedings commenced thereunder before the commencement of this Act.
34 & 35 Vict. c. 31.	The Trade Union Act, 1871.	In section seven the words "not exceeding one acre."
36 & 37 Vict. c. 66.	The Supreme Court of Judicature Act, 1873.	Subsections (3) to (7) of section twenty-five.

15 Geo. 5, c. 20, Sch. 7.

SEVENTH SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeals.
37 & 38 Vict. c. 37.	The Powers of Appointment Act, 1874.	The whole Act.
37 & 38 Vict. c. 78.	The Vendor and Purchaser Act, 1874.	The whole Act.
39 & 40 Vict. c. 17.	The Partition Act, 1876.	The whole Act without prejudice to proceedings commenced thereunder before the commencement of this Act.
44 & 45 Vict. c. 41.	The Conveyancing Act, 1881.	The whole Act, except section thirty so far as it relates to deaths occurring before the commencement of this Act, and except sections forty-two and forty-three so far as those sections relate to instruments coming into operation before the commencement of this Act and except section two and except section forty-eight.
45 & 46 Vict. c. 39.	The Conveyancing Act, 1882.	The whole Act.
55 & 56 Vict. c. 3.	The Conveyancing and Law of Property Act, 1892.	The whole Act.
55 & 56 Vict. c. 58.	The Accumulations Act, 1892.	The whole Act.
56 & 57 Vict. c. 21.	The Voluntary Conveyances Act, 1893.	The whole Act.
56 & 57 Vict. c. 53.	The Trustee Act, 1893.	Section forty-four.
57 Vict. c. 10.	The Trustee Act, 1893, Amendment Act, 1894.	Section three.
63 & 64 Vict. c. 26.	The Land Charges Act, 1900.	Subsections (1) & (2) of section two.
7 Edw. 7, c. 18.	The Married Women's Property Act, 1907.	Section one.
1 & 2 Geo. 5, c. 37.	The Conveyancing Act, 1911.	The whole Act except sections eight and fourteen and except section twelve so far as it relates to deaths occurring before the commencement of this Act.
12 & 13 Geo. 5, c. 16.	The Law of Property Act, 1922.	The whole of Part I. except sections four and ten so far as they relate to settled land, section twelve, section thirteen

SEVENTH SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeals.
12 & 13 Geo. 5, c. 16—*cont.*	The Law of Property Act, 1922—*cont.*	so far as it relates to settled land, and sections fourteen, sixteen, twenty-six, and subsection (2) of section twenty-eight. The whole of Part III. except subsection (4) of section eighty-three; sections eighty-six and eighty-eight. Subsection (3) of section one hundred and thirteen. Subsection (5) of section one hundred and twenty-three. Subsection (10) of section one hundred and thirty-eight. Section one hundred and forty-six. Section one hundred and fifty-two. Subsection (13) of section one hundred and fifty-six; Last paragraph of subsection (1) of section one hundred and fifty-eight. The First Schedule except as respects Part II. so far as it relates to settled land. The Second Schedule. The Third Schedule except so far as it relates to settled land. The Fourth Schedule. Sub-paragraph (3) of paragraph one of the Fifth Schedule. The Sixth Schedule except paragraphs one and three and sub-paragraphs (1), (3) and the first paragraph of sub-paragraph (4) of paragraph four and sub-paragraphs (2) and (3) of paragraph five. The Eighth Schedule. In the Ninth Schedule, forms Nos. 5, 6, 7 and 9, and No. 8, except so far as it relates to settled land. The Eleventh Schedule. In the Fifteenth Schedule, sub-paragraph (3) of paragraph seven.
15 Geo. 5, c. 5.	The Law of Property (Amendment) Act, 1924.	Section three and the Third Schedule.

The Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1925. Dated November 19, 1925.

In pursuance of section eighty-four of the Law of Property Act, 1925, the Reference Committee for England and Wales constituted under the Acquisition of Land (Assessment of Compensation) Act, 1919, hereby makes the following Rules:—

15 & 16 Geo. 5, c. 20.
9 & 10 Geo. 5, c. 57.

Short title.

1. These Rules may be cited as the Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1925.

Interpretation.

2.—(1) In these Rules, unless the context otherwise requires:—

The expression "the section" means section eighty-four of the Law of Property Act, 1925:

The expression "arbitrator" means official arbitrator:

The expression "restriction" means a restriction arising under a covenant or otherwise as to the user of any freehold land or of any leasehold land held for a term of more than seventy years of which at least fifty years have expired, or the building thereon.

52 & 53 Vict. c. 63.

(2) The Interpretation Act, 1889, applies for the purpose of the interpretation of these Rules as it applies for the purpose of the interpretation of an Act of Parliament.

Method of making applications.

3.—(1) Where a person interested in any land affected by a restriction is desirous of making an application under the section, he shall send to the Reference Committee a request for the selection of an arbitrator accompanied by the application.

(2) An application may be made by two or more persons jointly, whether the land in which they are interested is the same land or different parts of the land affected by the restriction.

Particulars to be stated in application.

(3) The application shall state the extent to which, or the manner in which, the restriction is sought to be discharged or modified, and the grounds on which such discharge or modification is applied for, and shall contain particulars with respect to the following matters so far as known to the applicant:—

(a) the nature of the restriction;

(b) the land affected by the restriction;

(c) the manner in which the restriction was imposed whether by covenant or otherwise, and the date of the imposition thereof;

(d) the consideration for which the restriction was imposed;

(e) the names and addresses of the persons entitled to the benefit of the restriction;

(f) the nature of the interests in virtue of which any such persons are entitled to the benefit of the restriction.

Forms.

(4) The request for the selection of an arbitrator and the application shall be in the forms set out in the Schedule to these Rules, or in forms to the like effect; and the particulars set out in the application shall, if so required by the Reference Committee, be verified by a statutory declaration, and where such verification is required the application shall not be deemed a valid application unless the requirement is complied with.

Selection of official arbitrator.

4.—(1) The Reference Committee on receiving a request for the selection of an arbitrator and a valid application shall, as soon as may be, proceed to select from the panel an arbitrator to deal with the case.

(2) The Reference Committee shall, as soon as they have selected an arbitrator, send to him a copy of the application, and shall inform the applicant of the name and address of the person so selected.

Determination of the notices to be given.

5. The arbitrator selected shall consider the application with a view to determining whether any and what notices are to be given, and whether by way of advertisement or otherwise, to persons who appear to be entitled to the benefit of the restriction; and may for this purpose require the applicant to furnish him with any documents or other information which he has in his power to furnish, and which the arbitrator may require for such purpose as aforesaid.

Giving of notices and lodging of objections.

6.—(1) The applicant shall, on being required so to do by the arbitrator, give such notices by way of advertisement or otherwise as the arbitrator may direct.

(2) The notices shall require persons claiming to be entitled to the benefit of the restriction who object to the discharge or modification of the restriction proposed by the application, or claim compensation for the discharge or modification thereof, to send to the arbitrator and to the applicant within such time, not being less than fourteen days from the giving of the notices, as may be specified in the notices, any objections that they may have to the application, and the grounds thereof, and if they claim

15 Geo. 5, c. 20, Rules.

compensation for the discharge or modification of the restriction, the amount of the compensation claimed.

(3) Objections and claims for compensation shall be in the form set out in the Schedule to these Rules, or in a form to the like effect.

Fixing of time and place of hearing.

7. The arbitrator shall as soon as practicable after the expiration of the time for lodging objections and claims for compensation fix a time and place for the hearing of the application, and shall give notice thereof to the applicant and to every person who has duly lodged an objection or claim for compensation:

Provided that—

(a) if no objections or claims for compensation are received by an arbitrator within the time allowed for the purpose, he may make an order in the terms of the application without any formal hearing;

(b) the arbitrator may if, having regard to the interest of the applicant, it appears to him that the applicant is not a proper person to make an application, dismiss the application without a formal hearing.

Power to direct service of additional notices.

8. If, in the course of the hearing, it appears to the arbitrator that any person to whom no notice was given otherwise than by way of advertisement is a person to whom specific notice of the application should be given, he may require the applicant to give notice to that person and adjourn the hearing for the purpose of allowing such person to make an objection or a claim for compensation.

Reference of questions for determination by the Court.

9. If, whether before or at the hearing, it appears to the arbitrator that a question arises—

(a) as to whether or not any land is affected by the restriction; or

(b) as to what, upon the true construction of any instrument purporting to impose the restriction, is the nature and extent of the restriction thereby imposed, or as to whether the same is enforceable, and, if so, by whom;

the arbitrator may require an application to be made to the court for the determination of the question in manner provided by subsection (2) of the section, and may adjourn the case pending the hearing of such question by the court.

Enquiries of local authorities.

10. If, whether before or at the hearing, it appears to the arbitrator that it is expedient to make enquiries of any local authority within whose jurisdiction the land affected by the restriction is situate, he may direct such enquiries

to be made as he thinks fit and may adjourn the case until the reply of the local authority has been obtained.

General provisions as to procedure.

11. Subject to the provisions of the section and of these Rules, the procedure before an arbitrator shall be such as, subject to any special directions of the Reference Committee, he may in his discretion think fit, and in particular the arbitrator may, subject to such directions as aforesaid, determine that in any case oral evidence shall be excluded.

Power to select another official arbitrator.

12. The Reference Committee may in the case of the death or the incapacity of the arbitrator originally selected, or if it is shown to the Committee that it is expedient so to do in any other case, at any time before the arbitrator has made his order, revoke the reference of the application to the selected arbitrator and select another arbitrator for the purpose of determining the application.

Provisions as to payment of prescribed fees.

13.—(1) If the fees prescribed by the Reference Committee with the consent of the Treasury, in pursuance of the powers conferred on them by subsection (4) of the section, include a fee in respect of an application under these Rules, or a fee in respect of the Hearing before an arbitrator, the prescribed fee shall be collected by means of adhesive stamps affixed to, or stamps impressed on, the application and the order of the arbitrator, respectively.

(2) Any application under these Rules which is not properly stamped in accordance with the foregoing provision shall be treated as invalid, and the order of the arbitrator shall not be issued by him unless and until it has been properly stamped in accordance with the said provision.

Provisions as to notices.

14. Any notice or other document required or authorised to be sent to any person for the purpose of these Rules shall be deemed to have been duly sent if sent by post addressed to that person at his ordinary address, and the address of the Reference Committee for this purpose shall be—

THE SECRETARY TO THE REFERENCE COMMITTEE.
ROOM 121,
ROYAL COURTS OF JUSTICE,
STRAND, LONDON, W.C. 2.

Informalities not necessarily to invalidate proceedings

15. Any failure on the part of any person to comply with the provisions of these Rules shall not render the proceedings of anything done in pursuance thereof invalid, unless the arbitrator so directs.

Provisions as to orders.

16.—(1) Where by the order a restriction is discharged in whole or in part or modified subject to the payment of any compensation awarded by the order, the order shall not so far as it affects such discharge or modification come into

15 Geo. 5, c. 20, Rules.

operation until the arbitrator by an endorsement on the order certifies that all the compensation has been paid.

(2) The arbitrator may by his order direct that the compensation awarded in respect of any land shall be paid into court.

(3) If the arbitrator makes an order discharging in whole or in part or modifying a restriction the order shall be in the form set out in the Schedule to these Rules, or in a form to the like effect.

HEWART, C.J.
ERNEST M. POLLOCK, M.R.
JOHN D. WALLIS, P.S.I.
The Reference Committee for England and Wales under the Acquisition of Land (Assessment of Compensation) Act, 1919.

Dated the 19th November, 1925.

SCHEDULE.

FORM OF REQUEST FOR SELECTION OF OFFICIAL ARBITRATOR.

Section 84 of the Law of Property Act, 1925.

Request for selection of Official Arbitrator.

To the Reference Committee,
121, Royal Courts of Justice, Strand, London, W.C. 2.

I (We), being the applicant(s) in the accompanying application, hereby request the selection pursuant to the above section of an official arbitrator to hear and determine the accompanying application.

**Signed*.....

Date.....

* If the application is signed by an agent, add "by..... his (or their) Agent."

FORM OF APPLICATION FOR DISCHARGE (WHOLE OR PARTIAL) OR MODIFICATION OF A RESTRICTION AS TO THE USER OF LAND OR THE BUILDING THEREON.

Section 84 of the Law of Property Act, 1925.

Application for discharge (or *modification*) *of a restriction affecting land.*

To the Official Arbitrator selected by the Reference Committee.

I, A. B. of ....., being entitled to (*here*

insert nature of interest) in (*here describe land in which the applicant is interested*) [*if there are more applicants than one the foregoing words should be repeated as respects each applicant*] which land is subject to a restriction of which particulars are set forth below hereby apply that the said restriction may be discharged wholly [*or* to the extent of (*here state extent of discharge applied for*)] [*or* may be modified (*here state nature of modification applied for*)].

And I (We) make this application on the ground that (*here state the ground of the application, whether it falls within paragraph* (*a*) *or paragraph* (*b*) *or paragraph* (*c*) *of subsection* (1) *of the above section*).

The following are the required particulars respecting the restriction:—

(a) The restriction (*here state nature of restriction*).

(b) The land affected or alleged to be affected by the restriction is (*here describe the land affected*) being freehold land (*or* being leasehold land held for a term of more than seventy years of which fifty years have expired).

(c) The restriction was imposed (*here state the manner, whether by covenant or otherwise, in which the restriction was imposed, and the date thereof*).

(d) The consideration for the restriction was [*here state the nature and amount of consideration* (*if any*)].

(e) The persons entitled to the benefit of the restriction are (*here state the names and addresses of such persons and the nature of the interests by virtue of which they are entitled to the benefit of the restriction*).

†*Signed*.....

Date.....

† If the application is signed by an agent, add "by ..... his (or their) Agent."

FORM OF OBJECTION TO APPLICATION.

Section 84 of the Law of Property Act, 1925.

In the matter of an application made by.....*under the above section.*

To.....Official Arbitrator.

I, being entitled to the benefit of the restriction to which the above application relates as being entitled to (*here state nature of interest*) in (*here describe land in which objector is interested*) hereby object to the said application being acceded to on the ground that (*here state shortly grounds of objection*) and in the event of the said restriction being discharged (or modified) I claim that compensa-

tion should be paid to the amount of £....., as the amount of the loss I and my successors in title will suffer thereby (*or* of the depreciation in the value of the said land occasioned thereby).

‡*Signed*.....

Date.....

‡ If the objection is signed by an agent, add "by ..... his agent."

FORM OF ORDER.

Section 84 of the Law of Property Act, 1925.

In the matter of the application made by . . . under the above section.

I, being the Official Arbitrator selected by the Reference Committee to hear and determine the above application, hereby order that the restriction (*here state nature of restriction*) affecting (*here describe land affected*) being freehold land (*or* being leasehold land held for a term of more than seventy years of which fifty years have expired, is hereby wholly discharged [*or* is hereby discharged to the extent of (*here state extent to which the restriction is discharged*)] [*or* is hereby modified (*here state nature of modification*)] subject to the payment to the persons hereinafter mentioned (*or* into court) of the amounts hereby awarded to them respectively, that is to say:

To.....£

To.....£

Signed.....

Date..... *Official Arbitrator.*

CERTIFICATE OF PAYMENT OF COMPENSATION.

I hereby certify that all compensation payable under this Order has been paid.

Signed.....

Date..... *Official Arbitrator.*

THE REDEMPTION OF RENTS RULES, 1925.

DATED JULY 30, 1925, MADE BY THE MINISTER OF AGRICULTURE AND FISHERIES UNDER THE POWERS VESTED IN HIM BY SECTION 191 (9) OF THE LAW OF PROPERTY ACT, 1925 (15 GEO. 5, c. 20).

The Minister of Agriculture and Fisheries in exercise of the powers conferred upon him by sub-section (9) of section 191 of the Law of Property Act, 1925, and of every

other power enabling him in this behalf hereby makes the following Rules for regulating proceedings to be taken under the said section and as to the manner in which costs of such proceedings are to be borne by the respective parties.

In witness whereof the Official Seal of the Minister of Agriculture and Fisheries is hereunto affixed this thirtieth day of July Nineteen hundred and twenty-five.

(L.S.) *F. L. C. Floud*,
Secretary.

SCHEDULE.

Part I.

Requisition for redemption.

1.—(1) A requisition by the owner of any land or any person interested in such land made under section 191 of the Law of Property Act, 1925, to the Minister of Agriculture and Fisheries (hereinafter called "the Minister") shall be in the form A set forth in Part II. of this Schedule or to the like effect.

(2) The rents to which such requisitions are applicable are—

(a) a quit rent, chief rent or other annual or periodical sum issuing out of land; or

(b) a rent reserved on a sale, or made payable under a grant or licence (not operating as an agreement for a lease or tenancy) for building purposes; or

(c) a compensation rentcharge created as the consideration for the extinguishment of manorial incidents.

Application for apportionment on redemption.

2. Where any person interested in the whole or any part of the land affected by the rent to which the requisition relates desires to effect a discharge of part of the land, and the remainder of the land is not exonerated or indemnified from the rent by means of a charge on the aforesaid part, and an application is made by any such person to the Minister under sub-section (7) of the said section the application shall be in the form B set forth in Part II. of this Schedule, or to the like effect.

Signature of requisition or application.

3. Any requisition or application by a corporation to which these Rules apply may be signed by the secretary or the clerk of the corporation, and in any other case may be signed by the owner or person interested in the land or

part thereof or by his solicitor or by any other person authorised in that behalf.

Notices.

4.—(1) Any person requiring the Minister under the said section to certify the amount of money in consideration whereof a rent may be redeemed shall serve a copy of his requisition on the person entitled to the rent and any applicant to the Minister under the said section for an apportionment of a rent shall serve a copy of his application on the person entitled to the rent and on each person, other than the applicant, who is interested in the land out of which the rent issues or any part of such land.

(2) A copy of a requisition or application by these Rules required to be served on any person shall be sufficiently served—

(a) by leaving the copy at the usual or last known place of abode or business in the United Kingdom of such person; or

(b) by sending the copy by post in a registered letter addressed to such person at that place unless the letter is returned through the post office undelivered; or

(c) where service cannot be effected in manner aforesaid by such other mode of service as the Minister may direct.

Statutory declaration as to title.

5. For the purposes of any proceedings under the said section the Minister may accept as sufficient evidence of the title to the rent a statutory declaration by the person in receipt of the rent or his solicitor stating—

(1) the nature and extent of such person's estate and interest in the rent;

(2) the date and short particulars of the instrument under which his estate or interest is derived;

(3) the names and addresses of the trustees, if any, under such instrument; and

(4) the incumbrances, if any, affecting the rent.

Costs.

6. The costs of proceedings for the redemption or apportionment under the said section of any compensation rentcharge created as the consideration for the extinguishment of manorial incidents shall be dealt with on the same footing as the expenses incurred in redeeming a mortgage; and the costs of proceedings for the redemption or apportionment of any other rent under the said section shall be borne by the person making the requisition or application, unless the Minister considers that the conduct of the other party has been unreasonable or that that party has unreasonably refused a proposal made by the person making

the requisition or application, in which case the Minister may disallow the payment of the whole or any part of the costs incurred as the Minister may consider just.

Short title.

7.—(1) These provisions shall come into operation on the first day of January, nineteen hundred and twenty-six, and may be cited as the Redemption of Rents Rules, 1925.

(2) These provisions do not extend to Scotland or Ireland.

For forms see W. N., October 17, 1925.

SETTLED LAND.

Settled Land Act, 1925.

15 Geo. 5, c. 18.

An Act to consolidate the enactments relating to Settled Land in England and Wales.

[9th April 1925.]

Part I.—*General Preliminary Provisions.*
§§ 1—15. *Settlements and Settled Land*...855—869.
§§ 16, 17. *Enforcement of Equitable Interests and Powers against Estate Owner, and discharge on termination of Settlement*...869—873.
§ 18. *Restrictions on dispositions of Settled Land where Trustees have not been discharged*...873—874.
§§ 19—29. *Tenants for Life and Persons with Powers of Tenant for Life*...874—888.
§§ 30—35. *Trustees of Settlement*...888—895.
§ 36. *Provisions as to Undivided Shares*...895—897.
§ 37. *Transitional Provisions*...897.

Part II.—*Powers of a Tenant for Life.*
§§ 38—40. *Sale and Exchange*...897—901.
§§ 41—43. *Leasing Powers*...901—904.
§§ 44—48. *Provisions as to Building, Mining, and Forestry Leases*...904—908.
§§ 49—64. *Miscellaneous Powers*...908—921.
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§ 71. *Raising of Money*...927—928.
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Part III.
§§ 73—82. *Investment or other Application of Capital Money*...930—943.

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Part VI.
§§ 94—102. *General Provisions as to Trustees*...953—960.

Part VII.
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Part I.

General Preliminary Provisions.

Settlements and Settled Land.

What constitutes a settlement.

1.—(1) Any deed, will (*a*), agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being—

(i) limited in trust (*b*) for any persons by way of succession; or

(ii) limited in trust for any person in possession—

(a) for an entailed interest whether or not capable of being barred or defeated;

(b) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(c) for a base or determinable fee or any corresponding interest in leasehold land (*bb*);

(d) being an infant (*c*), for an estate in fee simple or for a term of years absolute; or

(iii) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or

(iv) limited to or in trust for a married woman (*d*) of full age in possession for an estate in fee simple or a term of years absolute or any other interest with a restraint on anticipation; or

(v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same;

creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires:

Provided that, where land is the subject of a compound settlement (*e*), references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires.

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(2) Where an infant is beneficially entitled to land for an estate in fee simple or for a term of years absolute and by reason of an intestacy or otherwise there is no instrument under which the interest of the infant arises or is acquired, a settlement shall be deemed to have been made by the intestate, or by the person whose interest the infant has acquired.

(3) An infant (*c*) shall be deemed to be entitled in possession notwithstanding any subsisting right of dower (*f*) (not assigned by metes and bounds) affecting the land, and such a right of dower shall be deemed to be an interest comprised in the subject of the settlement and coming to the dowress under or by virtue of the settlement.

Where dower has been assigned by metes and bounds, the letters of administration or probate granted in respect of the estate of the husband of the dowress shall be deemed a settlement made by the husband.

(4) An estate or interest not disposed of by a settlement and remaining in or reverting to the settlor, or any person deriving title under him, is for the purposes of this Act an estate or interest comprised in the subject of the settlement and coming to the settlor or such person under or by virtue of the settlement (*g*).

(5) Where—

(a) a settlement creates an entailed interest which is incapable of being barred or defeated, or a base or determinable fee, whether or not the reversion or right of reverter is in the Crown, or any corresponding interest in leasehold land; or

(b) the subject of a settlement is an entailed interest, or a base or determinable fee, whether or not the reversion or right of reverter is in the Crown, or any corresponding interest in leasehold land;

the reversion or right of reverter upon the cesser of the interest so created or settled shall be deemed to be an interest comprised in the subject of the settlement, and limited by the settlement (*h*).

(6) Subsections (4) and (5) of this section bind the Crown (*i*).

(7) This section does not apply to land held upon trust for sale (*k*).

The present Act consolidates with many and important changes and additions, the Settled Land Acts, 1882 to 1890, which are repealed by it (except the S. L. Act, 1889, which had already been repealed by L. P. Act, 1922). See for these Acts the earlier editions of this work (2nd ed., pp. 667—732); and for the Settled Estates Act, 1877, also repealed, *ibid*, pp. 635—657.

The paramount object of the Legislature in the S. L. Acts was

15 Geo. 5, c. 18, s. 1.

the well-being of settled land (*Bruce* v. *Ailesbury*, [1892] A. C. 365), and of all persons interested therein including the tenants, not merely of persons taking under the settlement (*Re Mundy and Roper*, [1899] 1 Ch. 288). An obstacle to such well-being consists in incumbrances which prevent a tenant for life from properly keeping up the estate (*Re Richardson, R.* v. *R.*, [1900] 2 Ch. 793). Again, it has been said that the object of the Act was to render land marketable notwithstanding settlement (*Re Mundy and Roper, supra; Cardigan* v. *Curzon-Howe*, 30 Ch. D. 536). The class of persons coming within "tenant for life" should not be cut down (*Re Llanover, Herbert* v. *Freshfield*, [1903] 2 Ch. 24). And the provisions as to dealing with land by way of sale, exchange, or lease should be construed liberally (*Re Mundy and Roper*, [1899] 1 Ch. 289). But the provisions as to the raising or investing of capital moneys are construed more strictly (*Re Bruce, Halsey* v. *B.*, [1905] 2 Ch. 375). The S. E. Act, 1877, had little bearing on the construction of the S. L. Act, 1882, which rested on a different principle (*Re Aldam*, [1902] 2 Ch. 46; a decision as to mining leases). As regards the L. C. C. Act, 1845, decisions thereunder were held applicable on a question under sect. 34 of the S. L. Act, 1882 (sect. 79, *post*) (*Cottrell* v. *C.*, 28 Ch. D. 628); but not on a question under sects. 21 and 25 (sects. 73 and 83, *post*) (*Re Gerard*, [1893] 3 Ch. 257). Generally speaking, cases decided before S. L. Act, 1882, may have no application to questions thereunder (*Re Gladstone, G.* v. *G.*, [1900] 2 Ch. 105; *Re Aldam*, [1902] 2 Ch. 53).

The present section replaces S. L. Act, 1882, s. 2 (1) (2), which were as follows:—

"2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this act a settlement, and is in this act referred to as a settlement, or as the settlement, as the case requires.

"(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement."

Copyhold and customary tenure were abolished as from January 1, 1926, by L. P. Act, 1922, Part V.

Sub-sects. 1 to 3.

(*a*) Includes codicil (s. 117 (1) (xxxiii) *post*).

(*b*) This provision, requiring the limitations of settlements to be equitable, applies to the case of settled land the principle laid down in L. P. Act, 1925, s. 1, *ante*, that the only estates in land capable of subsisting or of being conveyed or created at law are an estate in fee simple absolute in possession and a term of years absolute. For definition of "land," see sect. 117, sub-sect. 1 (ix) *post*; for the provisions for vesting the legal estate in the land in the tenant for life or statutory owner, sects. 4 *et seq. post*; and for the provisions as to settlements existing on January 1, 1926, see sect. 37, Schedule I., Form 2, and Schedule II., *post*; cf. also sect. 117, sub-sect. 1 (xxiv), *post*.

(*bb*) See as to entailed interests, and the other interests named in clause (ii) (a) to (c), sect. 20, *post*.

(*c*) See as to infants, sects. 26 and 27, *post*.

(*d*) See also as to married women, sect. 20, sub-sect. 1 (x) and sect. 25, *post*. Under S. L. Act, 1882, where land was devised to a

15 Geo. 5, c. 18, s. 1.

married woman in fee, the mere fact that her husband might under the general law take an estate by the courtesy did not make the devise a settlement (*Bates* v. *Kesterton*, [1896] 1 Ch. 159). Nor did the imposition of a restraint on anticipation make the married woman a tenant for life (*ibid.*; see sect. 61 of the Act). Where land was limited to a married woman for life without power of anticipation, with remainder as she should by will appoint, and in default to herself in fee, it was doubted whether the instrument was a settlement within the section (*Re Pocock and Prankerd*, [1896] 1 Ch. 302). The last case, however, was held to fall within sect. 58, sub-sect. 1 (ix) (*ibid.*). See now sect. 20, sub-sect. 1 (viii), *post*.

Settlement by one instrument.

(*e*) The settlement may consist of one instrument. But a succession must take place under that instrument. The mere fact that by failure of a contingent remainder in part of the land, which occurred after the death of the tenant for life, that part devolved differently from the rest, did not prevent the settlement from being one settlement during the tenancy for life (*Re Freme, F.* v. *Logan*, [1894] 1 Ch. 1). One instrument may create several settlements requiring separate sets of trustees (see *Re Skerritt*, [1899] W. N. 240).

Case where there are successive instruments.

Where family estates have been dealt with by successive instruments, questions have arisen as to what is "the settlement." In the earlier cases (when it may have been supposed that for the purposes of the Act there could not be at the same time more than one settlement) it was decided that "the settlement" did not necessarily include either (1) every derivative settlement, whether made by a remainderman (*Re Knowles*, 27 Ch. D. 707), or by the tenant for life of his life interest (*Re Du Cane and Nettlefold*, [1898] 2 Ch. 96; see sect. 50, *post*, and S. L. Act, 1890, sect. 4); or (2) a jointure deed under a power in an original settlement (*Re Keck and Hart*, [1898] 1 Ch. 617; see *Re Meade*, [1897] 1 I. R. 121; *Re Tibbits*, [1897] 2 Ch. 149; *Re Hayes*, [1907] 1 I. R. 88). Later it was laid down by C. A. that for the purposes of the Act there might be co-existing at the same time (1) a more comprehensive settlement consisting of several deeds, and (2) a less comprehensive settlement constituted by one of the deeds only (*Re Mundy and Roper*, [1899] 1 Ch. 295; see *Re Du Cane and Nettlefold, supra*). See sect. 117, sub-sect. 1 (xxiv), *post*.

Co-existence of (1) settlement consisting of several instruments, and (2) settlement consisting of one instrument.

It is clear that limitations of a jointure and portions to arise on the death of a tenant for life may be treated as part of a "more comprehensive settlement," as being limitations by way of succession (*Re Mundy and Roper*, [1899] 1 Ch. 290; *Re Marshall, M.* v. *M.*, [1905] 2 Ch. 329; *Att.-Gen.* v. *Owen*, [1899] 2 Q. B. 253). And instances of such a "more comprehensive settlement" (referred to in the more recent cases and in the present Act as a "compound settlement") have been found in the following, viz.: in a series of re-settlements and jointure deeds (*Re Ailesbury and Iveagh*, [1893] 2 Ch. 345); in a settlement, a deed charging a jointure and portions, a disentailing deed and a resettlement (*Re Mundy and Roper*, [1899] 1 Ch. 275); in a deed whereby an owner in fee declared trusts of freeholds for himself for life with remainder to pay annuities and subject thereto for himself absolutely, and a will disposing of his absolute interest (*Re Phillimore, P.* v. *Milnes*, [1904] 2 Ch. 460; see *Re Marshall, M.* v. *M.*, [1905] 2 Ch. 325); and in a will charging annuities, a disentailing deed and a resettlement (*Re Trafford*, [1915] 1 Ch. 9).

Compound settlements.

As to questions arising on sales by a tenant for life where there has been a resettlement, with the same life tenant, see sect. 22 and notes, *post*, p. 881.

Trustees of compound settlement.

As regards an express appointment of trustees of a compound settlement, it has been held that where on a resettlement, limited owners who have joint absolute dominion over the settled land keep the original settlement alive by a sufficient restoration of the subsist-

ing uses they can appoint trustees of the compound settlement (*Re Spearman*, [1906] 2 Ch. 502). *Secus* where the parties resettling have not joint absolute dominion (*Re Spencer*, [1903] 1 Ch. 75). Trustees of compound settlements have frequently been appointed by the Court (*Re Ailesbury and Iveagh*, [1893] 2 Ch. 345; *Re Mundy and Roper, supra; Re Coull*, [1905] 1 Ch. 712). Where the original instrument limited land in trust for persons by way of succession the appointment of trustees of a compound settlement was unnecessary (*Re Curwen and Frame*, [1924] 1 Ch. 581). And see now sects. 31—33, *post*. **15 Geo. 5, c. 18, s. 1.**

Other instances of compound settlements.

The expression "compound settlement" has been applied by the Courts not only where there have been resettlements of family estates, but also where property has been settled by one instrument by reference to the trusts or uses of another instrument (*Re Stafford*, [1904] 2 Ch. 72; *Re Coull*, [1905] 1 Ch. 712). As where a will directed property to be held on the trusts of a pre-existing settlement (*Re Mundy*, [1891] 1 Ch. 399). So where similar limitations were created by a deed and by a will, there being no reference in the one to the other, the two documents constituted a compound settlement (*Re Byng*, [1892] 2 Ch. 219). Where an estate was settled by one instrument and afterwards by a separate instrument the equity of redemption in another estate was settled on like trusts, the two instruments formed one settlement within the section (*Re Monson*, [1898] 1 Ch. 427). Where a direction in the will to accumulate was void under the Thellusson Act and the accumulations went to the next of kin, the will and the Act constituted the settlement (*Vine* v. *Raleigh*, [1896] 1 Ch. 37). But where land was settled by will and a private Act was passed which gave power to the will trustees, but did not incorporate the will, or contain any limitations to persons in succession, the Act did not form part of the settlement (*Talbot* v. *Scarisbrick*, [1908] 1 Ch. 812; see *Wheeler* v. *Tootel*, 51 W. R. 693). See also as to settlements by reference, sects. 32 and 91, *post*.

By sect. 22, sub-sect. 1 (i) of the Finance Act, 1894, a settlement in that Act meant any instrument relating to real or personal property which was a settlement within sect. 2 of S. L. A., 1882, or if it related to real property would be such a settlement. Duty has been held payable in respect of property contingently settled (*Att.-Gen.* v. *Fairley*, [1897] 1 Q. B. 698; *Att.-Gen.* v. *Clarkson*, [1900] 1 Q. B. 156), and in respect of a fund held in trust to provide an annuity and subject thereto in trust for A. (*Att.-Gen.* v. *Owen*, [1899] 2 Q. B. 253; *Re Campbell*, [1902] 1 K. B. 113). See as to death duties, L. P. Act, 1925, ss. 16, 18, *ante*.

An award of land to a vicar "and his successors" did not constitute a settlement within S. L. A., 1882 (*Ex p. Castle Bytham*, [1895] 1 Ch. 348); nor did the Acts apply to ecclesiastical property consisting of houses in a cathedral city (*Re Bath and Wells*, [1899] 2 Ch. 138). But they applied to the sale by an incumbent of glebe lands (Glebe Lands Act, 1888, s. 8, sub-s. 4). See as to land held on charitable, ecclesiastical or public trusts, sect. 29, *post*, and cf. as to the devolution of the property of a corporation sole, L. P. Act, 1925, s. 180, *ante*, and Administration of Estates Act, 1925, s. 3 (5), *ante*.

A "settlement" need not be in its inception a settlement of land, but will include a settlement of personalty where there is power to invest in land, and the investment is made (*Re Child*, [1907] 2 Ch. 352). See sect. 10, sub-sect. 1, *post*.

(*f*) As to dower see the Dower Act, 1833, and notes, *ante*. It was abolished in the case of all deaths after 1925 by Administration of Estates Act, 1925, s. 45 (1), *ante*.

Sub-sect. 4.

(*g*) This replaces S. L. A., 1882, s. 2 (2), which related to "an estate or interest in remainder or reversion not disposed of by a

15 Geo. 5, c. 18, s. 1.

settlement and reverting to the settlor." Under it a tenant for life made title to the fee where the settlement trustees had only taken life estates, and a reversion had been left in the settlor (*Re Hunter and Hewlett*, [1907] 1 Ch. 46; see *Re Bond, Panes* v. *Att.-Gen.*, [1901] 1 Ch. 15).

Sub-sect. 5. (*h*) For definition of entailed interest, see L. P. Act, 1925, s. 130, *ante*. See also, as to the interests referred to in this sub-section and in sub-sect. 1 (ii), *supra*, sect. 20, sub-sect. 1, *post*.

Sub-sect. 6. (*i*) As to the effect on the rights of the Crown of a sale under S. L. Act, 1882, see *Re Bond, supra*.

Sub-sect. 7. (*k*) This sub-section was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*, as to this Act). See as to land held upon trust for sale, L. P. Act, 1925, ss. 23 *et seq.*, *ante*.

What is settled land.

2. Land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land.

For definition of "land," see sect. 117, sub-sect. 1 (ix), *post*. "Is deemed to be" did not occur in S. L. A., 1882, s. 2 (3).

Where two properties are limited by the same instrument to the same uses, except that one is subject to a term, they together form one settled estate (*Re Stamford*, 43 Ch. D. 84). It is doubtful whether properties limited by the same instrument to the same tenant for life and after his death to different remaindermen constituted one settled estate (*ibid.*, 43 Ch. D. 91; see *Re Freme, F.* v. *Logan*, [1894] 1 Ch. 1).

Duration of settlements.

3. Land not held upon trust for sale which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as—

(a) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised; or

(b) the person who, if of full age, would be entitled as beneficial owner to have that land vested in him for a legal estate is an infant.

Sections 3 to 18 inclusive are taken from L. P. Acts, 1922 and 1924. The words "not held upon trust for sale" in sect. 3 were added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*). Cf. sect. 1, sub-sect. 7, *ante*.

Duration of original settlement.

Merger.

As regards the duration of the original settlement under S. L. A., 1882, where such settlement creates no charges but limits land to A. for life with remainder to B. in fee, and A. conveys to B. his life estate in the whole land, it was suggested that there would be merger, and the settlement being brought to an end A.'s power of sale would be gone (*Re Mundy and Roper*, [1899] 1 Ch. 297). In one case where A. conveyed his life estate in a divided share of the settled land, the Court considered that there was no merger on the ground that it was for the benefit of the parties that A.'s life estate should continue; and see *Re Bruen*, [1911] 1 I. R. 76. A.'s power of selling the divided share accordingly remained (*Re Barry R. Co. and Wimborne*, 76 L. T. 489). In another case where A. conveyed to B. his

life estate in an undivided share of the settled land, A.'s power of selling the entire settled land was held to continue, subject to B.'s consent (*Re Barlow*, [1903] 1 Ch. 382). And see *Re Collis*, [1911] 1 I. R. 267. See now sect. 105, *post*, p. 964.

Authorised method of settling land inter vivos.

4.—(1) Every settlement of a legal estate in land inter vivos shall, save as in this Act otherwise provided, be effected by two deeds, namely, a vesting deed and a trust instrument and if effected in any other way shall not operate to transfer or create a legal estate.

(2) By the vesting deed the land shall be conveyed to the tenant for life or statutory owner (and if more than one as joint tenants) for the legal estate the subject of the intended settlement:

Provided that, where such legal estate is already vested in the tenant for life or statutory owner, it shall be sufficient, without any other conveyance, if the vesting deed declares that the land is vested in him for that estate.

(3) The trust instrument shall—

(a) declare the trusts affecting the settled land;

(b) appoint or constitute trustees of the settlement;

(c) contain the power, if any, to appoint new trustees of the settlement;

(d) set out, either expressly or by reference, any powers intended to be conferred by the settlement in extension of those conferred by this Act;

(e) bear any ad valorem stamp duty which may be payable (whether by virtue of the vesting deed or otherwise) in respect of the settlement.

This and the following sections down to sect. 10 prescribe the methods by which settlements of legal estates in land are to be effected. "Tenant for life" includes a person having the powers of a tenant for life (sect. 117, sub-sect. 1 (xxviii), *post*). The "statutory owner" is (sect. 117, sub-sect. 1 (xxvi), *post*), the trustees of the settlement or other persons who, during a minority, or at any other time when there is no tenant for life, have the powers of a tenant for life, with the exception of trustees who have power to convey the settled land in the name of the tenant for life. (An infant cannot hold a legal estate (L. P. Act, 1925, s. 1 (6), *ante*), and the legal estate in the settled land has under the scheme of this Act to be vested in the tenant for life.) Sect. 6 deals with settlements by will after 1925; sect. 7 with the procedure necessary on the death of a tenant for life, the attainment of majority, the forfeiture of a tenant for life's interest, and the attainment of an absolute interest. Sect. 8 provides for conveyances by personal representatives; sect. 9 states the instruments which are to be deemed to be "trust instruments," and sect. 10 defines the mode by which land acquired with capital money is to be vested. For forms of instruments see Schedule I., *post*. For the reference of questions to the Court, see sect. 93, *post*.

Contents of vesting deeds.

5.—(1) Every vesting deed for giving effect to a settlement or for conveying settled land to a tenant for

15 Geo. 5, c. 18, s. 5.

life or statutory owner during the subsistence of the settlement (in this Act referred to as a "principal vesting deed") shall contain the following statements and particulars, namely:—

(a) A description, either specific or general, of the settled land;

(b) A statement that the settled land is vested in the person or persons to whom it is conveyed or in whom it is declared to be vested upon the trusts from time to time affecting the settled land;

(c) The names of the persons who are the trustees of the settlement;

(d) Any additional or larger powers conferred by the trust instrument relating to the settled land which by virtue of this Act operate and are exercisable as if conferred by this Act on a tenant for life (*a*);

(e) The name of any person for the time being entitled under the trust instrument to appoint new trustees of the settlement.

(2) The statements or particulars required by this section may be incorporated by reference to an existing vesting instrument, and, where there is a settlement subsisting at the commencement of this Act, by reference to that settlement and to any instrument whereby land has been conveyed to the uses or upon the trusts of that settlement, but not (save as last aforesaid) by reference to a trust instrument nor by reference to a disentailing deed.

(3) A principal vesting deed shall not be invalidated by reason only of any error in any of the statements or particulars by this Act required to be contained therein.

(*a*) See sect. 109, *post*.

See as to principal vesting deeds, *Re Clayton's Settled Estates*, quoted in note to Schedule II., paragraph 1, sect. 1, sub-sect. 2, *post*, p. 993.

Procedure in the case of settlements by will.

6.—Where a settlement is created by the will of an estate owner (*b*) who dies after the commencement of this Act—

(a) the will is for the purposes of this Act a trust instrument; and

(b) the personal representatives of the testator shall hold the settled land on trust, if and when required so to do, to convey it to the person who, under the will, or by virtue of this Act, is the tenant for life or statutory owner, and, if more than one, as joint tenants.

(*b*) The owner of a legal estate (sect. 117, sub-sect. 1 (xi), *post*).

Procedure on change of ownership.

7.—(1) If, on the death of a tenant for life or statutory owner, or of the survivor of two or more tenants for life or statutory owners, in whom the settled land was vested, the land remains settled land, his personal representatives shall hold the settled land on trust, if and when required so to do, to convey it to the person who under the trust instrument or by virtue of this Act becomes the tenant for life or statutory owner and, if more than one, as joint tenants.

(2) If a person by reason of attaining full age becomes a tenant for life for the purposes of this Act of settled land, he shall be entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him.

(3) If a person who, when of full age, will together with another person or other persons constitute the tenant for life for the purposes of this Act of settled land attains that age, he shall be entitled to require the tenant for life, trustees of the settlement, personal representatives or other persons in whom the settled land is vested to convey the land to him and the other person or persons who together with him constitute the tenant for life as joint tenants.

(4) If by reason of forfeiture, surrender, or otherwise the estate owner of any settled land ceases to have the statutory powers of a tenant for life and the land remains settled land, he shall be bound forthwith to convey the settled land to the person who under the trust instrument, or by virtue of this Act, becomes the tenant for life or statutory owner and, if more than one, as joint tenants.

(5) If any person of full age becomes absolutely entitled to the settled land (whether beneficially, or as personal representative, or as trustee for sale, or otherwise) free from all limitations, powers, and charges taking effect under the settlement, he shall be entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him, and if more persons than one being of full age become so entitled to the settled land they shall be entitled to require such persons as aforesaid to convey the land to them as joint tenants.

Mode and costs of conveyance, and saving of rights of personal representatives and equitable chargees.

8.—(1) A conveyance by personal representatives under either of the last two preceding sections may be made by an assent in writing (*c*) signed by them which shall operate as a conveyance.

(2) Every conveyance under either of the last two preceding sections shall be made at the cost of the trust estate.

(3) The obligations to convey settled land imposed by

15 Geo. 5, c. 18, s. 8.

the last two preceding sections are subject and without prejudice—

(a) where the settlement is created by a will, to the rights and powers of the personal representatives for purposes of administration; and

(b) in any case, to the person on whom the obligation is imposed being satisfied that provision has been or will be made for the payment of any unpaid death duties in respect of the land or any interest therein for which he is accountable, and any interest and costs in respect of such duties, or that he is otherwise effectually indemnified against such duties, interest and costs.

(4) Where the land is or remains settled land a conveyance under either of the last two preceding sections shall—

(a) if by deed, be a principal vesting deed; and

(b) if by an assent, be a vesting assent, which shall contain the like statements and particulars as are required by this Act in the case of a principal vesting deed (*d*).

(5) Nothing contained in either of the last two preceding sections affects the right of personal representatives to transfer or create such legal estates to take effect in priority to a conveyance under either of those sections as may be required for giving effect to the obligations imposed on them by statute.

(6) A conveyance under either of the last two preceding sections, if made by deed, may contain a reservation to the person conveying of a term of years absolute in the land conveyed, upon trusts for indemnifying him against any unpaid death duties in respect of the land conveyed or any interest therein, and any interest and costs in respect of such duties.

(7) Nothing contained in either of the last two preceding sections affects any right which a person entitled to an equitable charge for securing money actually raised, and affecting the whole estate the subject of the settlement, may have to require effect to be given thereto by a legal mortgage, before the execution of a conveyance under either of those sections.

(*c*) See also as to assents, Admon. of Estates Act, 1925, s. 36, *ante*, and for form, see Schedule I., Form 5, *post*.

(*d*) See sect. 5, *ante*.

Procedure in the case of settlements and of instruments

9.—(1) Each of the following settlements or instruments shall for the purposes of this Act be deemed to be a trust instrument, and any reference to a trust instrument contained in this Act shall apply thereto, namely:—

15 Geo. 5, c. 18, s. 9.

deemed to be trust instruments.

(i) An instrument executed, or, in case of a will, coming into operation, after the commencement of this Act which by virtue of this Act is deemed to be a settlement;

(ii) A settlement which by virtue of this Act is deemed to have been made by any person after the commencement of this Act (*e*);

(iii) An instrument inter vivos intended to create a settlement of a legal estate in land which is executed after the commencement of this Act, and does not comply with the requirements of this Act with respect of the method of effecting such a settlement; and

(iv) A settlement made after the commencement of this Act (including a settlement by the will of a person who dies after such commencement) of any of the following interests—

(a) an equitable interest in land which is capable, when in possession, of subsisting at law (*f*); or

(b) an entailed interest (*g*); or

(c) a base or determinable fee or any corresponding interest in leasehold land,

but only if and when the interest settled takes effect free from all equitable interests and powers under every prior settlement (if any).

(2) As soon as practicable after a settlement, or an instrument which for the purposes of this Act is deemed to be a trust instrument, takes effect as such, the trustees of the settlement may, and on the request of the tenant for life or statutory owner shall, execute a principal vesting deed (*h*), containing the proper statements and particulars, declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named, being the tenant for life or statutory owner (*i*), and including themselves if they are the statutory owners, and such deed shall, unless the legal estate is already so vested, operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid and, if more than one, as joint tenants.

(3) If there are no trustees of the settlement, then (in default of a person able and willing to appoint such trustees) an application under this Act shall be made to the court for the appointment of such trustees (*k*).

(4) The provisions of the last preceding section with reference to a conveyance shall apply, so far as they are applicable, to a principal vesting deed (*h*) under this section.

(*e*) See sect. 1, sub-sects. 2 and 3, *ante*.

15 Geo. 5, c. 18, s. 9.

(*f*) See L. P. Act, 1925, s. 1 (1) and (2), *ante*.
(*g*) See *ibid.* sect. 130, *ante*.
(*h*) See sect. 5, *ante*.
(*i*) See sect. 117, sub-sect. 1 (xxvi), *post*.
(*k*) See as to applications, sect. 113, sub-sect. 5, *post*, and as to the appointment of trustees, Trustee Act, 1925, s. 64, *post*.

Procedure on acquisition of land to be made subject to a settlement.

10.—(1) Where after the commencement of this Act land is acquired with capital money arising under this Act or in exchange for settled land, or a rentcharge is reserved (*l*) on a grant of settled land, the land shall be conveyed to, and the rentcharge shall by virtue of this Act become vested in, the tenant for life or statutory owner (*m*), and such conveyance or grant is in this Act referred to as a subsidiary vesting deed:

Provided that, where an instrument is subsisting at the commencement of this Act, or is made or comes into operation after such commencement, by virtue of which any money or securities are liable under this Act, or the Acts which it replaces, or under a trust or direction contained in the instrument, to be invested in the purchase of land to be conveyed so as to become settled land, but at the commencement of this Act, or when such instrument is made or comes into operation after such commencement, as the case may be, there is no land in respect of which a principal vesting deed (*n*) is capable of being executed, the first deed after the commencement of this Act by which any land is acquired as aforesaid shall be a principal vesting deed and shall be framed accordingly.

(2) A subsidiary vesting deed executed on the acquisition of land to be made subject to a settlement shall contain the following statements and particulars, namely—

(a) particulars of the last or only principal vesting instrument affecting land subject to the settlement;

(b) a statement that the land conveyed is to be held upon and subject to the same trusts and powers as the land comprised in such last or only principal vesting instrument;

(c) the names of the persons who are the trustees of the settlement;

(d) the name of any person for the time being entitled to appoint new trustees of the settlement.

(3) A subsidiary vesting deed reserving a rentcharge (*l*) on a grant of settled land shall contain the following statements and particulars—

(a) a statement that the rentcharge is vested in the grantor and is subject to the settlement which, immediately before the grant, was subsisting with respect to the land out of which it was reserved;

(b) particulars of the last or only principal vesting instrument affecting such land. 15 Geo. 5, c. 18, s. 10.

(4) A subsidiary vesting deed shall not be invalidated by reason only of any error in any of the statements or particulars by this Act required to be contained therein.

(5) The acquisition of the land shall not operate to increase or multiply charges or powers of charging.

(*l*) See sect. 39, *post*.
(*m*) See sect. 117, sub-sect. 1, (xxvi), *post*.
(*n*) See sect. 5, *ante*.

11.—(1) A contract made or other liability created or arising after the commencement of this Act for the settlement of land— As to contracts for the settlement of land.

(i) by or on the part of an estate owner (*o*); or

(ii) by a person entitled to—

(a) an equitable interest which is capable when in possession of subsisting at law (*p*); or

(b) an entailed interest (*q*); or

(c) a base or determinable fee or any corresponding interest in leasehold land;

shall, but in cases under paragraph (ii) only if and when the interest of the person entitled takes effect free from all equitable interests and powers under every prior settlement, if any, be deemed an estate contract within the meaning of the Land Charges Act, 1925 (*r*), and may be registered as a land charge accordingly, and effect shall be given thereto by a vesting deed and a trust instrument in accordance with this Act (*s*). 15 Geo. 5, c. 22.

(2) A contract made or other liability created or arising before the commencement of this Act to make a settlement of land shall be deemed to be sufficiently complied with if effect is given thereto by a vesting deed and a trust instrument in accordance with this Act (*s*).

(*o*) The owner of a legal estate (sect. 117, sub-sect. 1 (xi) *post*).
(*p*) See L. P. Act, 1925, s. 1 (1) and (2), *ante*.
(*q*) See *ibid.*, sect. 130.
(*r*) See sect. 10, sub-sect. 1, Class C (iv) of that Act.
(*s*) See sect. 4, *ante*.

12.—(1) If— Power to make vesting orders as to settled land.

(a) any person who is bound under this Part of this Act to execute a conveyance, vesting deed or vesting assent or in whom settled land is wrongly vested refuses or neglects to execute the requisite conveyance, vesting deed or vesting assent within one month after demand in writing; or

15 Geo. 5, c. 18, s. 12.

(b) any such person is outside the United Kingdom (*t*), or cannot be found, or it is not known whether he is alive or dead; or

(c) for any reason the court is satisfied that the conveyance, vesting deed or vesting assent cannot be executed, or cannot be executed without undue delay or expense;

the court may, on the application of any person interested, make an order vesting the settled land in the tenant for life or statutory owner or person, if any, of full age absolutely entitled (whether beneficially or as personal representative or trustee for sale or otherwise), and, if the land remains settled land, the provisions of this Act relating to a principal vesting deed or a subsidiary vesting deed, as the case may be, shall apply to any order so made and every such order shall contain the like statements and particulars.

(2) No stamp duty shall be payable in respect of a vesting order made in place of a vesting or other assent.

(*t*) Great Britain and Northern Ireland (sect. 117, sub-sect. 1 (xxxii), *post*. As to vesting orders, see sect. 113, sub-sect. 9, *post*.

Dispositions not to take effect until vesting instrument is made.

13. Where a tenant for life or statutory owner (*u*) has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act (*x*) in respect of the settled land, any purported disposition thereof inter vivos by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument (*y*)), shall not take effect except in favour of a purchaser (*z*) of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid, but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite vesting instrument has been executed or made, and a purchaser (*z*) of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge.

The words from "such tenant for life" to "entitled as aforesaid," were substituted by L. P. (Amdt.) Act, 1926, sect. 7, for "any settlement." By sect. 6 of the same Act (as to which, see p. 594, *ante*), the present section is to have effect as if the following proviso were inserted at the end of it: "Nothing in this section affects the creation or transfer of a legal estate by virtue of an order of the court or the Minister or other competent authority." For the meaning of "Court" and "Minister" in S. L. Act, 1925, see sects. 113 and 117, sub-sect. 1 (xvi), *post*.

(*u*) See sect. 117, sub-sect. 1 (xxvi), *post*.

(*x*) See *ibid.* (xxxi) for definition of vesting instrument, and sects. 4—8, *ante*.

(*y*) See sect. 117, sub-sect. 1 (xxxi), *post* and sects. 4 and 9, *ante*. 15 Geo. 5, c. 18, s. 13.
(*z*) See sect. 117, sub-sect. 1 (xxi), *post*.

Forfeiture and stamps.

14.—(1) Any vesting effected under the powers conferred by this Act in relation to settled land shall not operate as a breach of a covenant or condition against alienation or give rise to a forfeiture.

(2) Nothing in this Act shall operate to impose any stamp duty on a vesting or other assent.

Examples of instruments.

15. Examples of instruments framed in accordance with the provisions of this Act are contained in the First Schedule to this Act.

Enforcement of Equitable Interests and Powers against Estate Owner and discharge on termination of Settlement.

Enforcement of equitable interests and powers against estate owner.

16.—(1) All equitable interests and powers (*a*) in or over settled land (whether created before or after the date of any vesting instrument affecting the legal estate) shall be enforceable against the estate owner (*b*) in whom the settled land is vested (but in the case of personal representatives without prejudice to their rights and powers for purposes of administration) in manner following (that is to say):—

(i) The estate owner shall stand possessed of the settled land and the income thereof upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the settled land or the income thereof of which he has notice according to their respective priorities;

(ii) Where any person of full age becomes entitled to require a legal estate in the settled land to be vested in him in priority to the settlement, by reason of a right of reverter, statutory or otherwise, or an equitable right of entry taking effect, or on the ground that his interest ought no longer to be capable of being over-reached under the powers of this Act, the estate owner (*b*) shall be bound, if so requested in writing, to transfer or create such legal estate as may be required for giving legal effect to the rights of the person so entitled;

(iii) Where—

(a) any principal sum is required to be raised on the security of the settled land, by virtue of any trust, or by reason of the exercise of an equitable power affecting the settled land, or by any person or persons who under the

15 Geo. 5, c. 18, s. 16.

settlement is or are entitled or together entitled to or has or have a general power of appointment over the settled land, whether subject to any equitable charges or powers of charging subsisting under the settlement or not; or

(b) the settled land is subject to any equitable charge (*a*) for securing money actually raised and affecting the whole estate the subject of the settlement;

the estate owner (*b*) shall be bound, if so requested in writing, to create such legal estate or charge by way of legal mortgage (*c*) as may be required for raising the money or giving legal effect to the equitable charge:

Provided that, so long as the settlement remains subsisting, any legal estate or charge by way of legal mortgage so created shall take effect and shall be expressed to take effect subject to any equitable charges (*a*) or powers of charging subsisting under the settlement which have priority to the interests or powers of the person or persons by or on behalf of whom the money is required to be raised or legal effect is required to be given to the equitable charge, unless the persons entitled to the prior charges or entitled to exercise the powers consent in writing to the same being postponed, but it shall not be necessary for such consent to be expressed in the instrument creating such legal estate or charge by way of legal mortgage (*c*).

(2) Where a mortgage or charge is expressed to be made by an estate owner (*b*) pursuant to this section, then, in favour of the mortgagee or chargee and persons deriving title under him, the same shall take effect in priority to all the trusts of the settlement and all equitable interests and powers subsisting or to arise under the settlement except those to which it is expressly made subject, and shall so take effect, whether the mortgagee or chargee has notice of any such trusts, interests, or powers, or not, and the mortgagee or chargee shall not be concerned to see that a case had arisen to authorise the mortgage or charge, or that no more money than was wanted was raised.

(3) Nothing contained in paragraph (iii) of subsection (1) of this section affects the power conferred by this Act on a tenant for life of raising money by mortgage or of directing capital money to be applied in discharge of incumbrances (*d*).

(4) Effect may be given by means of a legal mortgage to an agreement for a mortgage, or a charge or lien, whether or not arising by operation of law, if the agreement charge or lien ought to have priority over the settlement.

(5) Save as hereinbefore expressly provided, no legal

estate shall, so long as the settlement is subsisting, be transferred or created by the estate owner (*b*) for giving effect to any equitable interest or power under the settlement.

(6) If a question arises or a doubt is entertained whether any and what legal estate ought to be transferred or created pursuant to this section, an application may be made to the court for directions as hereinafter provided (*e*).

(7) If an estate owner refuses or neglects for one month after demand in writing to transfer or create any such legal estate, or if by reason of his being outside the United Kingdom, or being unable to be found, or by reason of the dissolution of a corporation, or for any other reason, the court is satisfied that the transaction cannot otherwise be effected, or cannot be effected without undue delay or expense, the court may, on the application of any person interested, make a vesting order transferring or creating the requisite legal estate (*f*).

(8) This section does not affect a purchaser (*g*) of a legal estate taking free from any equitable interest or power.

(*a*) See as to legal and equitable interests, powers and charges, L. P. Act, 1925, s. 1, *ante*.

(*b*) The owner of a legal estate (sect. 117, sub-sect. 1 (xi), *post*).

(*c*) See L. P. Act, 1925, s. 87, *ante*.

(*d*) See sects. 71, 73, sub-sect. 1, and sect. 75, sub-sect. 2, *post*.

(*e*) See sect. 93, *post*.

(*f*) "United Kingdom" means Great Britain and Northern Ireland (sect. 117, sub-sect. 1 (xxxii), *post*). See as to vesting orders, sect. 113, sub-sect. 9, *post*.

(*g*) See sect. 117, sub-sect. 1 (xxi), *post*.

Sect. 1, sub-sects. 2 and 3 of the L. P. (Amendment) Act, 1926, as to which Act see p. 594, *ante*, provide as follows :—

"(2) In any of the following cases, namely—

(a) where a legal estate has been conveyed or created under subsection one of this section (*gg*), or under section sixteen of the Settled Land Act, 1925, subject to any prior interest, or

(b) where before the first day of January, nineteen hundred and twenty-six, land has been conveyed to a purchaser for money or money's worth subject to any prior interest whether or not on the purchase the land was expressed to be exonerated from, or the grantor agreed to indemnify the purchaser against, such prior interest,

the estate owner for the time being of the land subject to such prior interest may, notwithstanding any provision contained in the Settled Land Act, 1925, but without prejudice to any power whereby such prior interest is capable of being overreached, convey or create a legal estate subject to such prior interest as if the instrument creating the prior interest was not an instrument or one of the instruments constituting a settlement of the land.

"(3) In this section 'interest' means an estate, interest, charge or power of charging subsisting, or capable of arising or of being exercised, under a settlement, and, where a prior interest arises under

15 Geo. 5, c. 18, s. 16.

the exercise of a power, 'instrument' includes both the instrument conferring the power and the instrument exercising it."

(*gg*) For sub-sect. 1 of sect. 1 of the Act of 1926, see p. 879, *post*, Under sect. 16, sub-sect. 1 (iii) of S. L. Act, 1925 (*supra*) it had been held that an estate owner having a general power of appointment over settled land could create a legal mortgage (*Re Egerton S. E.*, [1926] 1 Ch. 574).

Deed of discharge on termination of settlement.

17.—(1) Where the estate owner (*h*) of any settled land holds the land free from all equitable interests and powers under a trust instrument (*i*), the persons who in the last or only principal vesting instrument (*k*) or the last or only endorsement on or annex thereto are declared to be the trustees of the settlement or the survivors of them shall, save as hereinafter mentioned, be bound to execute, at the cost of the trust estate, a deed declaring that they are discharged from the trust so far as regards that land:

Provided that, if the trustees have notice of any derivative settlement, trust for sale or equitable charge affecting such land, they shall not execute a deed of discharge until—

(a) in the case of a derivative settlement, or trust for sale, a vesting instrument or a conveyance has been executed or made for giving effect thereto; and

(b) in the case of an equitable charge, they are satisfied that the charge is or will be secured by a legal mortgage, or is protected by registration as a land charge (*l*), or by deposit of the documents of title, or that the owner thereof consents to the execution of the deed of discharge.

Where the land is affected by a derivative settlement or trust for sale, the deed of discharge shall contain a statement that the land is settled land by virtue of such vesting instrument as aforesaid and the trust instrument therein referred to, or is held on trust for sale by virtue of such conveyance as aforesaid, as the case may require.

(2) If, in the circumstances mentioned in subsection (1) of this section and when the conditions therein mentioned have been complied with, the trustees of a settlement on being requested to execute a deed of discharge—

(a) by the estate owner (*h*); or

(b) by a person interested under, or by the trustees of, a derivative settlement; or

(c) by the trustees of a conveyance on trust for sale;

refuse to do so, or if for any reason the discharge cannot be effected without undue delay or expense, the estate owner, person interested, or trustees may apply to the court for an order discharging the first mentioned trustees as respects the whole or any part of the settled land, and the court may make such order as it may think fit (*m*).

(3) Where a deed or order of discharge contains no

statement to the contrary, a purchaser (*n*) of a legal estate in the land to which the deed or order relates shall be entitled to assume that the land has ceased to be settled land, and is not subject to any trust for sale. 15 Geo. 5, c. 18, s. 17.

Restrictions on dispositions of Settled Land where Trustees have not been Discharged.

Restrictions on dispositions of settled land where trustees have not been discharged.

18.—(1) Where land is the subject of a vesting instrument (*o*) and the trustees of the settlement have not been discharged under this Act, then—

(a) any disposition by the tenant for life or statutory owner (*p*) of the land, other than a disposition authorised by this Act or any other statute, or made in pursuance of any additional or larger powers mentioned in the vesting instrument, shall be void, except for the purpose of conveying or creating such equitable interests as he has power, in right of his equitable interests and powers under the trust instrument, to convey or create; and

(b) if any capital money is payable in respect of a transaction, a conveyance to a purchaser (*q*) of the land shall only take effect under this Act if the capital money is paid to or by the direction of the trustees of the settlement or into court; and

(c) notwithstanding anything to the contrary in the vesting instrument (*o*), or the trust instrument (*r*), capital money shall not, except where the trustee is a trust corporation (*s*), be paid to or by the direction of fewer persons than two as trustees of the settlement.

(2) The restrictions imposed by this section do not affect—

(a) the right of a personal representative in whom the settled land may be vested to convey or deal with the land for the purposes of administration (*t*);

(b) the right of a person of full age who has become absolutely entitled (whether beneficially or as trustee for sale or personal representative or otherwise) to the settled land, free from all limitations, powers, and charges taking effect under the trust instrument, to require the land to be conveyed to him;

(c) the power of the tenant for life, statutory owner (*p*), or personal representative in whom the settled land is vested to transfer or create such legal estates, to take effect in priority to the settlement, as may be required for giving effect to any obligations imposed on him by statute, but where any capital money is raised or received in respect of the trans-

15 Geo. 5, c. 18, s. 18.

action the money shall be paid to or by the direction of the trustees of the settlement or in accordance with an order of the court.

(*h*) The owner of a legal estate (sect. 117, sub-sect. 1 (xi), *post*).
(*i*) See *ibid* (xxxi) and sect. 4, *ante*.
(*k*) See sect. 5, *ante*.
(*l*) See Land Charges Act, 1925, s. 10, *ante*.
(*m*) See as to applications to the Court, sects. 93 and 113, sub-sect. 5, *post*. (*n*) See sect. 117, sub-sect. 1 (xxi), *post*.
(*o*) See *ibid.* (xxxi), *post*. (*p*) See *ibid.* (xxvi).
(*q*) See *ibid.* (xxi).
(*r*) See *ibid.* (xxxi) and sect. 4, *ante*.
(*s*) See p. 794, *ante*.
(*t*) See Admon. of Estates Act, 1925, ss. 22—24, *ante*, and as to death duties, L. P. Act, 1925, s. 16, *ante*.

Tenants for Life and Persons with Powers of Tenant for Life.

Who is tenant for life.

19.—(1) The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement.

(2) If in any case there are two or more persons of full age so entitled as joint tenants, they together constitute the tenant for life for the purposes of this Act.

(3) If in any case there are two or more persons so entitled as joint tenants and they are not all of full age, such one or more of them as is or are for the time being of full age is or (if more than one) together constitute the tenant for life for the purposes of this Act, but this subsection does not affect the beneficial interests of such of them as are not for the time being of full age.

(4) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent, and notwithstanding any assignment by operation of law or otherwise of his estate or interest under the settlement, whether before or after it came into possession, other than an assurance which extinguishes that estate or interest.

This section replaces S. L. Act, 1882, s. 2 (5) (6) and (7), which were as follows:—

"(5) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

"(6) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

" (7) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is encumbered or charged in any manner or to any extent." 15 Geo. 5, c. 18, s. 19.

An infant cannot hold a legal estate (L. P. Act, 1925, s. 1 (6), *ante*), and undivided shares in land can only be created in accordance with sect. 34 of that Act, and sect. 36 of the present Act, *post*, which provide trusts for sale.

" Beneficially entitled " means entitled for his own benefit, if there is anything to be derived from the estate, and not simply as trustee for others (*Re Jones*, 26 Ch. D. 743; *Re Llanover, Herbert* v. *Freshfield*, [1903] 2 Ch. 24; see, however, *Vine* v. *Raleigh*, [1896] 1 Ch. 41). A person may be " beneficially entitled " even though he actually receives nothing (*Re Jones*, 26 Ch. D. 743; *Re Atkinson, A.* v. *Bruce*, 30 Ch. D. 612; see sub-sect. 4). A trust to pay rents during a person's life to him, his wife and children, or one or more of them, does not make him a tenant for life (*Re Atkinson*, 31 Ch. D. 577). Where land was limited to trustees during the life of A. on trust to sell the life estate and hand over the proceeds to A. and B., and A. covenanted not to take the life estate *in specie*, it was held that A. and B. could together sell as the tenant for life (*Re Hale and Smyth*, 55 L. T. 151). Where there was a trust in a will for accumulation of rents during the life of the testator's son, who was his heir, such heir was on the expiration of the period allowed by the Thellusson Act held to be a tenant for life or person having the powers of a tenant for life (*Re Atherton*, [1891] W. N. 85; *Vine* v. *Raleigh*, [1896] 1 Ch. 37). " Entitled to possession " means possession as contradistinguished from reversion (*Re Atkinson, A.* v. *Bruce*, 30 Ch. D. 612; cf. *Re Petre, Legh* v. *P.*, [1910] 1 Ch. 290). A trust to permit a lady during her life to reside at certain mansion houses and grounds was held, notwithstanding powers of management in the trustees, to constitute her a tenant for life (*Re Llanover, Herbert* v. *Freshfield*, [1903] 2 Ch. 16; *Re Carne*, [1899] 1 Ch. 324; and see *Re Gibbons, G.* v. *G.*, [1920] 1 Ch. 372). As to persons who have the same powers as a tenant for life, see sects. 20, 21, 23, 25, 26, 28, 29, *post*, and cases there quoted. Where land was assured to A. for life, with remainder to B. in fee, B. being given powers of jointuring and charging portions, he was held to be tenant for life within S. L. Act, 1882, s. 2 (5), after A.'s death (*Re Monckton, M.* v. *Calder*, [1917], 1 Ch. 224). Cf. sect. 20, sub-s. 1 (ix), *post*. Sub-sect. 1. Tenant for life.

" So entitled " in this sub-section means entitled for life (*Re Atkinson, A.* v. *Bruce*, 31 Ch. D. 577; *Re Collinge*, 36 Ch. D. 516). Several persons constituted under sub-sect. 6 of sect. 2 of S. L. Act, 1882, the tenant for life (*Smith* v. *Lancaster*, [1894] 3 Ch. 439); but not where the shares were separate (*Re Osborne and Bright*, [1902] 1 Ch. 335; see, however, *Re Morris' Settled Estates*, [1920] 2 Ch. 229, and see now sect. 36, *post*). Where trustees have power to distribute rents between one or more of several persons during the life of one of them, these persons do not together constitute a tenant for life (*Re Atkinson, supra*). A jointress has not a " concurrent estate or interest " with the tenant for life (*Re Ailesbury*, [1893] 2 Ch. 357). When one undivided moiety was vested in A. in fee, the tenant for life of the other moiety could sell such moiety alone (*Cooper* v. *Belsey*, [1899] 1 Ch. 639; overruling *Re Collinge*, 36 Ch. D. 516; see also *Williams* v. *Jenkins*, [1894] W. N. 176; *Smith* v. *Lancaster*, [1894] 3 Ch. 439); see further the cases quoted under sect. 20, sub-sect. 1 (viii), *post*. Sub-sect. 2.

The provision applies even if the incumbrances exceed the income (*Re Jones*, 26 Ch. D. 740; *Williams* v. *Jenkins*, [1893] 1 Ch. 704).

15 Geo. 5, c. 18, s. 19. Sub-sect. 4.

A disposition of the entire rent is not an incumbrance within this sub-section (*Re Strangways, Hickley* v. *S.*, 34 Ch. D. 427). See as to assignments, sect. 104, p. 960, *post*, and as to extinguishing the interest, sect. 105; and see also sect. 20, sub-sect. 1 (vi) (viii), *infra*, pp. 878, 879, and cases there quoted.

Other limited owners having powers of tenant for life.

20.—(1) Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act, (namely):—

(i) A tenant in tail, including a tenant in tail after possibility of issue extinct, and a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services;

(ii) A person entitled to land for an estate in fee simple or for a term of years absolute with or subject to, in any of such cases, an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(iii) A person entitled to a base or determinable fee, although the reversion or right of reverter is in the Crown, or to any corresponding interest in leasehold land;

(iv) A tenant for years determinable on life, not holding merely under a lease at a rent;

(v) A tenant for the life of another, not holding merely under a lease at a rent;

(vi) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for any purpose;

(vii) A tenant by the curtesy;

(viii) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale;

(ix) A person beneficially entitled to land for an estate in fee simple or for a term of years absolute

subject to any estates, interests, charges, or powers of charging, subsisting or capable of being exercised under a settlement; 15 Geo. 5, c. 18, s. 20.

(x) A married woman entitled to land for an estate in fee simple or for a term of years absolute subject to a restraint on anticipation.

(2) In every such case as is mentioned in subsection (1) of this section, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, shall extend to each of the persons aforesaid, and any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of the estate or interest of the person on whom the powers of a tenant for life are conferred by this section.

(3) For the purposes of this Act the estate or interest of a tenant by the curtesy shall be deemed to be an estate or interest arising under a settlement made by his wife.

(4) Where the reversion or right of reverter or other reversionary right is in the Crown, the exercise by a person on whom the powers of a tenant for life are conferred by this section of his powers under this Act, binds the Crown.

This section replaces, adding "being of full age" (see note to sect. 19) S. L. A., 1882, s. 58. Other alterations are noted, *infra*. A corporation may have the powers of a tenant for life. (*Re Carnarvon Settled Estates*, [1926] W. N. 243.

The singular may include the plural (*Re Bennet, B.* v. *B.*, [1903] 2 Ch. 142). But the limited owners referred to in the section must be persons possessing beneficially the estates or interests therein mentioned (*Re Jemmett and Guest*, [1907] 1 Ch. 634). But see *Re Johnson, J.* v. *J.*, [1914] 2 Ch. 134.

Sub-sect. 1. In sub-sect. 1 the words "in possession" are used by way of distinction from in remainder and reversion (*Re Jones*, 26 Ch. D. 744; *Re Morgan*, 24 Ch. D. 116). So, under S. L. A., 1882, an infant might be "in possession" by his guardian (*Re Morgan, supra*). See now as to infants (to whom as above noted the section does not apply) sect. 26, *post*. An instrument limiting land in trust for an infant for an absolute interest is a settlement (sect. 1, sub-sect. 1 (ii), *ante*). But where there was a trust of the whole income for a term for management and accumulation, with a trust after the determination of the term to settle the land, the life estate under the executory settlement was held to be *in futuro*, and not within this section (*Re Strangways, Hickley* v. *S.*, 34 Ch. D. 423).

Clause (i). Clause (i), which re-enacts S. L. A. 1882, s. 58 (1) (i) and (vii), does not render a tenant in tail who is within the clause capable of alienating within the meaning of sect. 5, sub-sect. 5, of the Finance Act, 1894 (*Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289). In several Acts of Parliament conferring estates on eminent individuals tenants in tail are restrained from alienating them, except for their own lives: *e.g.*, the Duke of Marlborough (5 Anne, cc. 3, 4; see *Davis* v. *Marlborough*, 1 Swanst. 74; *Osborn* v. *Marlborough*, 14 W. R. 886; *Re Blenheim*, 8 Times L. R. 582); the Duke of Wellington (see 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28; Lord Abergavenny (2 & 3 Ph. & M. c. 23; see *Abergavenny* v. *Brace*, L. R. 7 Ex. Ch. 145; *Re Abergavenny*, [1923] 2 K. B. 18); the Bolton

15 Geo. 5, c. 18, s. 20.

Estates (see 27 Hen. 8, c. 16; *Re Bolton Estates, Russell* v. *Meyrick*, [1903] 2 Ch. 461, where, jointuring being excepted from the prohibition against alienation, a jointure given by a recent will was valid, and see *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289; *Re Bolton*, 52 L. T. 728); as to the cases where lands have been purchased with public moneys, see sect. 23, *post*; *Att.-Gen.* v. *Richmond*, [1907] 2 K. B. 981, the Acts contained no express restraint, and a restraint was not implied. An attempt to bring under the parliamentary settlement estates larger than those originally settled failed (*Howard* v. *Shrewsbury*, 2 Ch. 760). Sect. 18 (repealed by L. P. Act, 1924), of the Fines and Recoveries Act, 1833, provided that the power of disposition contained in that Act should not extend to tenants in tail restrained from barring, or to tenants in tail after possibility of issue extinct. See as to the latter, Co. Litt. 28a; 11 Rep. 80. An instrument limiting land in trust for an entailed interest or the interests named in (ii) and (iii) is a settlement (sect. 1, sub-sect. 1 (ii), *ante*). As to the tenants in tail who are within the clause, see also on sect. 18 of the Fines and Recoveries Act, 1883, 2nd ed., p. 278; and see *Re Bolton*, 52 L. T. 728. As to disentail, see *Re Trafford*, [1915] 1 Ch. 9.

Clause (ii.). Clause (ii) in S. L. A. 1882, s. 58, which applied only to tenants in fee simple, applied where there was an executory limitation over in a certain event (*Re Richardson, R.* v. *R.*, [1904] 2 Ch. 777); and where there was a trust to pay the income to a person for the maintenance of an infant until twenty-one, then to the infant absolutely, but if he died under twenty-one over (*Re Morgan*, 24 Ch. D. 114; see *Re James*, 51 L. T. 596). See also *Re Dilks*, 131 L. T. 533; *Re Walmsley*, 105 L. T. 332.

Clause (iii.). As to the words "base fee" in clause (iii), see Fines and Recoveries Act, 1833, s. 1 (*ante*, p. 307). A tenant for life of a base fee can sell the fee simple (*Re Morshead*, [1893] W. N. 180). See Sched. IV. (14), *post*, for retrospective provisions as to the powers of owners of base fees. The provision in the present clause as to leaseholds, and the words "or determinable," are new.

Clause (iv.). These words do not include a person entitled to receive, if he shall so long live, the rents payable under a lease for years (*Re Hazle*, 29 Ch. D. 79). As to the reason for the insertion of the words, see *Re Mundy and Roper*, [1899] 1 Ch. 298.

Clause (v.). Where income was directed to be accumulated during a person's life, the next of kin entitled under the Thellusson Act were held to be within this clause (*Vine* v. *Raleigh*, [1896] 1 Ch. 37). See also *Re Johnson, J.* v. *J.*, [1914] 2 Ch. 134.

Clause (vi.). A person to whom a property is devised so long as he shall reside, and in default over, is within clause (vi) (*Re Paget*, 30 Ch. D. 161); which has been applied also to a trust to permit a person to occupy a house so long as she desires (*Re Edwards*, [1897] 2 Ch. 412; *Re Boyer*, [1916] 2 Ch. 404; see *Re Carne*, [1899] 1 Ch. 324; see *Re Llanover, Herbert* v. *Freshfield*, [1903] 2 Ch. 16; *Re Anderson, Halligey* v. *Kirkley*, [1920] 1 Ch. 175; *Re Gibbons, G.* v. *G.*, *Ibid.* 372). Where a house was to be kept up by trustees for the use and enjoyment of persons entitled in expectancy, the case was not within the section (*Re Astor, A.* v. *A.*, [1922] 1 Ch. 364). The clause applied to a widowhood interest (*Re Eastman*, 68 L. J. Ch. 122). Even where the widow's interest was subject to a trust for maintenance of children (*Re Pollock, P.* v. *P.*, [1906] 1 Ch. 146; see *Re Booth*, [1894] 2 Ch. 282; and sect. 19, sub-sect. 4, *ante*, p. 874). But the clause does not apply to a person merely entitled to receive surplus rents from managing trustees (*Re Llanover, Herbert* v. *Ram*, [1907] 1 Ch. 649; but see *Re Sumner*, [1911] 1 Ch. 315), or to a trust to pay rents during A.'s life to A., his wife and children, or one or more of them (*Re Atkinson, Atkinson* v. *Bruce*, 31 Ch. D. 577). See also *Re Martin* (1919), 1 T. R. 71.

15 Geo. 5, c. 18, s. 20.

The words "trust for accumulation" applied where there was an antecedent term supporting such a trust (*Re Clitheroe*, 31 Ch. D. 141); and include a trust for payment of debts without express direction for accumulation (*Williams* v. *Jenkins*, [1893] 1 Ch. 700; see *Re Richardson, R.* v. *R.*, [1900] 2 Ch. 778; *Re Money-Kyrle, M.* v. *M.*, *Ibid.* 839; *Re Musgrave, Machell* v. *Parry*, [1916] 2 Ch. 417). Where the whole income is during a term directed to be applied in a certain manner or accumulated, a tenant for life who is given an immediate estate subject to the term is within this sub-section (*Re Martyn, Coode* v. *Martyn*, 69 L. J. Ch. 733; 83 L. T. 146; see *Re Woodhouse, Annesley* v. *Woodhouse*, [1898] 1 Ir. R. 69; *Re Llewellyn, L.* v. *L.*, [1911] 1 Ch. 451; *Re Beauchamp, Cadge* v. *Barker-Hahlo*, [1914] 1 Ch. 676); *secus*, where the life estate only commences after the determination of the term (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 431).

Clause (vii.).

The estate by the curtesy (clause (vii)) is deemed to arise under a settlement made by the wife (sub-sect. 3, re-enacting S. L. Act, 1884, s. 8). For the case of a lease under this Act by a tenant by the curtesy, see *Mogridge* v. *Clapp*, [1892] 3 Ch. 382; see also *Bates* v. *Kesterton*, [1896] 1 Ch. 159; *Re Pocock and Prankerd, Ibid.* 306. As to an estate by curtesy generally, see the note, *ante*, p. 405. It is abolished (except as to entailed interests, see L. P. Act, 1925, s. 130, *ante*), in the case of all deaths after 1925, by Administration of Estates Act, 1925, s. 45, *ante*.

Clause (viii.).

As compared with clause (ix) in S. L. Act, 1882, s. 58 (1), the words "or to a trust for accumulation of income for any purpose," "cesser or determination by any means," and the words from "unless" to "sale," are added. The two former are retrospective, and "trust" in clause (ix) in S. L. Act, 1882, is to be deemed always to have included an implied or constructive trust (Sched. IV. (15), *post*). Clause (ix) applied where several annuitants were together entitled to the whole income, the singular including the plural (*Re Bennet, B.* v. *B.*, [1903] 2 Ch. 136). "Entitled" in the clause means entitled according to the limitations of the settlement, without regard to incumbrances (*Re Jones*, 26 Ch. D. 738). The clause includes a direction to pay surplus rents, after keeping down interest on mortgages (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 525), or expenses under extensive powers of management (*Clarke* v. *Thornton*, 35 Ch. D. 307; see *Re Jones*, 26 Ch. D. 738; *Re Cookes* (1885), W. N. 177; *Re Bentley, Wade* v. *Wilson*, 33 W. R. 610; *Re Sumner*, [1911] 1 Ch. 315), but does not apply to an interest taken under an intestacy (*Re Llanover, Herbert* v. *Ram*, [1907] 1 Ch. 650). A trust for a married woman for life for her separate use without power of anticipation and after her death as she should by will appoint and in default to her in fee is within this clause (*Re Pocock and Prankerd*, [1896] 1 Ch. 302). A trust, however, to apply the whole or a part of the income for the maintenance of an infant, the surplus to be accumulated not necessarily for his benefit, did not entitle the infant to the income within this clause (*Re Horne*, 39 Ch. D. 84). See now the added words in the present clause. The clause does not apply to a trust to pay income to a husband, wife and children, or one or more of them (*Re Atkinson, A.* v. *Bruce*, 31 Ch. D. 577). A person is not within the clause if he is entitled only to a certain part of the income and the remainder is to be held and dealt with as capital money (*Re Frewen*, [1926] Ch. 580). See also on the clause *Re Llanover Settled Estates* (ib. 626); and on the concluding words of the clause, see *Re Leigh's Settled Estate*, [1926] Ch. 852.

Clauses (ix) and (x).

These clauses are new. See also as to married women sect. 25, *post*. Sect. 1, sub-sect. 1 of the L. P. (Amendment) Act, 1926

15 Geo. 5, c. 20, s. 20.

(see p. 594, *ante*), enacts that nothing in the S. L. Act shall prevent a person on whom the powers of a tenant for life are conferred by clause (ix) from conveying or creating a legal estate subject to a prior interest as if the land had not been settled land. See also note to sect. 16, *ante*.

Sub-sect. (2).

This sub-section combines sub-sects. 2 and 3 of S. L. Act, 1882, s. 58, but omits after "conferring powers on him or otherwise" the words "and to a settlement, and to settled land," which occurred in sub-sect. 2 of that section.

The effect of sub-sect. 2 was to bring within the Act instruments which did not fall within the definition of settlement in sect. 2 of it (*Re Pocock and Prankerd*, [1896] 1 Ch. 306).

For the present definition, see sect. 1, *ante*, and sect. 117, sub-sect. 1 (xxiv), *post*.

Sub-sect. 3.

Re-enacts, adding "or interest," S. L. Act, 1884, s. 8. See note to sub-sect. 1 (vii), *supra*.

Absolute owners subject to certain interests to have the powers of tenant for life.

21.—(1) Where a person of full age is beneficially entitled in possession to a legal estate subject to any equitable interests or powers, then, for the purpose of overreaching such interests or powers, he may, notwithstanding any stipulation to the contrary, by deed (which shall have effect as a principal vesting deed within the meaning of this Act (*a*)) declare that the legal estate is vested in him on trust to give effect to all equitable interests and powers affecting the legal estate, and that deed shall be executed by two or more individuals approved or appointed by the court or a trust corporation (*b*), who shall be stated to be the trustees of the settlement for the purposes of this Act.

Thereupon so long as any of the equitable interests and powers are subsisting the following provisions shall have effect:—

(a) The person so entitled as aforesaid and each of his successors in title being an estate owner (*c*) shall have the powers of a tenant for life and the land shall be deemed to be settled land;

(b) The instrument (if any) under which his estate arises or is acquired, and the instrument (if any) under which the equitable interests or powers are subsisting or capable of taking effect shall be deemed to be the trust instrument (*d*):

Provided that where there is no such instrument as last aforesaid then a deed (which shall take effect as a trust instrument) shall be executed contemporaneously with the vesting deed, and shall declare the trusts affecting the land;

(c) The persons stated in the principal vesting deed (*a*) to be the trustees of the settlement for the purposes of this Act shall also be the trustees of the trust instrument for those purposes; and

(d) Capital money arising on any disposition of the land shall be paid to or by the direction of the trustees of the settlement or into court, and shall

be applicable towards discharging or providing for payment in due order of any principal money payable in respect of such interests or charges as are overreached by such disposition, and until so applied shall be invested or applied as capital money under the trust instrument, and the income thereof shall be applied as the income of such capital money, and be liable for keeping down in due order any annual or periodical sum which may be overreached by the disposition (*e*).

(2) The following equitable interests and powers are excepted from the operation of subsection (1) of this section, namely—

(i) an equitable interest protected by a deposit of documents relating to the legal estate affected;

(ii) the benefit of a covenant or agreement restrictive of the user of land;

(iii) an easement, liberty or privilege over or affecting land and being merely an equitable interest (*f*);

(iv) the benefit of a contract to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption, or any other like right;

(v) any equitable interest protected by registration under the Land Charges Act, 1925, other than—

(a) an annuity within the meaning of Part II. of that Act (*g*);

(b) a limited owner's charge or a general equitable charge within the meaning of that Act (*h*).

(3) Subject to the powers conferred by this Act on a tenant for life, nothing contained in this section shall deprive an equitable chargee of any of his rights or of his remedies for enforcing those rights.

This section is from L. P. Act, 1922. Cf. L. P. Act, 1925, s. 2 (2) and (3), *ante*, p. 600.

(*a*) See sect. 5, *ante*.
(*b*) See p. 794, *ante*.
(*c*) The owner of a legal estate (sect. 117, sub-sect. 1 (xi), *post*).
(*d*) See sect. 4, *ante*.
(*e*) For the general provisions as to the application of capital money, see sects. 73, 75, *post*.
(*f*) See L. P. Act, 1925, s. 1 (2) and (3), *ante*, p. 598.
(*g*) See L. Charges Act, 1925, s. 4 (5), *ante*, p. 577.
(*h*) See *ibid.*, s. 10 (1), Class C (ii) and (iii), *ante*, p. 580.

Provisions applicable where interest in

22.—(1) Where by a disentailing assurance settled land is expressed to be limited (whether subject or not to any estates, interests, charges or powers expressly created or conferred thereby) upon the trusts subsisting with respect

15 Geo. 5, c. 18, s. 22.

settled land is restored.

thereto immediately before the execution of such disentailing assurance, or any of such trusts, then, for the purposes of this Act and otherwise, a person entitled to any estate or interest in the settled land under any such previously subsisting trust is entitled thereto after the execution of such disentailing assurance as of his former estate or interest.

(2) Where by a resettlement of settled land any estate or interest therein is expressed to be limited to any person (whether subject or not to any estate, interest, charge or power expressly created or conferred by the resettlement) in restoration or confirmation of his estate or interest under a prior settlement, then, for the purposes of this Act and otherwise, that person is entitled to the estate or interest so restored or confirmed as of his former estate or interest, and in addition to the powers exercisable by him in respect of his former estate or interest, he is capable of exercising all such further powers as he could have exercised by virtue of the resettlement, if his estate or interest under the prior settlement had not been so restored or confirmed, but he had been entitled under the resettlement only.

The effect of this section (taken, as are the two next sections, from L. P. Act, 1922) is retrospective (Sched. 4 (8), *post*, p. 1000).

Where land comprised in an original settlement under which A. was tenant for life is resettled, A. being still life tenant, questions, which appear to be determined by the present section, arose under the S. L. Acts, 1882 to 1890, as to how a title should be made to a purchaser by A. The following distinctions have been taken:—

Sale by life tenant where there is resettlement.

(1.) While the original settlement subsists A. could sell by virtue of his statutory power treated as arising under the original settlement alone (*Re Mundy and Roper*, [1899] 1 Ch. 296; *Re Wimborne and Browne*, [1904] 1 Ch. 541; but see *Re Domvile and Callwell*, [1908] 1 I. R. 475; *Re Cope and Wadland*, [1919] 2 Ch. 376). This was in effect a sale under the "less comprehensive settlement."

(2.) A. could also sell by virtue of his statutory power treated as arising under the compound settlement (see p. 858, *ante*) constituted by the original settlement and the resettlement; new trustees of the compound settlement being appointed (*Re Ailesbury and Iveagh*, [1893] 2 Ch. 345; see *Re Mundy and Roper*, [1899] 1 Ch. 294). This was in effect a sale under the "more comprehensive settlement."

(3.) Sometimes A. has claimed to sell by virtue of his statutory power treated as arising under the resettlement alone. Resettlements have taken two forms. In one form the resettlement limits to A. a life estate "in restoration" of his original life estate. In this case it was held A. could not sell under the resettlement alone (*Re Cornwallis-West and Munro*, [1903] 2 Ch. 150; *Re Wimborne and Browne*, [1904] 1 Ch. 542. In *Re Constable's Estates*, [1919] 1 Ch. 178, it was held by the C. A. that the resettlement had destroyed the old life estate and created a new one, but this decision was overruled by a majority of H. L. in *Parr* v. *Att.-Gen.*, [1926] A. C. 239. In another form, the resettlement limits to A. a new life estate, not in restoration of his original life estate. In this case A. could sell under the resettlement alone, subject, however, to any charges created by the original settlement (see *Re Mundy and Roper*, [1899] 1 Ch. 295).

15 Geo. 5, c. 18, s. 23.

Powers of trustees, &c. when there is no tenant for life.

23.—(1) Where under a settlement there is no tenant for life nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life then—

(a) any person of full age on whom such powers are by the settlement expressed to be conferred; and

(b) in any other case the trustees of the settlement;

shall have the powers of a tenant for life under this Act.

(2) This section applies to trustees of settlements of land purchased with money provided by Parliament in consideration of public services where the tenant in tail is restrained from barring or defeating his estate tail (*a*), except that, if the tenant in tail is of full age and capacity, the powers shall not be exercised without his consent, but a purchaser shall not be concerned to see or inquire whether such consent has been given.

(*a*) By sect. 20, sub-sect. 1 (i), *ante*, the tenant in tail in these cases has not the powers of a tenant for life.

As to a tenant for life who has parted with his interest.

24.—(1) If it is shown to the satisfaction of the court that a tenant for life, who has by reason of bankruptcy, assignment, incumbrance, or otherwise ceased in the opinion of the court to have a substantial interest in his estate or interest in the settled land or any part thereof, has unreasonably refused to exercise any of the powers conferred on him by this Act, or consents to an order under this section, the court may, on the application (*b*) of any person interested in the settled land or the part thereof affected, make an order authorising the trustees of the settlement, to exercise in the name and on behalf of the tenant for life, any of the powers of a tenant for life under this Act, in relation to the settled land or the part thereof affected, either generally and in such manner and for such period as the court may think fit, or in a particular instance, and the court may by the order direct that any documents of title in the possession of the tenant for life relating to the settled land be delivered to the trustees of the settlement.

(2) While any such order is in force, the tenant for life shall not, in relation to the settled land or the part thereof affected, exercise any of the powers thereby authorised to be exercised in his name and on his behalf, but no person dealing with the tenant for life shall be affected by any such order, unless the order is for the time being registered as an order affecting land (*c*).

(3) An order may be made under this section at any time after the estate or interest of the tenant for life under the settlement has taken effect in possession, and notwithstanding that he disposed thereof when it was an estate or interest in remainder or reversion.

(*b*) As to applications, see sect. 113, sub-sect. 5, *post*. *Re Cecil's Settled Estates*, [1926] W. N. 262).

(*c*) See L. Charges Act, 1925, s. 6 (1) (a), *ante*.

15 Geo. 5, c. 18, s. 25.

Married woman, how to be affected.

25.—(1) The foregoing provisions of this Act apply to a married woman (*d*) of full age, whether or not she is entitled to her estate or interest for her separate use or as her separate property, and she, without her husband, may exercise the powers of a tenant for life under this Act.

(2) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

(*d*) S. L. Act, 1882, s. 61, gave the powers of a tenant for life to a married woman without her husband only where she was entitled for her separate use or as her separate property.

Infants, how to be affected.

26.—(1) Where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute or would if of full age be a tenant for life of or have the powers of a tenant for life over settled land, then, during the minority of the infant—

(a) if the settled land is vested in a personal representative, the personal representative, until a principal vesting instrument (*e*) has been executed pursuant to the provisions of this Act; and

(b) in every other case, the trustees of the settlement;

shall have, in reference to the settled land and capital money, all the powers conferred by this Act and the settlement on a tenant for life, and on the trustees of the settlement.

(2) If the settled land is vested in a personal representative, then, if and when during the minority the infant, if of full age, would have been entitled to have the legal estate in the settled land conveyed to or otherwise vested in him pursuant to the provisions of this Act (*f*), a principal vesting instrument (*e*) shall, if the trustees of the settlement so require, be executed, at the cost of the trust estate, for vesting the legal estate in themselves, and in the meantime the personal representatives shall, during the minority, give effect to the directions of the trustees of the settlement, and shall not be concerned with the propriety of any conveyance directed to be made by those trustees if the conveyance appears to be a proper conveyance under the powers conferred by this Act or by the settlement, and the capital money, if any, arising under the conveyance is paid to or by the direction of the trustees of the settlement or into court, but a purchaser dealing with the personal representative and paying the capital money, if any, to him shall not be concerned to see that the money is paid to trustees of the settlement or into court, or to inquire whether the personal representative is liable to give effect to any such directions, or whether any such directions have been given.

(3) Subsection (2) of this section applies whether the infant becomes entitled before or after the commencement

of this Act, and has effect during successive minorities until a person of full age becomes entitled to require the settled land to be vested in him. 15 Geo. 5, c. 18, s. 26.

(4) This section does not apply where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute jointly with a person of full age (for which case provision is made in the Law of Property Act, 1925 (*g*)), but it applies to two or more infants entitled as aforesaid jointly, until one of them attains full age. 15 Geo. 5, c. 20.

(5) This section does not apply where an infant would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age, but it applies to two or more infants who would, if all of them were of full age, together constitute the tenant for life or have the powers of a tenant for life, until one of them attains full age.

(6) Nothing in this section affects prejudicially any beneficial interest of an infant (*h*).

(*e*) See sect. 5, *ante*, and sect. 117, sub-sect. 1 (xxxi), *post*.

(*f*) See sects. 7 and 8, *ante*.

(*g*) See sect. 19 of that Act, *ante*, p. 614. The estates named are the only legal estates in land (*ibid.*) sect. 1, sub-sect. 1, *ante*).

(*h*) By Sched. 4 (16), *post*, sects. 59 and 60 of the S. L. Act, 1882, are to be deemed always to have applied, although the infant was a married woman, and sect. 59 is to be deemed always to have extended to any leasehold interest whether at a rent or not. Sect. 59 provided that where an infant was seised of or entitled in possession to land in his own right, he should be deemed tenant for life (see *Re Price, Leighton* v. *P.*, 27 Ch. D. 552; *Re James*, 51 L. T. 596; *Re Horne*, 39 Ch. D. 84; *Re Wells*, 48 L. T. 859; *Re Greenville*, 11 L. R. Ir. 138). By sect. 60, if a tenant for life or a person having the powers of one was an infant, or an infant would if of full age be a tenant for life or have those powers, the powers might be exercised on his behalf by the trustees of the settlement, and if there were none, then by such person and in such manner as the Court, on the application of a guardian or next friend, either generally or in a particular instance, ordered. (See *Re Newcastle*, 24 Ch. D. 140; *Re Greys Court*, [1901] W. N. 60; *Re Dudley*, 35 Ch. D. 343; *Re Helyar, H.* v. *Beckett*, [1902] 1 Ch. 391, where trustees were held not trustees with a power of sale within C. A. 1881, s. 42; and see now sect. 102, *post*, p. 958; *Re Stamford and Warrington, Payne* v. *Grey*, [1916] 1 Ch. 404). See Sched. 2, para. 3 (3), *post*. As to cases where infants are absolutely entitled under a will or intestacy, see also Admon. of Estates Act, 1925, s. 42, *ante*, p. 468, which empowers personal representatives, if there are no trustees, to appoint trustees for the infant. As to special executors in regard to settled land, see sects. 22—24 of the same Act, *ante*, pp. 432 *et seq.* Infants may hold equitable interests in settled land (sect. 27, sub-sect. 2, *post*).

Effect of conveying legal estate to infant.

27.—(1) A conveyance of a legal estate in land to an infant alone, or to two or more persons jointly, both or all of whom are infants, for his or their own benefit shall

15 Geo. 5, c. 18, s. 27.

operate only as an agreement for valuable consideration to execute a settlement by means of a principal vesting deed and a trust instrument (*i*) in favour of the infant or infants, and in the meantime to hold the land in trust for the infant or infants.

(2) Nothing in this Act prevents an equitable interest in settled land being vested in or transferred to an infant.

18 & 19 Vict. c. 43.

(3) Nothing in this Act affects the powers conferred by the Infant Settlements Act, 1855, provided that a legal estate in land is not vested in an infant.

(*i*) See sects. 5 and 4, *ante*.

Tenant for life lunatic.

28.—(1) Where a tenant for life is a lunatic or a defective, his committee or receiver may, in his name and on his behalf, under an order in lunacy exercise the powers of a tenant for life under this Act, and the order may be made on the application of any person interested in the settled land, or of the committee or receiver.

(2) Orders may be made under this section—

(a) either generally or in a particular instance;

(b) without requiring the estate of the lunatic or defective to be administered in lunacy;

(c) by appointing a receiver to act solely in relation to the settled land or in relation to particular settlement.

This section replaces S. L. Act, 1882, s. 62, which applied only to tenants for life, or persons having the powers of a tenant for life, who were lunatics so found by inquisition. For "defective" see sect. 117, sub-sect. 1 (xiii), *post*. "Tenant for life" includes a person having the powers of one, other than a statutory owner (*ibid.* xxviii). Sub-sect. 2 is from L. P. Act, 1924.

Under S. L. Act, 1882, s. 62, it was held that a general authority might be given to the committee to take proceedings under the Act to sell (*Re Gaitskell*, 40 Ch. D. 416). See now sub-sect. 2 (a). And see *Re D.*, [1917] 1 I. R. 344. Trustees should be appointed, if there are none, to receive notice under sect. 101 (*Re Taylor*, 49 L. T. 420; 52 L. J. Ch. 728). Notices cannot be given by the committee without leave of the Court (*Re Ray*, 25 Ch. D. 464). On a sale of the fee the committee may be authorised to enter into the covenants usual in a conveyance (*Re Ray*, [1896] 1 Ch. 468; see *Re Fox*, 33 Ch. D. 37). As to the jurisdiction in lunacy, see now Lunacy Act, 1890, ss. 108, 120; and as to applications in lunacy, see sect. 338.

In the case of a lunatic not so found, any powers which, if such person were a lunatic so found, could be exercised by his committee may be exercised by the quasi committee ("receiver") appointed under sect. 116 of the Lunacy Act, 1890, subject to the direction of the Judge in Lunacy (Lunacy Act, 1908, s. 1). Before that Act it had been held that the power of leasing vested in the tenant for life by the Settled Land Acts fell within sect. 120 of the Lunacy Act, 1890, and accordingly could be exercised by the quasi committee appointed under sect. 116 of that Act (*Re Salt*, [1896] 1 Ch. 117). On the other hand, it had been held that the quasi committee could not exercise certain other powers which did not fall within sect. 120

or sect. 128 of the Lunacy Act, 1890; such as the power of sale given by the Settled Land Acts (*Re Baggs*, [1894] 2 Ch. 416); or the power of sale given by sect. 7 of the L. C. C. Act, 1845 (*Re S. S. B.*, [1906] 1 Ch. 712); or the power of consenting to a sale by trustees (*Re De Moleyns and Harris*, [1908] 1 Ch. 110).

Charitable and public trusts.

29.—(1) For the purposes of this section, all land vested or to be vested in trustees on or for charitable, ecclesiastical, or public trusts or purposes shall be deemed to be settled land, and the trustees shall, without constituting them statutory owners (*k*), have in reference to the land, all the powers which are by this Act conferred on a tenant for life and on the trustees of a settlement.

In connexion only with the exercise of those powers, and not so as to impose any obligation in respect of or to affect—

(a) the mode of creation or the administration of such trusts; or

(b) the appointment or number of trustees of such trusts (*l*);

the statute or other instrument creating the trust or under which it is administered shall be deemed the settlement, and the trustees shall be deemed the trustees of the settlement, and, save where the trust is created by a will coming into operation after the commencement of this Act, a separate instrument shall not be necessary for giving effect to the settlement.

Any conveyance of land held on charitable, ecclesiastical or public trusts shall state that the land is held on such trusts, and, where a purchaser has notice that the land is held on charitable, ecclesiastical, or public trusts, he shall be bound to see that any consents or orders requisite for authorising the transaction have been obtained.

(2) The said powers shall be exercisable subject to such consents or orders, if any, being obtained as would, if this Act had not been passed, have been requisite if the transaction were being effected under an express power conferred by the instrument creating the trust, and where the land is vested in the official trustee of charity lands or in any other persons having no powers of management, the said powers shall be exercisable by the managing trustees or committee of management, and the official trustee or other persons aforesaid shall not be liable for giving effect to directions given by the managing trustees or committee of management:

Provided that where—

(a) a disposition or dealing is to be effected for a nominal price or rent, or for less than the best price or rent that can be reasonably obtained or gratuitously; or

(b) any interest in land is to be acquired;

15 Geo. 5, c. 18, s. 29.

the like consent or order (if any) shall be required in reference to the disposition, dealing or acquisition, as would have been requisite if the intended transaction were a sale.

(3) Nothing in this section affects the jurisdiction of the court, Charity Commissioners, Board of Education, or other competent authority, in regard to the administration of charitable, ecclesiastical, or public trusts.

(4) Every assurance of land or of personal estate, within the meaning of section four of the Mortmain and Charitable Uses Act, 1888, or if the charitable uses are declared by a separate instrument, then that instrument, shall, in place of the requirements respecting attestation and enrolment prescribed by subsections (6) and (9) of that section, be sent to the offices of the Charity Commissioners within six months after the execution thereof or within such extended period as the said Commissioners may, either before or after the expiration of the six months, in any particular case allow, for the purpose of being recorded in the books of the said Commissioners.

51 & 52 Vict. c. 42.

Where the original cannot be produced, an attested or office copy may be sent instead of the original.

This subsection does not apply to registered dispositions of registered land, or to assurances or instruments required by section one hundred and seventeen of the Education Act, 1921, to be sent to the Board of Education, and only applies to instruments executed after the commencement of this Act.

11 & 12 Geo. 5, c. 51.

(5) Where any trustees or the majority of any set of trustees have power to transfer or create any legal estate, that estate shall be transferred or created by them in the names and on behalf of the persons (including the official trustee of charity lands) in whom the legal estate is vested.

(6) This section applies (save as otherwise provided) whether the trust was created before or after the commencement of this Act, but does not apply to land to which the Universities and College Estates Act, 1925, applies (*m*).

15 Geo. 5, c. 24.

This section is from L. P. Act, 1924.

(*k*) See sect. 117, sub-sect. 1 (xxvi), *post*.

(*l*) As to the appointment of charitable trustees, see note to sect. 52 of the Trustee Act, 1925, *post*; and as to trustees of land held for religious or educational purposes, the Trustees Appointment Act, 1890.

(*m*) *I.e.*, lands of Oxford, Cambridge, and Durham Universities and the colleges or halls in them, and Winchester and Eton Colleges (see sect. 1 of the Act).

Trustees of Settlement.

Who are trustees for purposes of Act.

30.—(1) Subject to the provisions of this Act, the following persons are trustees of a settlement for the

purposes of this Act, and are in this Act referred to as the "trustees of the settlement" or "trustees of a settlement," namely— 15 Geo. 5, c. 18, s. 30.

(i) the persons, if any, who are for the time being under the settlement, trustees with power of sale of the settled land (subject or not to the consent of any person), or with power of consent to or approval of the exercise of such a power of sale, or if there are no such persons; then

(ii) the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, or any of them, or this Act, or if there are no such persons (*n*); then

(iii) the persons, if any, who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold or otherwise dealt with, or with power of consent to or approval of the exercise of such a power of sale, or, if there are no such persons; then

(iv) the persons, if any, who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the settled land, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not, or, if there are no such persons (*o*); then

(v) the persons, if any, appointed by deed to be trustees of the settlement by all the persons who at the date of the deed were together able, by virtue of their beneficial interests or by the exercise of an equitable power, to dispose of the settled land in equity for the whole estate the subject of the settlement (*p*).

(2) Paragraphs (i) (iii) and (iv) of the last preceding subsection take effect in like manner as if the powers therein referred to had not by this Act been made exercisable by the tenant for life or statutory owner (*q*).

(3) Where a settlement is created by will, or a settlement has arisen by the effect of an intestacy (*r*), and apart from this subsection there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a trust corporation (*s*), it shall be obligatory on

15 Geo. 5, c. 18, s. 30.

him to appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly (*t*).

(*n*) Clauses (i) and (ii) re-enact S. L. Act, 1882, s. 2 (8), adding the bracketed words in (i).

Trustees of the settlement.

The provisions of the Trustee Act, 1925, as to the appointment, discharge and retirement of trustees apply to trustees for the purposes of this Act (Trustee Act, 1925, s. 64, *post*). Trustees with a power of sale subject to the consent of another were trustees for the purposes of the S. L. Act, 1882 (*Constable* v. *C.*, 32 Ch. D. 233), unless that consent could not be obtained (*Re Johnston*, 17 L. R. Ir. 172) (see now the bracketed words in clause (i)); and were such trustees for the purposes of a sale of heirlooms, though the power of sale did not extend to the heirlooms (*Constable* v. *C.*, *supra*). A general power of sale, not a limited one, is intended (*Re Coull*, [1905] 1 Ch. 724). Such a power was inferred from power being given to trustees to vary securities (*Re Tapp and London Docks*, 92 L. T. 829). So trustees holding realty on trusts declared of personalty, which included a power to call in and vary investments, were held trustees for the purposes of the Act (*Re Garnett Orme and Hargreaves*, 25 Ch. D. 595). Trustees of a term of a thousand years limited immediately before the life estate on trusts *inter alia* by mortgage, or out of rents, or by other reasonable means, to raise large sums, are not trustees within this definition (*Re Carne*, [1899] 1 Ch. 324).

(*o*) Clauses (iii) and (iv) re-enact S. L. Act, 1890, s. 16, adding in (iii) "or otherwise dealt with," and in (iv) substituting "trust for sale of the settled land" for "trust for sale of the land to be sold."

See, before the S. L. Act, 1890, *Wheelwright* v. *Walker*, 23 Ch. D. 752. "Land comprised in the settlement," in clause (iii), means "for the time being comprised"; and includes land subsequently purchased and settled (*Re Moore, M.* v. *Bigg*, [1906] 1 Ch. 792).

A tenant for life of settled land which is subject to a future trust for sale exercisable after his death can be a trustee (*Re Davies and Kent*, [1910] 2 Ch. 35; *Re Jackson*, [1902] 1 Ch. 258); in which last case it was said that "under" in clause (iv) meant "bound by." See also *Re Johnson's Settled Estates*, [1913] W. N. 222. If the "future trust" is valid at the time of the tenant for life's sale, it is immaterial that it may afterwards be made invalid (*Re Davies and Kent*, [1910] 2 Ch. 35).

(*p*) This clause, and the remainder of this section, are from L. P. Act, 1922.

(*q*) See sect. 117, sub-sect. 1 (xxvi), *post*.

(*r*) See sect. 1, sub-sect. 2, *ante*.

(*s*) See p. 794, *ante*.

(*t*) See sects. 36 and 40 of that Act, *post*.

As to trustees of compound settlements.

31.—(1) Persons who are for the time being trustees for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement constituted by that instrument and any instruments subsequent in date or operation.

Where there are trustees for the purposes of this Act of the instrument under which there is a tenant for life or statutory owner but there are no trustees for those purposes of a prior instrument, being one of the instruments by which a compound settlement is constituted, those trustees shall, unless and until trustees are appointed of the prior instrument or of the compound settlement, be the trustees for the purposes of this Act of the compound settlement. 15 Geo. 5, c. 18, s. 31.

(2) This section applies to instruments coming into operation before as well as after the commencement of this Act, but shall have effect without prejudice to any appointment made by the court before such commencement of trustees of a settlement constituted by more than one instrument, and to the power of the court in any case after such commencement to make any such appointment, and where any such appointment has been made before such commencement or is made thereafter this section shall not apply or shall cease to apply to the settlement consisting of the instruments to which the appointment relates.

Sects. 31—33 are from L. P. Act, 1922. The concluding portion of sub-sect. 1 of sect. 31, from "where there are trustees," was added by sect. 7 of the L. P. (Amdt.) Act, 1926 (see p. 595, *ante*). See, as to compound settlements, and the appointment of trustees of them by the Court, p. 859, *ante*, and the next two sections. See also *Re Cradock*, [1926] W. N. 179.

As to trustees of referential settlements.

32.—(1) Where a settlement takes or has taken effect by reference to another settlement, the trustees for the time being of the settlement to which reference is made shall be the trustees of the settlement by reference, but this section does not apply if the settlement by reference contains an appointment of trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, or any of them, or this Act.

(2) This section applies to instruments coming into operation before as well as after the commencement of this Act, but shall have effect without prejudice to any appointment made by the court before such commencement of trustees of a settlement by reference, or of the compound settlement consisting of a settlement and any other settlement or settlements made by reference thereto, and to the power of the court in any case after such commencement to make any such appointment, and where any such appointment has been made before such commencement or is made thereafter this section shall not apply or shall cease to apply.

(3) In this section "a settlement by reference to another settlement" means a settlement of property upon the

15 Geo. 5, c. 18, s. 32.

limitations and subject to the powers and provisions of an existing settlement, with or without variation.

The effect of this section is retrospective (Sched. 4 (9), *post*). See as to settlements by reference, p. 859, *ante*, and *Re Stafford*, [1904] 2 Ch. 72, and other cases there quoted; and as to the treating of estates settled by different settlements upon the same limitations, whether by reference or otherwise, as one aggregate estate, see sect. 91, *post*, p. 951.

Continuance of trustees in office, and as to certain compound settlements.

33.—(1) Where any persons have been appointed or constituted trustees of a settlement, whether by an order of the court or otherwise, or have by reason of any power of sale, or trust for sale, or by reason of a power of consent to, or approval of, the exercise of a power of sale, or by virtue of this Act, or otherwise at any time become trustees of a settlement for the purposes of the Settled Land Acts, 1882 to 1890, or this Act (*u*), then those persons or their successors in office shall remain and be trustees of the settlement as long as that settlement is subsisting or deemed to be subsisting for the purposes of this Act.

In this subsection "successors in office" means the persons who, by appointment or otherwise, have become trustees for the purposes aforesaid.

(2) Where settled land is or has been expressed to be disposed of under a compound settlement of which trustees were appointed by the court, and the capital money (if any) arising on the disposition is or was paid to the persons who by virtue of the order or any subsequent appointment appear to be or to have been the trustees of that settlement, and where the person by or on whose behalf the disposition is or was made is or was the tenant for life or statutory owner (*x*) of the land disposed of under an instrument mentioned in the order as constituting part of such compound settlement (in this subsection called "the principal instrument") then the title of the person to whom the disposition is made shall not be impeachable on the ground—

(a) that the instruments mentioned in the order did not constitute a compound settlement; or

(b) that those instruments were not all the instruments at the date of the order or of the disposition constituting the compound settlement of the land disposed of; or

(c) that any of the instruments mentioned in the order did not form part of the settlement of the land disposed of, or had ceased to form part of the settlement at the date of the disposition;

but nothing in this subsection shall prejudice the rights of any person in respect of any estate, interest or charge under any instrument existing at the date of the order and not mentioned therein which would not have been overreached

if the disposition had been made by or on behalf of the tenant for life or statutory owner (*x*) under the principal instrument as such (*y*), and there had been trustees of that instrument for the purposes of the Settled Land Acts, 1882 to 1890, or this Act, and the capital money, if any, arising on the disposition had been paid to the trustees. 15 Geo. 5, c. 18, s. 33.

(3) The foregoing provisions of this section operate to confirm all dispositions made before the commencement of this Act, but not so as to render invalid or prejudice any order of the court, or any title or right acquired before the commencement of this Act, and operate without prejudice to any appointment already made by the court of trustees of a settlement, and to the power of the court in any case hereafter to make any such appointment.

(*u*) See sect. 30, *ante*.
(*x*) See sect. 117, sub-sect. 1 (xxvi), *post*.
(*y*) For definition of "disposition," see sect. 117, sub-sect. 1 (v), *post*, and as to the effect of a disposition by a tenant for life, see sect. 72, *post*, p. 928.

34.—(1) If at any time there are no trustees of a settlement, or where in any other case it is expedient, for the purposes of this Act, that new trustees of a settlement be appointed, the court may, if it thinks fit, on the application of the tenant for life, statutory owner, or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder or otherwise, or, in the case of an infant, of his testamentary or other guardian or next friend, appoint fit persons to be trustees of the settlement. Appointment of trustees by Court.

(2) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall become and be the trustees or trustee of the settlement.

Re-enacts S. L. Act, 1882, s. 38, with the addition of "or statutory owner" (see sect. 117, sub-sect. 1 (xxvi), *post*). See also sect. 35.

The provisions as to the appointment, discharge and retirement of trustees contained in the Trustee Act, 1925, apply to trustees for the purposes of the S. L. Acts (T. A. 1925, s. 64, *post*, p. 1103, *q.v.*, as to who may appoint); see before S. L. Act, 1890, *Re Wilcock*, 34 Ch. D. 508; *Re Kane*, 21 L. R. Ir. 112. Trustees for the purposes of the Act should be appointed by the Judge in person (see Annual Practice (1925), 2277). See also Practice note (1921) W. N. 222.

As to who are "trustees, &c.," see sect. 30, *ante*, p. 888. The trustees are intended to be a check on the tenant for life; and accordingly the solicitor of the tenant for life will not be appointed (*Re Kemp*, 24 Ch. D. 485; *Wheelwright* v. *Walker*, 23 Ch. D. 763; *Re Stamford, Payne* v. *S.*, [1896] 1 Ch. 288); unless as a matter

15 Geo. 5, c. 18, s. 34.

of convenience, as where he is already one of the trustees of a deed forming part of the settlement (*Re Ailesbury and Iveagh*, [1893] 2 Ch. 360); nor will the tenant for life himself be appointed, nor a person who may become a tenant for life (*Re Harrop*, 24 Ch. D. 719; see *Re Jackson*, [1902] 1 Ch. 258; *Re Davies and Kent*, [1910] 2 Ch. 35). The Court refused to appoint two persons related to each other (*Re Knowles*, 27 Ch. D. 707; see, however, *Re Wells*, 48 L. T. 859; 31 W. R. 764). The existing trustees of the instrument creating the settlement were appointed (*Re Morgan*, 24 Ch. D. 114; see *Re Harrop, ibid.* 717; *Re Kemp, ibid.* 487); but they will not necessarily be appointed (*Re Nicholas*, [1894] W. N. 165).

Where an infant domiciled in a British colony was deemed to be tenant for life under S. L. Act, 1882, s. 59 (see now sect. 26, *ante*), persons domiciled in the same colony were appointed trustees (*Re Simpson*, [1897] 1 Ch. 256; see *Re Lloyd, Edwards* v. *L.*, 54 L. T. 643). The addition of land in England to the property subject to an Irish settlement did not make an appointment of trustees by the Court in England necessary (*Re Arran and Knowlsden*, [1912] 2 Ch. 141). See also *Re Charteris, C.* v. *Kenyon*, [1917] 2 Ch. 257.

It would seem that on an appointment of trustees under this section the Court has no jurisdiction to place restrictions on the exercise of their powers (*Re Dudley*, 35 Ch. D. 343). Trustees have been appointed under the following circumstances: Where they were required for the purpose of receiving notices (sect. 101, *post*) (*Wheelwright* v. *Walker*, 23 Ch. D. 763; *Re Taylor*, 49 L. T. 420; see *Re Bentley, Wade* v. *Wilson*, 33 W. R. 610; *Williams* v. *Jenkins*, [1894] W. N. 176); or for receiving out (sect. 73, subsect. 1 (xix), *post*) money paid into Court under the Lands Clauses Act (*Re Wright*, 24 Ch. D. 662; *Re Belfast Improvement Acts, Ex p. Reid*, [1898] 1 I. R. 1); or when the tenant for life was an infant, under S. L. Act, 1882, s. 60 (*Re Morgan*, 24 Ch. D. 114; *Re Price, Leighton* v. *P.*, 27 Ch. D. 552. See now sect. 26, *ante*). Trustees were appointed where the limitations of the original settlement were spent and a sale was being made under a new settlement (*Re Gordon and Adams*, [1914] 1 Ch. 110). As to the appointment of trustees of a compound settlement, see the note to sect. 1, *ante*, p. 859; and see sects. 31—33, *ante*. The Court is not bound to appoint trustees if satisfied that a sale is impossible (*Williams* v. *Jenkins*, [1894] W. N. 176). And the Court has refused to appoint trustees to enable an investment to be made under sect. 33 of S. L. Act, 1882 (see now sect. 77, *post*), which was not authorised by the will and might interfere with its objects (*Burke* v. *Gore*, 13 L. R. Ir. 367). A reference to chambers was directed (*Re Carne*, [1899] 1 Ch. 330).

Trustees appointed under this section can, under sect. 95, give a good discharge for money paid to them (*Cookes* v. *C.*, 34 Ch. D. 502).

On an original appointment of trustees under this section no duty is chargeable (*Re Potter*, (1889), W. N. 69; see *Re Kennaway, ibid.* p. 70).

For form of summons, see R. S. L. Act, Form 19 (*post*, p. 1012). As to the form of order generally, see *Re Harrop* (24 Ch. D. 719); *Re Simpson* ([1897] 1 Ch. 256); Seton, 7th ed. 1756; and in the case of separate trustees of several settlements created by one will, *Re Skerritt* ([1899] W. N. 240). An order appointing new trustees was drawn up *nunc pro tunc* where a trustee died before the drawing up (*Re Jones, Bullis* v. *J.*, [1891] W. N. 114).

Procedure on appointment of new trustees.

35.—(1) Whenever a new trustee for the purposes of this Act is appointed of a trust instrument (*z*) or a trustee

thereof for the purposes aforesaid is discharged from the trust without a new trustee being appointed, a deed shall be executed supplemental to the last or only principal vesting instrument (*a*) containing a declaration that the persons therein named, being the persons who after such appointment or discharge, as the case may be, are the trustees of the trust instrument (*z*) for the purposes aforesaid, are the trustees of the settlement for those purposes; and a memorandum shall be endorsed on or annexed to the last or only principal vesting instrument in accordance with the Trustee Act, 1925 (*b*). 15 Geo. 5, c. 18, s. 35. 15 Geo. 5, c. 19.

(2) Every such deed as aforesaid shall, if the trustee was appointed or discharged by the court, be executed by such person as the court may direct, and, in any other case, shall be executed by—

(i) the person, if any, named in the principal vesting instrument (*a*) as the person for the time being entitled to appoint new trustees of the settlement, or if no person is so named, or the person is dead or unable or unwilling to act, the persons who if the principal vesting instrument had been the only instrument constituting the settlement would have had power to appoint new trustees thereof;

(ii) the persons named in the deed of declaration as the trustees of the settlement; and

(iii) any trustee who is discharged as aforesaid or retires.

(3) A statement contained in any such deed of declaration as is mentioned in this section to the effect that the person named in the principal vesting instrument (*a*) as the person for the time being entitled to appoint new trustees of the settlement is unable or unwilling to act, or that a trustee has remained outside the United Kingdom (*c*) for more than twelve months, or refuses or is unfit to act, or is incapable of acting, shall in favour of a purchaser of a legal estate be conclusive evidence of the matter stated.

This and sect. 36 are from L. P. Acts, 1922 and 1924.

(*z*) See sects. 4 and 9, *ante*.

(*a*) See sect. 5, *ante*, and sect. 117, sub-sect. 1 (xxxi), *post*.

(*b*) See sect. 35, sub-sect. 2 of that Act, *post*, p. 1060.

(*c*) Great Britain and Northern Ireland (sect. 117, sub-sect. 1 (xxxii), *post*).

36.—(1) If and when, after the commencement of this Act, settled land is held in trust for persons entitled in possession under a trust instrument (*d*) in undivided shares, the trustees of the settlement (if the settled land is not already vested in them) may require the estate owner (*e*) in whom the settled land is vested (but in the case of a

Undivided shares to take effect behind a trust for sale of the land.

15 Geo. 5, c. 18, s. 36.

personal representative subject to his rights and powers for purposes of administration), at the cost of the trust estate, to convey the land to them, or assent to the land vesting in them as joint tenants, and in the meantime the land shall be held on the same trusts as would have been applicable thereto if it had been so conveyed to or vested in the trustees.

(2) If and when the settled land so held in trust in undivided shares is or becomes vested in the trustees of the settlement, the land shall be held by them (subject to any incumbrances affecting the settled land which are secured by a legal mortgage, but freed from any incumbrances affecting the undivided shares or not secured as aforesaid, and from any interests, powers and charges subsisting under the trust instrument (*d*) which have priority to the trust for the persons entitled to the undivided shares) upon the statutory trusts.

(3) If the estate owner (*e*) refuses or neglects for one month after demand in writing to convey the settled land so held in trust in undivided shares in manner aforesaid, or if by reason of his being outside the United Kingdom (*f*) or being unable to be found, or by reason of the dissolution of a corporation, or for any other reason, the court is satisfied that the conveyance cannot otherwise be made, or cannot be made without undue delay or expense, the court may, on the application of the trustees of the settlement, make an order vesting the settled land in them on the statutory trusts (*g*).

(4) An undivided share in land shall not be capable of being created except under a trust instrument (*d*) or under the Law of Property Act, 1925 (*h*), and shall then only take effect behind a trust for sale.

(5) Nothing in this section affects the priority inter se of any incumbrances whether affecting the entirety of the land or an undivided share.

(6) For the purposes of this section land held upon the statutory trusts shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same, with power to postpone the sale of the whole or any part thereof, and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale, after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested in the settled land.

(7) The provisions of this section bind the Crown.

(*d*) See sects. 4 and 9, *ante*.
(*e*) The owner of a legal estate (sect. 117, sub-sect. 1 (xi), *post*).

(*f*) Great Britain and Northern Ireland (*ibid.* (xxxii)). 15 Geo. 5, c. 18, s. 36.
(*g*) As to applications, see sects. 93 and 113, sub-sect. 5, *post*.
(*h*) See sect. 34 of that Act, *ante*, p. 622. An undivided share could be sold alone under S. L. Act, 1882 (*Cooper* v. *Belsey*, [1899] 1 Ch. 639). See *Williams* v. *Jenkins*, [1894] W. N. 176; *Re Powell, Allaway* v. *Oakeley* (1884), W. N. 67; *Re Barlow*, [1903] 1 Ch. 382.

Transitional Provisions.

37. The transitional provisions set out in the Second Schedule to this Act shall have effect as regards settlements existing at the commencement of this Act. Transitional provisions with respect to existing settlements, &c.

Part II.

Powers of a Tenant for Life.

Sale and Exchange.

38. A tenant for life— Powers of sale and exchange.

(i) May sell the settled land, or any part thereof, or any easement, right or privilege of any kind over or in relation to the land; and

(ii) Where the settlement comprises a manor, may sell the seignory of any freehold land within the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an extinguishment of the manorial incidents; and

(iii) May make an exchange of the settled land, or any part thereof, or of any easement, right, or privilege of any kind, whether or not newly created, over or in relation to the settled land, or any part thereof, for other land, or for any easement, right or privilege of any kind, whether or not newly created, over or in relation to other land, including an exchange in consideration of money paid for equality of exchange.

This section re-enacts S. L. Act, 1882, s. 3, and S. L. Act, 1890, s. 5, with the following changes: References to copyhold or customary land and to partition of undivided shares in land are omitted, the former tenure having been abolished as from January 1, 1926, by L. P. Act, 1922, Part V., and tenure in undivided shares (except under a trust for sale) by sect. 36, *ante*, and L. P. Act, 1925, s. 34, *ante*. For definition of "mining purposes," see sect. 117, sub-sect. 1 (xv), *post*; and as to "manorial incidents," L. P. Act, 1922, s. 128 (see note to L. P. Act, 1925, s. 28, *ante*, p. 619). For the leasing powers of a tenant for life, see sects. 41 *et seq.*, *post*; for his powers of mortgaging, sect. 71, *post*; and for miscellaneous

15 Geo. 5, c. 18, s. 38.

powers, sects. 49 *et seq.*, *post*. As to accepting re-grants, see sect. 52, *post*; and as to the power of the Court to sanction transactions not otherwise authorised, sect. 64, *post*. As to securing part of the purchase-money by mortgage, see Trustee Act, 1925, s. 10 (2), *post*.

As regards the power of sale, the Acts do not make saleable what is in its nature inalienable, as a dignity (*Re Rivett-Carnac*, 30 Ch. D. 140). A sale to a railway company of the right to construct and use tunnels was a sale, not of an easement, but of part of the settled land (*Re Pearson*, 83 L. T. 626). In selling the tenant for life is a trustee for all parties (sect. 107); but he may sell to increase his own income (*Wheelwright* v. *Walker*, 23 Ch. D. 759; *Re Sebright*, 33 Ch. D. 436; see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 539). It has been said that he may sell from ill-will, or caprice, or because the remainderman is disliked (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540; *Wheelwright* v. *Walker*, *supra*; *Re Chaytor*, 25 Ch. D. 654; see, however, the cases quoted under sect. 107, *post*, p. 966). The tenant for life may sell, notwithstanding that he has assigned his own interest (sect. 104, *post*, p. 960; *Re Sebright*, 33 Ch. D. 429; *Re Ailesbury*, [1892] 1 Ch. 506; see *Re Mundy and Roper*, [1899] 1 Ch. 296; *Re Barry Rail. and Wimborne*, 76 L. T. 489); but in such case the sale is without prejudice to the assignee's rights (*Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341); and may sell, notwithstanding that the remainderman has assigned his interest (*Wheelwright* v. *Walker*, 23 Ch. D. 752).

A remainderman cannot restrain the tenant for life from selling on the ground that the property may increase in value (*Thomas* v. *Williams*, 24 Ch. D. 558). But he may restrain him from selling until trustees under the Act have been appointed (*Wheelwright* v. *Walker*, 23 Ch. D. 752; see *Mogridge* v. *Clapp*, [1892] 3 Ch. 395, 400). As between the tenant for life and a purchaser from him, however, the fact that there were no trustees at the time of the contract, or that (if there were any) no notice (see sect. 101, *post*) had been given to them, is not a defect of the title of the tenant for life to sell (*Hatten* v. *Russell*, 38 Ch. D. 344; *Marlborough* v. *Sartoris*, 32 Ch. D. 615; *Mogridge* v. *Clapp*, *supra*). It would seem that a purchaser may require the appointment of trustees before completion (*Hatten* v. *Russell*, 38 Ch. D. 345; see *Re Fisher and Grazebrook*, [1898] 2 Ch. 661). As to the result where a purchaser completes with knowledge that there are no trustees, see *Mogridge* v. *Clapp*, [1892] 3 Ch. 396, 401. Where persons were appointed under sect. 60 of S. L. Act, 1882 (see note to sect. 26, *ante*) to exercise a tenant for life's powers, no trustee needed to be appointed (*Re Dudley*, 35 Ch. D. 338). The restrictions imposed by a private Act on a sale by trustees do not affect a sale by the tenant for life under this section (*Re Chaytor*, 25 Ch. D. 651; compare *Talbot* v. *Scarisbrick*, [1908] 1 Ch. 812). A decree for the execution of the trusts of the settlement does not prevent the tenant for life from selling without the sanction of the Court (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531). For the case where an order for sale has been previously made in an action, see *Taylor* v. *Poncia*, 25 Ch. D. 646; or under the S. E. Act, 1877, *Re Barrs-Haden*, 49 L. T. 661; 32 W. R. 194; *Re Poole*, 50 L. T. 585; 32 W. R. 956.

Where trustees had contracted for an immediate sale, but, in consequence of their power of sale not arising till after the death of a tenant for life, could not make a good title, they could not force the purchaser to accept a conveyance from the tenant for life under this Act (*Re Bryant and Barningham*, 44 Ch. D. 218; see *Re Baker and Salmon*, [1907] 1 Ch. 238; *Re Atkinson and Horsell*, [1912] 2 Ch. 1).

Crown.

Semble, a sale under the Act is good as against the Crown claiming

in remainder in default of heirs (*Re Bond, Panes* v. *Att.-Gen.*, [1901] 1 Ch. 20). And see sect. 1, sub-sect. 6, and sect. 20, sub-sect. 4, *ante*.

15 Geo. 5, c. 18, s. 38.

Before S. L. Act, 1882, the Court had a discretion to put an equitable tenant for life into possession (*Tidd* v. *Lister*, 5 Madd. 429; *Taylor* v. *Taylor*, 20 Eq. 303). Since the Act, and having regard to the powers thereby conferred on a tenant for life, the Court exercised this discretion more freely in his favour (*Re Bagot, B.* v. *Kittoe*, [1894] 1 Ch. 182; *Re Richardson, R.* v. *R.*, [1900] 2 Ch. 784); and let into possession equitable tenants for life, even where the trustees had powers of management (*Re Bagot, supra; Re Wythes, West* v. *Wythes*, [1893] 2 Ch. 369; see *Re Wilkinson, Lloyd* v. *Steel*, 85 L. T. 43, the case of a tenant for life of ground rents subject to a mortgage); and where the property was leasehold (*Re Newen, N.* v. *Barnes*, [1894] 2 Ch. 297); and has let into possession legal tenants for life subject to terms for securing incumbrances (*Re Richardson, supra; Re Money-Kyrle, M.* v. *M.*, [1900] 2 Ch. 839; but see *Re Stamford and Warrington, Payne* v. *Grey*, [1925] Ch. 162). The orders have been made on terms protecting the trustees in the form of undertakings (*Re Wythes, supra; Re Bagot, supra; Re Newen, supra*), and the giving of security (*Re Money-Kyrle, supra*). As to letting into possession the assignee of an equitable life interest, see *Re Hunt, Pollard* v. *Geake*, [1901] W. N. 144.

Letting tenant for life into possession.

Since the S. L. Act, 1882, the Court has also ordered the title-deeds to be delivered to an equitable tenant for life (*Re Burnaby*, 42 Ch. D. 621; *Re Richardson, supra; Re Money-Kyrle, supra; Re Wilkinson, Lloyd* v. *Steel, supra*); but not where he had mortgaged his interest (*Re Newen, supra;* see *Wheeler* v. *Tootell*, 51 W. R. 693). See as to the custody of deeds by trustees having, before the present Act, the legal estate, *Re Sisson, Jones* v. *Trapper*, [1903] 1 Ch. 262; *Tendring Co.* v. *Jones*, [1903] 2 Ch. 615. Easements may be exchanged apart from any exchange of land (*Re Bracken*, [1903] 1 Ch. 265). Cross sales of easements by the tenants for life of adjoining settled estates were held to be within their powers (*Re Brotherton, B.* v. *B.*, [1908] W. N. 56). The power to exchange releases of easements was doubtful (*ibid.*, [1907] W. N. 230). See also as to easements sect. 49, sub-sect. 1, and sect. 58, sub-sect. 2, *post*.

Easements.

39.—(1) Save as hereinafter provided every sale shall be made for the best consideration in money that can reasonably be obtained.

Regulations respecting sales.

(2) A sale may be made in consideration wholly or partially of a perpetual rent, or a terminable rent consisting of principal and interest combined, payable yearly or half-yearly to be secured upon the land sold, or the land to which the easement, right or privilege sold is to be annexed in enjoyment or an adequate part thereof.

In the case of a terminable rent, the conveyance shall distinguish the part attributable to principal and that attributable to interest, and the part attributable to principal shall be capital money arising under this Act:

Provided that, unless the part of the terminable rent attributable to interest varies according to the amount of the principal repaid, the trustees of the settlement shall, during the subsistence of the rent, accumulate the income of the said capital money in the way of compound interest

15 Geo. 5, c. 18, s. 39.

by investing it and the resulting income thereof in securities authorised for the investment of capital money and shall add the accumulations to capital.

(3) The rent to be reserved on any such sale shall be the best rent that can reasonably be obtained, regard being had to any money paid as part of the consideration, or laid out, or to be laid out, for the benefit of the settled land, and generally to the circumstances of the case, but a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable during any period not exceeding five years from the date of the conveyance.

(4) Where a sale is made in consideration of a rent, the following provisions shall have effect:—

(i) The conveyance shall contain a covenant by the purchaser for payment of the rent, and the statutory powers and remedies for the recovery of the rent shall apply.

(ii) A duplicate of the conveyance shall be executed by the purchaser and delivered to the tenant for life or statutory owner, of which execution and delivery the execution of the conveyance by the tenant for life or statutory owner shall be sufficient evidence;

(iii) A statement, contained in the conveyance or in an indorsement thereon, signed by the tenant for life or statutory owner, respecting any matter of fact or of calculation under this Act in relation to the sale, shall, in favour of the purchaser and of those claiming under him, be sufficient evidence of the matter stated.

(5) The consideration on a sale to any company incorporated by special Act of Parliament or by provisional order confirmed by Parliament or by any other order, scheme or certificate having the force of an Act of Parliament, may, with the consent of the tenant for life, consist, wholly or in part, of fully-paid securities of any description of the company, and such securities shall be vested in the trustees of the settlement and shall be subject to the provisions of this Act relating to securities representing capital money arising under this Act, and may be retained and held by the trustees in like manner as if they had been authorised by this Act for the investment of capital money.

(6) A sale may be made in one lot or in several lots, and either by auction or by private contract, and may be made subject to any stipulations respecting title, or evidence of title, or other things.

(7) On a sale the tenant for life may fix reserve biddings and may buy in at an auction.

15 Geo. 5, c. 18, s. 39.

Replaces S. L. Act, 1882, s. 4, the provision as to sales for a rent being new, and provisions as to partitions and enfranchisement being omitted (see note to preceding section). Sub sect. 6 of sect. 4, permitting restrictions or reservations as to the use of land, &c., is also omitted (see sect. 49, sub-sect. 1, *post*). The wording of sub-sect. 4 (i) of the present section, from "the statutory powers and remedies" to "shall apply" was substituted by L. P. (Amendment) Act, 1926, s. 7 (see p. 595, *ante*), for "a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days." For the statutory powers, see L. P. Act, 1925, s. 121, *ante*. For "statutory owner," see sect. 117, sub-sect. 1 (xxvi), *post*. Cf. as to sales for a rent the provisions as to leases in sects. 42, 44, and 48, *post*. Sub-sect. 5 is new.

As to the best price, &c., see the presumptions applicable under sect. 110, *post*, and cases there quoted. Having regard to sub-sect. 1, a tenant for life was restrained from selling at a less price than that offered by the remainderman (*Wheelwright* v. *Walker*, 48 L. T. 867). A sale which involved the taking by the trustees of fully-paid shares in a water company was sanctioned, under S. L. Act, 1882, in the circumstances (*Re Orwell Park Estate*, [1894] W. N. 135); see now sub-sect. 5. A tenant for life cannot sell at a price to be fixed by arbitration (*Re Wilton*, [1907] 1 Ch. 55). When the sale or exchange is made for the erection of dwellings for the working classes, small dwellings, or small holdings, see sect. 57, *post*. See also sects. 54-56 as to grants of water rights, of land for public purposes, and for streets, open spaces, &c. As to exchange of easements, see sect. 38, *ante*.

Regulations respecting exchanges.

40.—(1) Save as in this Part of this Act provided, every exchange shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(2) An exchange may be made subject to any stipulations respecting title, or evidence of title, or other things.

(3) Settled land in England or Wales shall not be given in exchange for land out of England and Wales.

Replaces as to exchanges S. L. Act, 1882, s. 4. See notes to sect. 39.

Leasing Powers.

Power to lease for ordinary or building or mining or forestry purposes.

41. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i) In case of a building lease, nine hundred and ninety-nine years;

(ii) In case of a mining lease, one hundred years;

(iii) In case of a forestry lease, nine hundred and ninety-nine years;

(iv) In case of any other lease, fifty years.

Re-enacts S. L. Act, 1882, s. 6, substituting the maximum terms named in clauses (i) (ii) and (iv) for ninety-nine, sixty, and twenty-one years respectively, and adding clause (iii). The restrictions do not apply to mortgage terms (sect. 71, sub-sect. 3, *post*).

15 Geo. 5, c. 18, s. 41.

The Court refused to narrow the leasing powers of S. L. Act, 1882, by reference either to previous decisions on powers of leasing or to the S. E. Act (*Re Aldam*, [1902] 2 Ch. 62, 64; see also *Davies* v. *D.*, 38 Ch. D. 499).

Where under the S. E. Act, 1877, trustees had been given a power of leasing, a tenant for life could not lease under this section until that order was stayed (*Re Poole*, 50 L. T. 585). A tenant for life can under this section grant a lease of a right to work mines so as to let down the surface, as being a lease of an "easement" (*Sitwell* v. *Londesborough*, [1905] 1 Ch. 460); and can grant a wayleave for foreign minerals (*Re Aldam*, [1902] 2 Ch. 46), and can grant a lease of the surface reserving the minerals (*Re Gladstone, G.* v. *G.*, [1900] 2 Ch. 101; overruling *Re Newell and Nevill*, [1900] 1 Ch. 90; see *Scott* v. *Moxon*, [1900] W. N. 14; and compare *Re Rutland, R.* v. *Bristol*, [1900] 2 Ch. 206). But he could not grant a lease to himself (*Boyce* v. *Edbrooke*, [1903] 1 Ch. 844), or *semble* to a trustee for himself (*ibid.*, p. 847), nor a lease to himself and others, for the reversioners did not obtain binding legal covenants by all the lessees (*ibid.*). But see now sect. 68, *post*; and cf. L. P. Act, 1925, s. 82 and note, *ante*.

A lease may be granted by a tenant for life to his wife (*Gilbey* v. *Rush*, [1906] 1 Ch. 11), but leases granted by a tenant for life to his wife solely for her benefit were void as not a *bona fide* exercise of his powers (*Sutherland* v. *S.*, [1893] 3 Ch. 169; *Middlemas* v. *Stevens*, [1901] 1 Ch. 574). As to granting a lease to a married woman, see *Sutherland* v. *S.*, *supra*. As to a tenant for life refusing to lease, see *Re Mansel* (1884), W. N. 209.

Apart from sect. 42, sub-sect. 5, *post*, the tenant for life must give notice to the trustees before granting a lease (sect. 101, *post*, p. 957); but where the lessee deals with the tenant for life in good faith the lease will be valid, even if there are no trustees (*Mogridge* v. *Clapp*, [1892] 3 Ch. 382).

See further as to building, mining, and forestry leases, sects. 44-48, *post*; as to accepting surrenders of leases, sect. 52, *post*; and as to varying terms of leases, sect. 59, *post*. A tenant for life was held entitled to retain damages for breach of covenant in a lease of a mansion-house (see sect. 65, *post*; *Re Lacon, L.* v. *L.*, [1911] 2 Ch. 17). But see now sect. 80, sub-sect. 1, *post*.

Regulations respecting leases generally.

42.—(1) Save as hereinafter provided, every lease—

(i) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;

(ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case;

(iii) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(2) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life or statutory

owner, of which execution and delivery the execution of the lease by the tenant for life or statutory owner shall be sufficient evidence. 15 Geo. 5, c. 18, s. 42.

(3) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life or statutory owner, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

(4) A fine received on the grant of a lease under any power conferred by this Act shall be deemed to be capital money arising under this Act.

(5) A lease at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made—

(i) Where the term does not exceed twenty-one years—

(a) without any notice of an intention to make the lease having been given under this Act; and

(b) notwithstanding that there are no trustees of the settlement; and

(ii) Where the term does not extend beyond three years from the date of the writing, by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent.

For "statutory owner," see sect. 117, sub-sect. 1 (xxvi), *post*.

This section re-enacts (except for the words from "or in reversion" to the end of sub-sect. 1 (i), which are new) S. L. Act, 1882, s. 7; S. L. Act, 1884, s. 4, and S. L. Act, 1890, s. 7. Cf. as to sub-sect. 5 (ii), L. P. Act, 1925, s. 54 (2), *ante*, p. 650. As to a lease "taking effect in possession," see *Sutherland* v. *S.*, [1893] 3 Ch. 169, 192; *Re Ford*, 8 Eq. 309. The application of sub-sect. 1 (ii) to mining leases was discussed in *Re Aldam*, [1902] 2 Ch. 59, 62. As to what is the "best rent," see the presumptions applicable under sect. 110 (*post*), and *Sutherland* v. *S.*, [1893] 3 Ch. 195; *Pumford* v. *Butler*, [1914] 2 Ch. 353. The test is whether the man who makes the lease had got as much for others as he has for himself (*Chandler* v. *Bradley*, [1897] 1 Ch. 324). In the last case a lease granted by a tenant for life in consideration of a money payment was declared void (*ibid.*). It seems doubtful whether a lease granted at a rent not the best is void or voidable (*Re Handman and Wilcox*, [1902] 1 Ch. 599; see *Mogridge* v. *Clapp*, [1892] 3 Ch. 398; Woodfall, 21st ed. ch. 1, sect. 4). See, as to money paid on the surrender of a lease, sect. 52, *post*. The words "any money laid out" do not include a past voluntary expenditure (*Re Chawner*, [1892] 2 Ch. 196). As to the necessity of proper covenants, see *Boyce* v. *Edbrooke*, [1903] 1 Ch. 836.

As to renewable leases, see *Re Farnell* (33 Ch. D. 599), and sect. 43, *post*. As to leases made for the erection of dwellings for the working classes, small dwellings and small holdings, see sect. 57, *post*; for public purposes, sects. 54—56; and as to fines (sub-sect. 4), *Beddington* v. *Bauman*, [1903] A. C. 13.

15 Geo. 5, c. 18, s. 43.

Leasing powers for special objects.

43. The leasing power of a tenant for life extends to the making of—

(i) a lease for giving effect (in such manner and so far as the law permits) to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(ii) a lease for confirming, as far as may be, a previous lease being void or voidable, but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under this Act or otherwise, as the case may require.

Re-enacts S. L. Act, 1882, s. 12 (ii) and (iii), adding the bracketed words in clause (i), as to which see L. P. Act, 1922, s. 145 and Sched. 15. As to leases for giving effect to contracts entered into by predecessors in title (to which clause (i) of S. L. A. 1882, s. 12, related) see sect. 63, *post*.

Provisions as to building, mining and forestry leases.

Regulations respecting building leases.

44.—(1) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected or agreeing to erect buildings, new or additional, or having improved or repaired or agreeing to improve or repair buildings, or having executed or agreeing to execute on the land leased, an improvement authorised by this Act for or in connexion with building purposes.

(2) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner:

Provided that—

(i) the annual rent reserved by any lease shall not be less than ten shillings; and

(ii) the total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii) the rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

Re-enacts S. L. Act, 1882, s. 8. See the definition of building lease and building purposes in sect. 117 (1) (i), *post*, and *Re*

Ellesmere ([1898] W. N. 18). The words in sub-sect. 1, "in consideration of the lessee having erected buildings," do not include the case of past voluntary expenditure (*Re Chawner*, [1892] 2 Ch. 195). A lease partly in consideration of the expenditure of money on specified improvements and repairs is within the section; but the Court will not sanction a lease where the repairs agreed to be done are such as a landlord is usually expected to do (*Re Daniell*, [1894] 3 Ch. 503; compare *Truscott* v. *Diamond, &c. Co.*, 20 Ch. D. 251). As to whether a lease of land let in connection with building land, but not itself built upon, is a building lease, see *Re Sabin* ((1885), W. N. 197).

15 Geo. 5, c. 18, s. 44.

As to granting options to purchase or lease settled land, see sect. 51, *post*.

Regulations respecting mining leases.

45.—(1) In a mining lease—

(i) the rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii) the rent may also be made to vary according to the price of the minerals or substances gotten, or any of them, and such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period; and

(iii) a fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity or otherwise, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2) A lease may be made partly in consideration of the lessee having executed, or agreeing to execute, on the land leased an improvement authorised by this Act, for or in connexion with mining purposes.

Re-enacts S. L. Act, 1882, s. 9, and S. L. Act, 1890, s. 8, with the addition of "or otherwise" in sub-sect. 1 (iii). See the definition of mining lease and mining purposes (sect. 117, sub-sect. 1 (xv), *post*. On sub-sect. 1 (ii) compare *Lonsdale* v. *Lowther*, [1900] 2 Ch. 687 (a lease under a power). See also the definitions of rent and mines and minerals, sect. 117, sub-sect. 1 (xxii) and (xv), *post*.

15 Geo. 5, c. 18, s. 45.

A varying rent may be reserved without the addition of a fixed or minimum rent. Such fixed or minimum rent, if reserved, need not be uniform, but may vary; and in a particular year, *e.g.*, the first of the term, it may be *nil*. It may also cease when all the coal has been paid for at the acreage rent reserved (*Re Aldam*, [1902] 2 Ch. 59, 60).

Variation of building or mining lease according to circumstances of district.

46.—(1) Where it is shown to the court with respect to the district in which any settled land is situate, either—

(i) that it is the custom for land therein to be leased for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act; or

(ii) that it is difficult to make leases for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act;

the court may, if it thinks fit, authorise generally the tenant for life or statutory owner to make from time to time leases of or affecting the settled land in that district, or parts thereof for any term or on any conditions as in the order of the court expressed, or may, if it thinks fit, authorise the tenant for life or statutory owner to make any such lease in any particular case.

(2) Thereupon the tenant for life or statutory owner, and, subject to any direction in the order of the court to the contrary, each of his successors in title being a tenant for life or statutory owner, may make in any case, or in the particular case, a lease of the settled land, or part thereof, in conformity with the order.

Re-enacts as to leases, S. L. Act, 1882, s. 10, which applied also to grants of land. As to "building" and "mining purposes," see sect. 117, sub-sect. 1 (i) and (xv), *post*; and as to statutory owner, *ibid.* (xxvi).

When the tenant for life was an infant of eighteen, and the trustees asked for power to grant building leases for 200 years, power was only given subject to the approval of the Court in each case (*Cecil* v. *Langdon*, 51 L. T. 618; 54 L. J. Ch. 313). A mining lease for ninety-nine years was sanctioned under the S. L. Act, 1882, s. 10 (the maximum term under that Act being sixty years) (*Re Powell, Allaway* v. *Oakeley* (1884), W. N. 67), and a building lease for 500 years (the maximum term being ninety-nine years) (*Re O'Connell*, [1903] 1 I. R. 154). As to land in Scotland, see *Re Forrest*, [1910] W. N. 201. For forms of summons under this section, see *post*, p. 1007.

Capitalisation of part of mining rent.

47. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely—where the tenant for life or statutory owner is impeachable for waste in respect of minerals, three fourth parts of the

rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits. 15 Geo. 5, c. 18, s. 47.

Re-enacts, adding "statutory owner" (sect. 117, sub-sect. 1 (xxvi), *post*), S. L. Act, 1882, s. 11. For "mining lease," see sect. 117, sub-sect. 1 (xv), *post*. Rent in a mining lease is really purchase-money for coal worked (*Re Aldam*, [1902] 2 Ch. 63). In the case of open mines, it has been held under the present section that a tenant for life even though not declared unimpeachable for waste by the settlement is still not "impeachable for waste in respect of minerals" and only one-fourth of the rent need be set aside (*Re Chaytor*, [1900] 2 Ch. 804). See as to "opened" mines, *Re Morgan, Vachell* v. *M.*, [1914] 1 Ch. 910. And see *Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504 (a case under sect. 63 of S. L. Act, 1882, repealed and not re-enacted—see L. P. Act, 1925, s. 28, *ante*), and *Re Hodgkinson, H.* v. *H.*, 132 L. T. 526. For instances of contrary intention, see *Re Newcastle*, 24 Ch. D. 129; *Re Bagot*, [1894] 1 Ch. 184; *Re Hanbury's Estates* (*No.* 2), [1913] 2 Ch. 357; for a case where none was found, *Re Daniels, Weeks* v. *D.*, [1912] 2 Ch. 90. See also on the section, *Re Rayer, R.* v. *R.*, [1913] 2 Ch. 210; *Re Hall, H.* v. *H.*, [1916] 2 Ch. 488. For form of summons for payment into Court of rent set aside, see R. S. L. Act, Form X. (*post*).

Where a lease of mines was granted by the tenant for life under S. L. Act, 1882, s. 12 (i), to give effect to a contract of the settlor (see note to sect. 43, *ante*, and sect. 63, *post*), the right of the tenant for life to rents was the same as if the lease had been granted by the settlor, sect. 11 not applying (*Re Kemeys-Tynte*, [1892] 2 Ch. 211).

Regulations respecting forestry leases.

48.—(1) In the case of a forestry lease—

(i) a peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first ten years or any less part of the term;

(ii) the rent may be made to be ascertainable by, or to vary according to the value of the timber on the land comprised in the lease, or the produce thereof, which may during any year be cut, converted, carried away, or otherwise disposed of;

(iii) a fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent according to value in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent; and

(iv) any other provisions may be made for the sharing of the proceeds or profits of the user of the land between the reversioner and the Forestry Commissioners.

(2) In this section the expression "timber" includes all forest products.

15 Geo. 5, c. 18, s. 48.

This section is from L. P. Act, 1922. For definition of forestry lease see sect. 117, sub-sect. 1 (x), *post*. The Forestry Commissioners were appointed under the Forestry Act, 1919 (9 & 10 Geo. 5, c. 58). See also as to timber, sects. 49 and 66, *post*.

Miscellaneous Powers.

Power on dispositions to impose restrictions and make reservations and stipulations.

49.—(1) On a sale or other disposition or dealing under the powers of this Act—

(a) any easement, right, or privilege of any kind may be reserved or granted over or in relation to the settled land or any part thereof or other land, including the land disposed of, and, in the case of an exchange, the land taken in exchange; and

(b) any restriction with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed and made binding, as far as the law permits, by covenant, condition or otherwise, on the tenant for life or statutory owner and the settled land or any part thereof, or on the other party and any land disposed of to him; and

(c) the whole or any part of any capital or annual sum (and in the case of an annual sum whether temporary or perpetual) charged on or payable out of the land disposed of, or any part thereof, and other land subject to the settlement, may as between the tenant for life or statutory owner and his successors in title, and the other party and persons deriving title under or in succession to him (but without prejudice to the rights of the person entitled to such capital or annual sum) be charged exclusively on the land disposed of, or any part thereof, or such other land as aforesaid, or any part thereof, in exoneration of the rest of the land on or out of which such capital or annual sum is charged or payable.

(2) A sale of land may be made subject to a stipulation that all or any of the timber and other trees, pollards, tellers, underwood, saplings and plantations on the land sold (in this section referred to as "timber") or any articles attached to the land (in this section referred to as "fixtures") shall be taken by the purchaser at a valuation, and the amount of the valuation shall form part of the price of the land, and shall be capital money accordingly.

(3) Where on a sale the consideration attributable to any timber or fixtures is by mistake paid to a tenant for life or other person not entitled to receive it, then, if such

person or the purchaser or the persons deriving title under either of them subsequently pay the aforesaid consideration, with such interest, if any, thereon as the court may direct, to the trustees of the settlement or other persons entitled thereto or into court, the court may, on the application of the purchaser or the persons deriving title under him, declare that the disposition is to take effect as if the whole of the consideration had at the date thereof been duly paid to the trustees of the settlement or other persons entitled to receive the same. 15 Geo. 5, c. 18, s. 49.

The person, not entitled to receive the same, to whom the consideration is paid, and his estate and effects shall remain liable to make good any loss attributable to the mistake.

This section is taken from L. P. Acts, 1922 and 1924. For retrospective provisions as to sub-sects. 1 and 2, see Sched. 4 (5) and (6), *post*. See also, as to easements, sects. 38 and 41, *ante*; and as to releasing restrictions and easements, sect. 58, sub-sect. 2, *post*. For "disposition," see sect. 117, sub-sect. 1 (v), *post*; and for "statutory owner," *ibid.* (xxvi). Sub-sect. 1 (b) replaces S. L. Act, 1882, s. 4 (6), and sub-sect. 3 L. P. (Amdt.) Act, 1859, s. 13. Before that Act, trustees having a power of sale only could not sell the estate separate from the timber standing upon it, though the tenant for life was without impeachment of waste, and might have cut the timber previously to the sale (*Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C.* nom. *Cockerell* v. *Cholmley*, 10 B. & C. 564; 3 Russ. 565; 1 Russ. & M. 418; 1 Cl. & Fin. 60, discussed in *Re Rutland, R.* v. *Bristol*, [1900] 2 Ch. 206). In *Re Llewellin, L.* v. *Williams* (37 Ch. D. 317), the price of uncut timber sold (with the land) by a tenant for life not impeachable for waste was treated as capital money under the S. L. Act, 1882. And compare sect. 66 (*post*), dealing with the power of a tenant for life impeachable for waste to cut and sell timber.

Separate dealing with surface and minerals, with or without wayleaves, &c.

50. A sale, exchange, lease or other authorised disposition, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

Re-enacts S. L. Act, 1882, s. 17 (1), which named mining leases only, but did not prevent the reservation of minerals in a building lease of the surface by a tenant for life (*Re Gladstone, G.* v. *G.*, [1900] 2 Ch. 105). In the following cases land has been sold separately from the minerals: *Re Newcastle*, 24 Ch. D. 129; *Re Brown*, 27 Ch. D. 179. Sect. 17, sub-sect. 1 is to be deemed always to have had effect as if "or mining" had not been contained in it, and "or other authorised disposition" had been inserted after "lease" (Sched. 4 (4), *post*). The lease may grant a wayleave for foreign

15 Geo. 5, c. 18, s. 50.

coal without reserving a separate rent therefor; and such wayleave may continue after the cesser of the minimum rent (*Re Aldam*, [1902] 2 Ch. 46). See, as to the power of trustees to dispose of land and minerals separately, Trustee Act, 1925, s. 12 (2), *post*.

For "disposition," see sect. 117, sub-sect. 1 (v), *post*.

Power to grant options.

51.—(1) A tenant for life may at any time, either with or without consideration, grant by writing an option to purchase or take a lease of the settled land, or any part thereof, or any easement, right, or privilege over or in relation to the same at a price or rent fixed at the time of the granting of the option.

(2) Every such option shall be made exercisable within an agreed number of years not exceeding ten.

(3) The price or rent shall be the best which, having regard to all the circumstances, can reasonably be obtained and either—

(a) may be a specified sum of money or rent, or at a specified rate according to the superficial area of the land with respect to which the option is exercised, or the frontage thereof or otherwise; or

(b) in the case of an option to purchase contained in a lease or agreement for a lease, may be a stated number of years' purchase of the highest rent reserved by the lease or agreement; or

(c) if the option is exercisable as regards part of the land comprised in the lease or agreement, may be a proportionate part of such highest rent;

and any aggregate price or rent may be made to be apportionable in any manner, or according to any system, or by reference to arbitration.

(4) An option to take a mining lease may be coupled with the grant of a licence to search for and prove any mines or minerals under the settled land, or any part thereof, pending the exercise of the option.

(5) The consideration for the grant of the option shall be capital money arising under this Act.

This section is from L. P. Act, 1922, but S. L. Act, 1889, s. 2, authorised the inclusion, in building leases and agreements to grant building leases, of an option to purchase the land leased. See as to the "best price or rent" notes to sect. 39, *ante*, p. 901; and for definitions of mining lease and mines and minerals sect. 117, sub-sect. 1 (xv), *post*.

Surrenders and re-grants.

52.—(1) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, or a regrant of any land granted in fee simple, whether under this Act or not, in respect of the whole land leased or granted, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and

minerals, or any of them, and with or without an exception of any easement, right or privilege of any kind over or in relation to the land surrendered or regranted. 15 Geo. 5, c. 18, s. 52.

(2) On a surrender of a lease, or a regrant of land granted in fee simple, in respect of part only of the land or mines and minerals leased or granted, the rent or rentcharge may be apportioned.

(3) On a surrender or regrant, the tenant for life may in relation to the land or mines and minerals surrendered or regranted, or of any part thereof, make a new or other lease, or grant in fee simple, or new or other leases, or grants in fee simple, in lots.

(4) A new or other lease, or grant in fee simple, may comprise additional land or mines and minerals, and may reserve any apportioned or other rent or rentcharge.

(5) On a surrender or regrant, and the making of a new or other lease, whether for the same or for any extended or other term, or of a new or other grant in fee simple, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's or grantee's interest in the lease surrendered, or the land regranted, may be taken into account in the determination of the amount of the rent or rentcharge to be reserved, and of any fine or consideration in money to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease, or grant in fee simple.

(6) Every new or other lease, or grant in fee simple, shall be in conformity with this Act.

(7) All money, not being rent or a rentcharge, received on the exercise by the tenant for life of the powers conferred by this section, shall, unless the court, on an application made within six months after the receipt thereof or within such further time as the court may in special circumstances allow, otherwise directs, be capital money arising under this Act.

(8) A regrant shall be made to the tenant for life or statutory owner, and shall be deemed a subsidiary vesting deed, and the statements and particulars required in the case of subsidiary vesting deeds shall be inserted therein.

(9) In this section "land granted in fee simple" means land so granted with or subject to a reservation thereout of a perpetual or terminable rentcharge which is or forms part of the settled land, and "grant in fee simple" has a corresponding meaning.

Sub-sects. 1 to 6 re-enact as to surrenders S. L. Act, 1882, s. 13. The extension to regrants, and the provision in sub-sect. 1 as to exception of easements, &c., are new, as are sub-sects. 7 to 9. For definition of mines and minerals, see sect. 117, sub-sect. 1 (xv), *post*; for "statutory owner," *ibid.* (xxvi); and as to subsidiary vesting

15 Geo. 5, c. 18, s. 52.

deeds, sect. 10, *ante*. As to varying the terms of leases, see sect. 59, *post*.

Sub-sect. 7.

Before this Act, where a lease granted under a power by a legal tenant for life enabled the tenant to surrender on payment of money to the lessor, and the tenant for life apart from the powers of S. L. Acts accepted a surrender accordingly, the money belonged to the tenant for life (*Re Hunloke, Fitzroy* v. *H.*, [1902] 1 Ch. 941; see *Re Guthrie, ibid.* 942, n.; *Re Penrhyn*, [1922] 1 Ch. 500). But where an equitable tenant for life under the powers of S. L. Acts accepted a surrender, money paid as a consideration was distributed between the tenant for life and remaindermen (*Re Rodes, Sanders* v. *Hobson*, [1909] 1 Ch. 815). The tenant for life was held entitled to additional rent under a new lease (*Re Wix, Hardy* v. *Lemon*, [1916] 1 Ch. 279). See as to accumulations of income, *Re Westminster* (*No.* 2), [1921] 1 Ch. 585.

Apart from the powers of the S. L. Acts, a surrender could not be accepted by a person not having the legal reversion (*Robbins* v. *Whyte*, [1906] 1 K. B. 125). But see L. P. Act, 1925, s. 100, *ante*, p. 692, replacing C. A. 1911, s. 3.

A forfeited deposit on an abortive sale was held to be capital (*Re Ward's Settled Estates*, [1919] W. N. 51; *Re Foster's Settled Estates*, [1922] 1 Ch. 348). Compensation paid for damage to a park by troops was held to be a casual profit (*Re Williams' Settlement*, [1922] 2 Ch. 750); cf. *Re Terry*, [1918] W. N. 273; 87 L. J. Ch. 577, and *Gage* v. *Pigott*, [1919] 1 Ir. R. 23, quoted under sect. 66, *post*, and sect. 80, sub-sect. 1, *post*.

Acceptance of leases.

53.—(1) A tenant for life may accept a lease of any land, or of any mines and minerals or of any easement, right, or privilege, convenient to be held or worked with or annexed in enjoyment to the settled land, or any part thereof, for such period, and upon such terms and conditions, as the tenant for life thinks fit:

Provided that no fine shall be paid out of capital money in respect of such lease.

(2) The lease shall be granted to the tenant for life or statutory owner, and shall be deemed a subsidiary vesting deed, and the statements and particulars required in the case of subsidiary vesting deeds shall either be inserted therein or endorsed thereon.

(3) The lease may contain an option to purchase the reversion expectant on the term thereby granted.

Sects. 53-55 are from L. P. Act, 1922. For "statutory owner," see sect. 117, sub-sect. 1 (xxvi), *post*; for "mines and minerals," *ibid.* (xv); and for "subsidiary vesting deed," sect. 10, *ante*.

Power to grant water rights to statutory bodies.

54.—(1) For the development, improvement, or general benefit of the settled land, or any part thereof, a tenant for life may make a grant in fee simple or absolutely, or a lease for any term of years absolute, for a nominal price or rent, or for less than the best price or rent that can reasonably be obtained, or gratuitously, to any statutory authority, of any water or streams or springs of water in, upon, or under the settled land, and of any rights of

taking, using, enjoying and conveying water, and of laying, constructing, maintaining, and repairing mains, pipes, reservoirs, dams, weirs and other works of any kind proper for the supply and distribution of water, and of any part of the settled land required as a site for any of the aforesaid works, and of any easement, right or privilege over or in relation to the settled land or any part thereof in connexion with any of the aforesaid works. 15 Geo. 5, c. 18, s. 54.

(2) This section does not authorise the creation of any greater rights than could have been created by a person absolutely entitled for his own benefit to the settled land affected.

(3) In this section "statutory authority" means an authority or company for the time being empowered by any Act of Parliament, public general, or local or private, or by any order or certificate having the force of an Act of Parliament, to provide with a supply of water any town, parish or place in which the settled land or any part thereof is situated.

(4) All money, not being rent, received on the exercise of any power conferred by this section shall be capital money arising under this Act.

For "term of years absolute," see sect. 117, sub-sect. 1 (xxix), *post.*

Power to grant land for public and charitable purposes.

55.—(1) For the development, improvement, or general benefit of the settled land, or any part thereof, a tenant for life may make a grant in fee simple, or absolutely, or a lease for any term of years absolute, for a nominal price or rent, or for less than the best price or rent that can reasonably be obtained, or gratuitously, of any part of the settled land, with or without any easement, right or privilege over or in relation to the settled land or any part thereof, for all or any one or more of the following purposes, namely:—

(i) For the site, or the extension of any existing site, of a place of religious worship, residence for a minister of religion, school house, town hall, market house, public library, public baths, museum, hospital, infirmary, or other public building, literary or scientific institution, drill hall, working-men's club, parish room, reading room or village institute, with or without in any case any yard, garden, or other ground to be held with any such building; or

(ii) For the construction, enlargement, or improvement of any railway, canal, road (public or private), dock, sea-wall, embankment, drain, watercourse, or reservoir; or

15 Geo. 5, c. 18, s. 55.

(iii) For any other public or charitable purpose in connection with the settled land, or any part thereof, or tending to the benefit of the persons residing, or for whom dwellings may be erected, on the settled land, or any part thereof.

Not more than one acre shall in any particular case be conveyed for any purpose mentioned in paragraphs (i) and (iii) of this subsection, nor more than five acres for any purpose mentioned in paragraph (ii) of this subsection, unless the full consideration be paid or reserved in respect of the excess.

(2) All money, not being rent, received on the exercise of any power conferred by this section shall be capital money arising under this Act.

For "term of years absolute," see sect. 117, sub-sect. 1 (xxix), *post*.

Dedication for streets, open spaces, &c.

56.—(1) On or after or in connexion with a sale or grant for building purposes, or a building lease, or the development as a building estate of the settled land, or any part thereof, or at any other reasonable time, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof—

(i) may cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii) may provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii) may execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

(2) In regard to the dedication of land for the public

purposes aforesaid, a tenant for life shall be in the same position as if he were an absolute owner. 15 Geo. 5, c. 18, s. 56.

(3) A tenant for life shall have power—

(a) to enter into any agreement for the recompense to be made for any part of the settled land which is required for the widening of a highway under section eighty-two of the Highway Act, 1835, or otherwise; 5 & 6 Will 4, c. 50.

(b) to consent to the diversion of any highway over the settled land under section eighty-five of that Act, or otherwise; and

(c) to consent to any such road as is mentioned in section thirty-six of the Highway Act, 1862, being declared a public highway; 25 & 26 Vict. c. 61.

and any agreement or consent so made or given shall be as valid and effectual, for all purposes, as if made or given by an absolute owner of the settled land.

(4) All money, not being rent, received on the exercise of any power conferred by this section shall be capital money arising under this Act.

Sub-sect. 1 re-enacts S. L. Act, 1882, s. 16, with the additions of "after or" before "in connexion with," and of the words from "or the development" to "reasonable time." These additions are retrospective (Sched. 4 (3), *post*). The remainder of the section is new, and sub-sect. 3 is also retrospective in effect (Sched. 4 (3), *post*). The roads mentioned in sect. 36 of the Highway Act, 1862, are driftways, and private carriage or occupation roads. For definitions of "building" purposes and lease, see sect. 117, sub-sect. 1 (i), *post*.

Provision of land for small dwellings, small holdings and dwellings for working classes.

57.—(1) Where land is sold, or given in exchange or leased—

(a) for the purpose of the erection on such land of small dwellings; or

(b) to the council of a county or county borough for the purposes of small holdings;

the sale, exchange, or lease may, notwithstanding anything contained in this Act, be made for such consideration in money, or land, or in land and money, or may reserve such rent, as having regard to the said purposes and to all the circumstances of the case, is the best that can reasonably be obtained, notwithstanding that a better consideration or rent might have been obtained if the land were sold, exchanged, or leased, for another purpose.

(2) Notwithstanding anything contained in, and in addition to the other powers conferred by this Act, a tenant for life may at any time—

(a) for the purpose of the erection of dwellings for the working classes, or the provision of gardens to be held therewith; or

15 Geo. 5, c. 18, s. 57.

(b) for the purpose of the Small Holdings and Allotments Acts, 1908 to 1919;

make a grant in fee simple or absolutely, or a lease for any term of years absolute of any part of the settled land, with or without any easement, right or privilege of any kind over or in relation to the settled land or any part thereof, for a nominal price or rent, or for less than the best price or rent that can reasonably be obtained or gratuitously:

Provided that, except under an order of the court, not more than two acres in the case of land situate in an urban district, or ten acres in the case of land situate in a rural district, in any one parish shall be granted or leased under the powers conferred by this subsection, unless the full consideration be paid or reserved in respect of the excess.

(3) All money, not being rent, received on the exercise of any power conferred by this section shall be capital money arising under this Act.

This section replaces sect. 74, sub-sect. 1 of the Housing of the Working Classes Act, 1890, sect. 18 of S. L. Act, 1890, sect. 40, sub-sects. 4 and 5 of the Small Holdings and Allotments Act, 1908, sect. 31 of the Housing, Town Planning, &c. Act, 1919, and sect. 29 of the Land Settlement (Facilities) Act, 1919. "Small dwellings" means dwelling-houses of a rateable value not exceeding £100 a year (sect. 117, sub-sect. 1 (xv), *post*). See for "term of years absolute," *Ib.* (xxix). Under S. L. Act, 1890, s. 18, "working classes" included all classes of persons earning their livelihood by wages or salaries, but the section applied only to buildings of the same maximum rateable value as "small dwellings" (*supra*).

Power to compromise claims and release restrictions, &c.

58.—(1) A tenant for life may, with the consent in writing of the trustees of the settlement, either with or without giving or taking any consideration in money or otherwise, compromise, compound, abandon, submit to arbitration, or otherwise settle any claim, dispute, or question whatsoever relating to the settled land, or any part thereof, including in particular claims, disputes or questions as to boundaries, the ownership of mines and minerals, rights and powers of working mines and minerals, local laws and customs relative to the working of mines and minerals and other matters, manorial incidents, easements, and restrictive covenants, and for any of those purposes may enter into, give, execute, and do such agreements, assurances, releases, and other things as the tenant for life may, with such consent as aforesaid, think proper.

(2) A tenant for life may, with the consent in writing of the trustees of the settlement, at any time, by deed or writing, either with or without consideration in money or otherwise, release, waive, or modify, or agree to release, waive, or modify, any covenant, agreement, or restriction imposed on any other land for the benefit of the settled land, or any part thereof, or release, or agree to release, any other

land from any easement, right or privilege, including a right of pre-emption, affecting the same for the benefit of the settled land, or any part thereof. 15 Geo. 5, c. 18, s. 58.

(3) A tenant for life may contract that a transaction effected before or after the commencement of this Act, which (whether subject or not to any variation authorised by this subsection) is affected by section seventy-eight of the Railway Clauses Consolidation Act, 1845, or by section twenty-two of the Waterworks Clauses Act, 1847 (relating to support by minerals) shall take effect as if some other distance than forty yards or the prescribed distance had been mentioned in such sections or had been otherwise prescribed. 8 & 9 Vict. c. 20. 10 & 11 Vict. c. 17.

In any case where section seventy-eight aforesaid has effect as amended and re-enacted by Part II. of the Mines (Working Facilities and Support) Act, 1923, a tenant for life may make any agreement authorised by section eighty-five A of the Railway Clauses Consolidation Act, 1845, as enacted in the said Part II. 13 & 14 Geo. 5, c. 20.

Sects. 58-62 are from L. P. Acts, 1922 and 1924. As to "mines and minerals," see sect. 117, sub-sect. 1 (xv), *post*; and as to "manorial incidents," note to L. P. Act, 1925, s. 28, *ante*, p. 619. As to "consideration in money or otherwise," and as to moneys, other than rent, payable by the tenant for life or received under this section, see sect. 61, *post*, p. 919.

Sects. 78 and 85A of the Railway Clauses Consolidation Act, 1845, as amended and re-enacted by Part II. of the Mines (Working Facilities and Support) Act, 1923, are as follows:— Sub-sect. 3.

"78.—(1) If the mine owner of minerals lying under an area of protection as hereinafter defined is desirous of working any such minerals, he shall give to the company and also to the royalty owner (if any) notice of his intention so to do at least thirty days before the commencement of the working and on the receipt of such notice the company and the royalty owner respectively may cause the minerals to be inspected by any person appointed for the purpose by the company or royalty owner as the case may be.

"(2) If it appears to the company that the working of any of the minerals to which such notice relates will be likely to damage the railway or works or any part thereof, the company may, at any time after the receipt of such notice, give a counter-notice to the mine owner requiring him to leave unworked all or any part of such minerals, and the counter-notice shall specify the minerals (hereinafter referred to as the specified minerals) so required to be left unworked and the particular portion of the railway or works (hereinafter referred to as the protected works) for the support of which the specified minerals are required to be left unworked.

"(3) Where any such counter-notice has been served on the mine owner, he shall forthwith serve a copy thereof on the royalty owner (if any).

"(4) Where any such counter-notice has been served on the mine owner, the specified minerals shall not be worked or got after the service of the counter-notice, and the company shall pay compensation to the mine owner and the royalty owner (if any) for the loss caused by the specified minerals being left unworked.

"(5) The area of protection in relation to any seam of minerals

15 Geo. 5, c. 18, s. 58.

shall be the area comprising any railway or works of the company and such a lateral distance therefrom, on all or both sides thereof, as is equal at each point along the railway to one-half of the depth of the seam at that point or forty yards, whichever be the greater; and, when the said lateral distance exceeds forty yards, the area of protection shall be divided into two areas:

"(a) an inner area of protection consisting of the area comprising the railway or works and a distance of forty yards therefrom on all or both sides thereof; and

"(b) an outer area of protection consisting of so much of the area of protection as is not included in the inner area of protection.

"85A. Notwithstanding anything contained in this Act, a mine owner, a royalty owner, and the company or any two of them may, by agreement, alter, extend, or otherwise vary their respective rights under the provisions of this Act with regard to any minerals to which this Act applies, but not so as to prejudice the rights of any mine owner, royalty owner, or company not a party to the agreement without his or their consent."

As to the duty of the Court to consider public as well as private interests on applications under the Mines, &c., Act, 1923 (*supra*), and as to the form of order, see *Re Nunnery Colliery Co.*, 69 S. J. 52.

Power to vary leases and grants and to give licences and consents.

59.—(1) A tenant for life may, at any time, by deed, either with or without consideration in money or otherwise, vary, release, waive or modify, either absolutely or otherwise, the terms of any lease whenever made of the settled land or any part thereof, or any covenants or conditions contained in any grant in fee simple whenever made of land with or subject to a reservation thereout of a rent which is or forms part of the settled land, and in either case in respect of the whole or any part of the land comprised in any such lease or grant, but so that every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Act if the lease had been surrendered, or the land comprised in the grant had never been so comprised, or had been regranted.

(2) Where land is or has been disposed of subject to any covenant requiring the licence, consent, or approval of the covenantee or his successors in title as to—

(a) the user of the land in any manner; or

(b) the erection construction or alteration of or addition to buildings or works of any description on the land; or

(c) the plans or elevations of any proposed buildings or other works on the land; or

(d) any other act, matter, or thing relating to the land, or any buildings or works thereon; or

(e) any assignment, under-letting or parting with the possession of all or any part of the property comprised in any lease affecting the settled land;

and the covenant enures for the benefit of settled land

(including, where the disposition is a lease, the reversion expectant on the determination thereof), the licence, consent or approval may be given by the tenant for life of the settled land affected. 15 Geo. 5, c. 18, s. 59.

See for the meaning of "consideration in money or otherwise," and as to money payable by the tenant for life, or received under this section, sect. 61, *post*. As to leases, see sects. 41 *et seq.*; as to surrenders, sect. 52; and as to grants, sect. 39, *ante*. See also next section.

Power to apportion rents.

60.—(1) A tenant for life may, at any time, by deed, either with or without consideration in money or otherwise, agree for the apportionment of any rent reserved or created by any such lease or grant as mentioned in the last preceding section, or any rent being or forming part of the settled land, so that the apportioned parts of such rent shall thenceforth be payable exclusively out of or in respect of such respective portions of the land subject thereto as may be thought proper, and also agree that any covenants, agreements, powers, or remedies for securing such rent and any other covenants or agreements by the lessee or grantee and any conditions shall also be apportioned and made applicable exclusively to the respective portions of the land out of or in respect of which the apportioned parts of such rent shall thenceforth be payable.

(2) Where the settled land, or any part thereof, is held or derived under a lease, or under a grant reserving rent, or subject to covenants, agreements or conditions, whether such lease or grant comprises other land or not, the tenant for life may at any time by deed, with or without giving or taking any consideration in money or otherwise, procure the variation, release, waiver, or modification, either absolutely or otherwise, of the terms, covenants, agreements, or conditions contained in such lease or grant, in respect of the whole or any part of the settled land comprised therein, including the apportionment of any rent, covenants, agreements, conditions, and provisions reserved, or created by, or contained in, such lease or grant.

(3) This section applies to leases or grants made either before or after the commencement of this Act.

See note to preceding section.

Provisions as to consideration.

61.—(1) All money, not being rent, payable by the tenant for life in respect of any transaction to which any of the three last preceding sections relates shall be paid out of capital money arising under this Act, and all money, not being rent, received on the exercise by the tenant for life of the powers conferred by any of those sections, shall, unless the court, on an application made within six months

15 Geo. 5, c. 18, s. 61.

after the receipt thereof or within such further time as the court may in special circumstances allow, otherwise directs, be capital money arising under this Act.

(2) For the purpose of the three last preceding sections "consideration in money or otherwise" means—

(a) a capital sum of money or a rent;

(b) land being freehold or leasehold for any term of years whereof not less than sixty years shall be unexpired;

(c) any easement, right or privilege over or in relation to the settled land, or any part thereof, or any other land;

(d) the benefit of any restrictive covenant or condition; and

(e) the release of the settled land, or any part thereof, or any other land, from any easement, right or privilege, including a right of pre-emption, or from the burden of any restrictive covenant or condition affecting the same.

Special provisions as to manorial incidents, &c.

62.—(1) Where rights to manorial incidents are comprised in a settlement the tenant for life may, as respects any fines payable in respect of an alienation in lieu of a fine payable for a licence authorising the alienation, agree the amount of the fine if it is not fixed by the custom of the manor.

(2) Any gross sum or an instalment thereof (attributable to capital) received in respect of the extinguishment of manorial incidents shall be capital money arising under this Act.

(3) Where a manor, manorial incident or enfranchised land is comprised in a settlement, the tenant for life under the settlement, shall have the powers conferred by Part VI of the Law of Property Act, 1922, on the lord or the tenant (as the case may be) in reference to a compensation agreement and matters incidental thereto.

12 & 13 Geo. 5, c. 16.

In this subsection "enfranchised land" "lord" and "tenant" have the same meanings as in the Law of Property Act, 1922.

(4) In reference to the conversion of a perpetually renewable lease or underlease into a long term, a tenant for life may enter into such agreements and do such acts and things as the lessor or lessee or underlessee, as the case may require, is, by any enactment authorised to enter into or do.

Sub-sects. 1 and 2. See as to manorial incidents, note to L. P. Act, 1925, s. 28, *ante*, p. 619.

Sub-sect. 3. "Enfranchised land" means copyhold land enfranchised by L. P. Act, 1922, s. 128. For "lord" and "tenant," see *ibid.*, s. 143.

As to the conversion of perpetually renewable leases and under-leases into long terms, see *ibid.*, s. 145 and Sched. 15. **15 Geo. 5, c. 18, s. 62.**

Sub-sect. 4. Power to complete predecessor's contracts.

63. A tenant for life may make any disposition which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by that predecessor would have been valid as against his successors in title.

Re-enacts S. L. Act, 1890, s. 6, substituting "disposition" (see sect. 117, sub-sect. 1 (v), *post*) for "conveyance" S. L. Act, 1890, s. 6, did not apply to leases (*Kemeys-Tynte* v. *Kemeys-Tynte*, [1892] 2 Ch. 213). Cf. sect. 43, *ante*, and as to the power to enter into contracts see sect. 90, *post*.

General power for the tenant for life to effect any transaction under an order of the Court.

64.—(1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.

(2) In this section "transaction" includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing, or arrangement; but does not include an application of capital money in payment for any improvement not authorised by this Act, or by the settlement; and "effected" has the meaning appropriate to the particular transaction; and the references to land include references to restrictions and burdens affecting land.

This section is from L. P. Act, 1922. Cf. Trustee Act, 1925, s. 57 and note, *post*, p. 1095. As to manorial incidents see note to sect. 28 of the L. P. Act, 1925, p. 619, *ante*.

Provisions as to special classes of property.

Power to dispose of mansion.

65.—(1) The powers of disposing of settled land conferred by this Act on a tenant for life may be exercised as respects the principal mansion house, if any, on any settled land, and the pleasure grounds and park and lands, if any, usually occupied therewith:

Provided that those powers shall not be exercised without the consent of the trustees of the settlement or an order of the court—

(a) if the settlement is a settlement made or coming

15 Geo. 5, c. 18, s. 65.

into operation before the commencement of this Act and the settlement does not expressly provide to the contrary; or

(b) if the settlement is a settlement made or coming into operation after the commencement of this Act and the settlement expressly provides that these powers or any of them shall not be exercised without such consent or order.

(2) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands, if any, usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section, and may accordingly be disposed of in like manner as any other part of the settled land.

This section replaces S. L. Act, 1890, s. 10, sub-sect. 3 of which is re-enacted by sub-sect. 2 of the present section. Sub-sect. 2 was as follows:—

"(2) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court."

Semble (sub-sect. 1 (a)) that the principal mansion house, &c., may be disposed of (see sect. 117, sub-sect. 1 (v), *post*), without consent or order under a settlement coming into operation before 1926, if the settlement contains an express provision to that effect.

There may be two principal mansion houses on lands settled by one settlement (*Gilbey* v. *Rush*, [1906] 1 Ch. 21). But a house may cease to be a principal mansion house, as where it was adapted for a school, and the park was laid out for building (*Re Wythes*, [1908] 1 Ch. 593). The section applies to the lease of an easement over the principal mansion house, park and lands (*Pease* v. *Courtney*, [1904] 2 Ch. 503; *Sutherland* v. *S.*, [1893] 3 Ch. 194). Also to the lease of a park not usually occupied with the principal mansion house (*Pease* v. *Courtney*, *supra*). The word "park" includes an ordinary private park (*ibid.*). The consent of the trustees need not be in writing or communicated to the parties. But it must be the consent of all the trustees, given at the time with reference to the particular transaction (*Gilbey* v. *Rush*, [1906] 1 Ch. 23). It is immaterial, where the principal mansion house is dealt with, whether the trustees believed the house to be the principal mansion house or not (*ibid.*).

When the tenant for life was insolvent and had mortgaged his life interest, the Court sanctioned a sale of the principal mansion and large family estates, even though the next remainderman could keep up the estates if he came into them (*Re Ailesbury*, [1892] 1 Ch. 506; *Bruce* v. *Ailesbury*, [1892] A. C. 356). In giving its consent the Court had regard to public interests, and the interests of tenants (*ibid.*). A subsequent action to restrain the sale on the ground of fraud was dismissed (*Bruce* v. *Ailesbury*, [1892] W. N. 149). And in connection with the sale trustees of the compound settlement were appointed (*Re Ailesbury and Iveagh*, [1893] 2 Ch. 345). But owing to a claim in respect of an annuity granted by the tenant for life, his title was subsequently held too doubtful to force on the purchaser (*Re Ailesbury*, [1893] W. N. 140).

15 Geo. 5, c. 18, s. 65.

The following cases have been decided under S. L. Act, 1890, s. 10, sub-sect. 2 or under S. L. Act, 1882, s. 15 (which was similar to sub-sect. 2 and was repealed by sub-sect. 1 of sect. 10). Notwithstanding a clause of forfeiture for non-residence, a mansion house may be sold (*Re Paget*, 30 Ch. D. 161) or let (*Re Thompson*, 21 L. R. Ir. 109). So a mansion house may be ordered to be sold though directed to be kept as a residence, and expressly excluded from the power of sale (*Re Brown*, 27 Ch. D. 179). But not without an order as to the disposal of heirlooms in a case where the settlement directed the heirlooms to devolve with the house (*ibid.*). A house subject to a trust for sale on the death of the tenant for life was allowed to be sold by him (*Re Wortham*, 75 L. T. 293). The Court refused to order a sale until all facts were known (*Re Sebright*, 33 Ch. D. 429). For forms of summons, see *post*, p. 1008.

A forfeited deposit on an abortive sale of a mansion house was held to be capital (*Re Foster's Settled Estates*, [1922] 1 Ch. 348).

Cutting and sale of timber, and capitalisation of part of proceeds.

66.—(1) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the court, may cut and sell that timber, or any part thereof.

(2) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Re-enacts S. L. Act, 1882, s. 35. Proceeds of sale of timber were applied as directed by this section (*Re Newcastle* (1883), W. N. 99; 31 W. R. 782). Where, however, a tenant for life had obtained the consent of the trustees to a sale of the settled land with the timber, but not any consent to cutting the timber, he was not entitled to any part of the purchase-money of the timber (*Re Llewellin, L.* v. *Williams*, 37 Ch. D. 317).

As between the real and personal representatives of the remainderman there is no equity for re-conversion in the case of proceeds of timber cut under order of the court (*Hartley* v. *Pendarves*, [1901] 2 Ch. 498; see *Burgess* v. *Booth*, [1908] 2 Ch. 648). See as to beech trees (timber in Buckinghamshire) cut by trustees under a settlement *Re Trevor-Battye*, [1912] 2 Ch. 339; as to trees realising an exceptional amount in special circumstances *Re Terry, T.* v. *T.*, [1918] W. N. 273; 87 L. J. Ch. 577; and as to compensation money for trees cut for military purposes *Gage* v. *Pigott*, [1919] 1 I. R. 23 (cf. *Re Williams' Settlement*, [1922] 2 Ch. 750). See also *Re Londesborough*, [1923] 1 Ch. 500.

For form of summons, see R. S. L. Act, Forms 6, 7 (*post*).

Sale and purchase of heirlooms under order of Court.

67.—(1) Where personal chattels are settled so as to devolve with settled land, or to devolve therewith as nearly as may be in accordance with the law or practice in force at the date of the settlement, or are settled together with land, or upon trusts declared by reference to the trusts affecting land, a tenant for life of the land may sell the chattels or any of them.

(2) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or

15 Geo. 5, c. 18, s. 67.

applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3) A sale or purchase of chattels under this section shall not be made without an order of the court.

(4) Any reference in any enactment to personal chattels settled as heirlooms shall extend to any chattels to which this section applies.

Sub-sects. 2 and 3 re-enact S. L. Act, 1882, s. 37 (2) and (3), sub-sect. 1 of which was as follows:—

"37.—(1) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them."

Sub-sect. 4 is new. See as to entailed interests in personalty L. P. Act, 1925, s. 130, *ante*, p. 718; and as to implying a power of appointment over chattels corresponding with the limitations of realty, *Re Penton, P.* v. *Langley*, [1924] 2 Ch. 192.

In selling under this section a tenant for life is a trustee, and regard must be had to the interests of all entitled (*Re Radnor*, 45 Ch. D. 402). The interest, however, of any one liable to be cut off by a tenant in tail is entitled to little weight (*ibid.* 424); all the circumstances must be considered (*ibid.* 416; *Re Beaumont*, 58 L. T. 916); including the intention of the settlor, and the wishes of the remaindermen (*Re Hope, De Cetto* v. *H.*, [1899] 2 Ch. 691; see as to "sentiment," *ibid.* 688). The tenant for life must make out a case for the sale (*ibid.* 689; *Re Sebright, S.* v. *Brownlow*, 28 Times L. R. 191; but see *S.C.*, 31 Times L. R. 25; see also *Re Hope*, 26 Times L. R. 413). The court would not sanction a sale proposed wantonly or maliciously (*Re Radnor*, 45 Ch. D. 413); nor a sale without any colour of necessity (*Re Marlborough, Marlborough* v. *Marjoribanks*, 32 Ch. D. 4); but sanctioned a sale to produce income for a tenant for life impecunious through no fault of his own (*Re Townshend*, 89 L. T. 691). Incumbrances created by the tenant for life on his interest should not, as a rule, be taken into account (*Re Radnor*, 45 Ch. D. 410; *Re Beaumont*, 58 L. T. 918; see *Re Hope, De Cetto* v. *H.*, [1899] 2 Ch. 679).

A sale of heirlooms cannot be sanctioned *ex post facto* (*Re Ames, A.* v. *A.*, [1893] 2 Ch. 479). Chattels settled to devolve with a title were ordered to be sold where they were useless and a cause of expense (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Houghton, ibid.*, 102). Where heirlooms were directed to be kept in a certain house, an order for sale of the house was refused, without some direction as to the disposal of these heirlooms. These were subsequently ordered to be sold (*Re Brown*, 27 Ch. D. 179; see *Re Wortham*, 75 L. T. 293). An order has been made for sale of some chattels, and removal of the remainder to another mansion (*Browne* v. *Collins*, 62 L. T. 566). On a sale of heirlooms a tenant for life may be given leave to bid (*Re Brown, supra*).

Trustees with a power of sale over land are trustees for the purposes of this Act, including the sale of heirlooms (*Constable* v. *C.*,

32 Ch. D. 233). Moneys arising from the sale of heirlooms may be applied in discharge of incumbrances on the settled land (*Re Marlborough, supra*); even where the heirlooms were vested in an infant tenant in tail (*Re Stafford, Gerard* v. *S.*, [1904] 2 Ch. 72); or such money may be applied in payment for improvements (*Re Houghton*, 30 Ch. D. 102); or in payment for repair of other heirlooms (*Re Waldegrave, W.* v. *Selborne*, 81 L. T. 632). They were placed to a separate account (*Browne* v. *Collins, supra*). Land purchased with the proceeds of heirlooms was not subject to the charges subsisting on the other settled land (*Re Marlborough and Queen Anne's Bounty*, [1897] 1 Ch. 712). As to keeping down interest on death duties on heirlooms, see *Re Egmont, Lefroy* v. *E.*, [1912] 1 Ch. 251.

15 Geo. 5, c. 18, s. 67.

For form of summons, see R. S. L. Act, Forms 6 and 7 (*post*), and for forms of orders, Seton (7th ed.), pp. 1764 *et seq.*

For the special meaning of "personal chattels" in Admon. of Estates Act, 1925, see sect. 55, sub-sect. 1 (x) of that Act, *ante*.

Dealings as between tenants for life and the estate.

Provision enabling dealings with tenant for life.

68.—(1) In the manner mentioned and subject to the provisions contained in this section—

(a) a sale, grant, lease, mortgage, charge or other disposition of settled land, or of any easement, right, or privilege over the same may be made to the tenant for life; or

(b) capital money may be advanced on mortgage to him; or

(c) a purchase may be made from him of land to be made subject to the limitations of the settlement; or

(d) an exchange may be made with him of settled land for other land; and

(e) any such disposition, advance, purchase, or exchange as aforesaid may be made to, from, or with any persons of whom the tenant for life is one.

(2) In every such case the trustees of the settlement shall, in addition to their powers as trustees, have all the powers of a tenant for life in reference to negotiating and completing the transaction, and shall have power to enforce any covenants by the tenant for life, or, where the tenant for life is himself one of the trustees, then the other or others of them shall have such power, and the said powers of a tenant for life may be exercised by the trustees of the settlement in the name and on behalf of the tenant for life.

(3) This section applies, notwithstanding that the tenant for life is one of the trustees of the settlement, or that an order has been made authorising the trustees to act on his behalf, or that he is a lunatic, or a defective, but does not apply to dealings with any body of persons which includes a trustee of the settlement, not being the tenant for life, unless the transaction is either previously or subsequently approved by the court.

15 Geo. 5, c. 18, s. 68.

This section is from L. P. A., 1922. S. L. A., 1890, s. 12, contained provisions similar to those of sub-sect. 2 in regard to sales of settled land to a tenant for life or a purchase from or exchange with him or a partition with him of land held in undivided shares. For "defective" (sub-sect. 3), see sect. 117, sub-sect. 1 (xiii), *post*.

Incumbrances.

Shifting of incumbrances.

69. Where there is an incumbrance affecting any part of the settled land (whether capable of being overreached on the exercise by the tenant for life of his powers under this Act or not), the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, or on all or any part of the capital money or securities representing capital money subject or to become subject to the settlement, whether already charged therewith or not, in exoneration of the first mentioned part, and, by a legal mortgage, or otherwise, make provision accordingly.

Replaces S. L. A., 1882, s. 5, which applied on a sale (see *Re Knight's Settled Estates*, [1918] 1 Ch. 211), exchange, or partition, and empowered the charging of the incumbrance on any other part of the settled land. For the retrospective effect of provisions in the present section, see Sched. 4 (1), *post*.

"Incumbrance" includes a rentcharge under the Improvement of Land Act, 1864, and upon the terms of the section being complied with the land sold will be completely exonerated (*Re Strafford and Maples*, [1896] 1 Ch. 235).

As to the effect of conveyance by tenant for life, see sect. 72, *post*, and as to the costs of a transaction authorised by this section, sect. 71, sub-sect. 1 (ix), *post*. For "legal mortgage," see sect. 117, sub-sect. 1 (xi), *post*.

Power to vary provisions of an incumbrance and to charge by way of additional security.

70.—(1) Where an incumbrance affects any part of the settled land, the tenant for life may, with the consent of the incumbrancer, vary the rate of interest charged and any of the other provisions of the instrument, if any, creating the incumbrance, and with the like consent charge that incumbrance on any part of the settled land, whether already charged therewith or not, or on all or any part of the capital money or securities representing capital money subject or to become subject to the settlement, by way of additional security, or of consolidation of securities, and by a legal mortgage or otherwise, make provision accordingly.

(2) "Incumbrance" in this section includes any annual sum payable during a life or lives or during a term of years absolute or determinable, but in any such case an additional security shall be effected so as only to create a charge or security similar to the original charge or security.

This section is from L. P. Acts, 1922 and 1924. The tenant for life is to be deemed always to have had power with the consent of the incumbrancer to vary the rate of interest and the provisions of

the instrument (Sched. 4 (2), *post*). As to costs see sect. 71, subsect. 1 (ix), *post*. 15 Geo. 5, c. 18, s. 70.

Raising of Money.

Power to raise money by mortgage.

71.—(1) Where money is required for any of the following purposes namely:—

(i) Discharging an incumbrance on the settled land or part thereof;

(ii) Paying for any improvement authorised by this Act or by the settlement;

(iii) Equality of exchange;

(iv) Extinguishing any manorial incidents;

(v) Compensating the steward on the extinguishment of manorial incidents and discharging the expenses incurred in connexion with the extinguishment;

(vi) Redeeming a compensation rentcharge in respect of the extinguishment of manorial incidents and affecting the settled land;

(vii) Commuting any additional rent made payable on the conversion of a perpetually renewable leasehold interest into a long term;

(viii) Satisfying any claims for compensation on the conversion of a perpetually renewable leasehold interest into a long term by any officer, solicitor, or other agent of the lessor in respect of fees or remuneration which would have been payable by the lessee or under-lessee on any renewal;

(ix) Payment of the costs of any transaction authorised by this section or either of the two last preceding sections;

the tenant for life may raise the money so required, on the security of the settled land, or of any part thereof, by a legal mortgage, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2) "Incumbrance" in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

(3) The restrictions imposed by this Part of this Act on the leasing powers of a tenant for life do not apply in relation to a mortgage term created under this Act.

S. L. A., 1882, s. 18, authorised a mortgage where money was required for enfranchisement (including the purchase of the reversion on a leasehold interest, *Re Bruce, Halsey* v. *B.*, [1905] 2 Ch. 372) or for equality of exchange or partition. S. L. A., 1890, s. 11, extended the power to the case of money being required for the discharge of incumbrances on the settled land, subsect. 2 of the section being re-enacted by sub-sect. 2 of the present section. The following cases were decided on sect. 11:

15 Geo. 5, c. 18, s. 71.

"Required" means reasonably required having regard to the circumstances of the settled land; and is not confined to a mortgagee calling in money (*Re Clifford, Scott* v. *C.*, [1902] 1 Ch. 87). So one part of the settled land may be mortgaged in order to pay off incumbrances on another part (*Hampden* v. *Buckinghamshire*, [1893] 2 Ch. 531; *Re Monson*, [1898] 1 Ch. 427). But such a course will be restrained where it would act unfairly on some of the persons interested (*Hampden* v. *Buckinghamshire, supra;* see also *Annesley* v. *Woodhouse*, [1898] 1 Ir. R. 69).

Expenses incurred by a local authority and charged on settled land by sect. 257 of the P. H. Act, 1875, are an "incumbrance" within this section; and if the tenant for life pays them, he can raise the money by a mortgage of the land (*Re Smith*, [1901] 1 Ch. 689). *Semble*, he could also do so in respect of a charge under sect. 13 of the Private Street Works Act, 1892 (*Re Pizzi, Scrivener* v. *Aldridge*, [1907] 1 Ch. 71).

As to manorial incidents, see note to L. P. Act, 1925, s. 28, *ante*, p. 619. Compensation rentcharges in respect of their extinguishment are provided for by L. P. Act, 1922, s. 138 and Sched. 13. As to the conversion of perpetually renewable leaseholds, see sect. 145 and Sched. 15 of that Act. Power to raise money is to be deemed always to have included power to raise money properly required for the costs of the transaction (Sched. 4 (7), *post*). As to the restrictions on the leasing powers of a tenant for life, see sect. 41, *ante*, and as to mortgage terms L. P. Act, 1925, ss. 85 *et seq.*, *ante*.

Sub-sect. 3.

Conveyance.

Completion of transactions by conveyance.

72.—(1) On a sale, exchange, lease, mortgage, charge, or other disposition, the tenant for life may, as regards land sold, given in exchange, leased, mortgaged, charged, or otherwise disposed of, or intended so to be, or as regards easements or other rights or privileges sold, given in exchange, leased, mortgaged, or otherwise disposed of, or intended so to be, effect the transaction by deed to the extent of the estate or interest vested or declared to be vested in him by the last or only vesting instrument affecting the settled land or any less estate or interest, in the manner requisite for giving effect to the sale, exchange, lease, mortgage, charge, or other disposition, but so that a mortgage shall be effected by the creation of a term of years absolute in the settled land or by charge by way of legal mortgage, and not otherwise.

(2) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, privileges or other interests created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i) all legal estates and charges by way of legal mortgage having priority to the settlement; and

(ii) all legal estates and charges by way of legal

mortgage which have been conveyed or created for securing money actually raised at the date of the deed; and 15 Geo. 5, c. 18, s. 72.

(iii) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges which—

(a) were before the date of the deed granted or made for value in money or money's worth, or agreed so to be, by the tenant for life or statutory owner, or by any of his predecessors in title, or any trustees for them, under the settlement, or under any statutory power, or are at that date otherwise binding on the successors in title of the tenant for life or statutory owner; and

(b) are at the date of the deed protected by registration under the Land Charges Act, 1925, if capable of registration thereunder.

(3) Notwithstanding registration under the Land Charges Act, 1925, of—

(a) an annuity within the meaning of Part II. of that Act;

(b) a limited owner's charge or a general equitable charge within the meaning of that Act;

a disposition under this Act operates to overreach such annuity or charge which shall, according to its priority, take effect as if limited by the settlement.

(4) Where a lease is by this Act authorised to be made by writing under hand only, such writing shall have the same operation under this section as if it had been a deed.

S. L. Act, 1882, s. 20, replaced by this section, empowered (sub-sect. 1) the tenant for life to convey land or create easements "for the estate or interest the subject of the settlement, or for any less estate or interest." As to vesting instruments, see sect. 117, sub-sect. 1 (xxxi), *post*, and as to mortgages, L. P. Act, 1925, ss. 85 *et seq.*, *ante*. Sub-sect. 1.

The tenant for life may properly convey "as beneficial owner" (*Re Ray*, [1896] 1 Ch. 474, 475; see *ante*, p. 814). In practice a provision is usually inserted restricting his liability on the implied covenants to the acts and defaults of himself and persons claiming through or in trust for him. Before S. L. Act, 1882, covenants for title could be required from a tenant for life assenting to a sale by his trustees (*Poulett* v. *Hood*, 5 Eq. 115; *Re Sawyer and Baring* (1884), W. N. 192).

Exceptions (i) and (ii) in S. L. Act, 1882, s. 20 (2) were:— Sub-sect. 2.

(i) All estates, interests, and charges having priority to the settlement; and

(ii) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed.

(iii) is re-enacted by clause (iii) (a) adding "statutory owner" (sect. 117, sub-sect. 1 (xxvi) *post*).

15 Geo. 5, c. 18, s. 72.

Clause (iii) (b) is new. See L. Charges Act, 1925, s. 10, *ante*.

A building lease granted by a tenant by the curtesy as absolute owner was held by virtue of sub-sect. 2 of S. L. Act, 1882, s. 20, to operate as a good lease under the Act (*Mogridge* v. *Clapp*, [1892] 3 Ch. 382).

Sub-sect. 2 (ii) (*supra*) included all estates and interests created subsequently to the settlement to secure money; and included charges for portions, or charges created under a power to mortgage in the settlement, when the money had been "actually raised"; but not a mortgage of his life interest by the tenant for life (*Re Dickin and Kelsall*, [1908] 1 Ch. 221). Such a mortgagee need not concur in the conveyance (*ibid.*); see also *Re Davies and Kent*, [1910] 2 Ch. 35. Clause (ii) prevents a tenant for life from conveying free from the mortgages of mortgagees who have actually lent their money (*Re Mundy and Roper*, [1899] 1 Ch. 289). But a tenant for life can convey free from jointures created under the settlement (*Re Keck and Hart*, [1898] 1 Ch. 617; *Re Ailesbury and Iveagh*, [1893] 2 Ch. 357), and from portions not actually raised (*Re Ducane and Nettlefold*, [1898] 2 Ch. 108). Where no money had been actually raised between the settlement and the conveyance, but a charge had been created in respect of a debt earlier than the settlement, the tenant for life could convey free from the charge (*Connolly* v. *Keating*, [1903] 1 I. R. 353).

Sub-sect. 3. See L. Charges Act, 1925, ss. 4 and 10 (1), Class C (ii) and (iii), *ante*. This and sub-sect. 4 are new.

Sub-sect. 4. See sect. 42, sub-sect. 5 (ii), *ante*.

Part III.

Investment or other application of Capital Money.

Modes of investment or application.

73.—(1) Capital money arising under this Act, subject to payment of claims properly payable thereout and to the application thereof for any special authorised object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):—

(i) In investment in Government securities, or in other securities in which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, with power to vary the investment into or for any other such securities;

(ii) In discharge, purchase, or redemption of incumbrances affecting the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land, or of any charge in respect of an improvement created on a holding under the Agricultural Holdings Act, 1923, or any similar previous enactment;

(iii) In payment for any improvement authorised by this Act; 15 Geo. 5, c. 18, s. 73.

(iv) In payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1923, or any similar previous enactment, or under custom or agreement or otherwise, in or about the execution of any improvement comprised in Part I. or Part II. of the First Schedule to the said Agricultural Holdings Act; 13 & 14 Geo. 5, c. 9.

(v) In payment for equality of exchange of settled land;

(vi) In discharge of any fines payable in respect of the alienation of any settled land affected by manorial incidents;

(vii) In payment of the gross sum or an instalment thereof attributable to capital payable as compensation for the extinguishment of manorial incidents affecting the settled land, and for the acquisition of any mines, minerals, and other rights of the lord, or the owner of the land affected by the manorial incidents, and for the compensation of the steward;

(viii) In redemption of any compensation rentcharge created in respect of the extinguishment of manorial incidents, and affecting the settled land;

(ix) In commuting any additional rent made payable on the conversion of a perpetually renewable leasehold interest into a long term, and in satisfying any claim for compensation on such conversion by any officer, solicitor, or other agent of the lessor in respect of fees or remuneration which would have been payable by the lessee or under-lessee on any renewal;

(x) In purchase of the freehold reversion in fee of any part of the settled land, being leasehold land held for years;

(xi) In purchase of land in fee simple, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land;

(xii) In purchase either in fee simple, or for a term of sixty years of more, of mines and minerals

15 Geo. 5, c. 18, s. 73.

convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes;

(xiii) In redemption of an improvement rentcharge, that is to say, a rentcharge (temporary or permanent) created, whether before or after the commencement of this Act, in pursuance of any Act of Parliament, with the object of paying off any money advanced for defraying the expenses of an improvement of any kind authorised by Part I. of the Third Schedule to this Act;

(xiv) In the purchase, with the leave of the court, of any leasehold interest where the immediate reversion is settled land, so as to merge the leasehold interest (unless the court otherwise directs) in the reversion, and notwithstanding that the leasehold interest may have less than sixty years to run.

(xv) In payment of the costs and expenses of all plans, surveys, and schemes, including schemes under the Town Planning Act, 1925, or any similar previous enactment, made with a view to, or in connexion with the improvement or development of the settled land, or any part thereof, or the exercise of any statutory powers, and of all negotiations entered into by the tenant for life with a view to the exercise of any of the said powers, notwithstanding that such negotiations may prove abortive, and in payment of the costs and expenses of opposing any such proposed scheme as aforesaid affecting the settled land, whether or not the scheme is made;

15 Geo. 5, c. 16.

(xvi) In the purchase of an annuity charged under section four of the Tithe Act, 1918, on the settled land or any part thereof, or in the discharge of such part of any such annuity as does not represent interest;

8 & 9 Geo. 5, c. 54.

(xvii) In payment to a local or other authority of such sum as may be agreed in consideration of such authority taking over and becoming liable to repair a private road on the settled land or a road for the maintenance whereof a tenant for life is liable ratione tenuræ;

(xviii) In financing any person who may have agreed to take a lease or grant for building purposes of the settled land, or any part thereof, by making advances to him in the usual manner

on the security of an equitable mortgage of his building agreement;

(xix) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge;

(xx) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act including the costs and expenses incidental to any of the matters referred to in this section;

(xxi) In any other mode authorised by the settlement with respect to money produced by the sale of the settled land.

(2) Notwithstanding anything in this section capital money arising under this Act from settled land in England or Wales shall not be applied in the purchase of land out of England and Wales, unless the settlement expressly authorises the same.

This section replaces S. L. Act, 1882, s. 21, and clauses (i), (ii) (with the addition of the final clause), (iii), (v), (x), (xi), (xii), (xix), (xx) (adding the words from "including") and (xxi) represent clauses of that section; under which it was held that where capital money was applied in discharge of an incumbrance prior to the settlement, the receipt of the prior incumbrancer was not sufficient, but that the money must in the first instance be paid to the trustees or into Court (*Re Norton and Las Casas*, [1909] 2 Ch. 59). The section states what is to be done with capital moneys "when received"; and the Court cannot previously charge them (*Round* v. *Turner*, 60 L. T. 379). Money bequeathed to trustees to be laid out in a new purchase of land to be settled has been applied under this section as capital money (*Re Mackenzie*, 23 Ch. D. 750); and where such new land was to be settled on the trusts of an existing settlement, the money was applicable in improving land originally comprised in the settlement (*Re Mundy*, [1891] 1 Ch. 399; *Re Byng*, [1892] 2 Ch. 219). Purchase-money arising from a sale under the S. E. Act, 1877, and ordered to be applied under sect. 34 of that Act, has been applied under sect. 21 of S. L. Act, 1882 (*Re Tennant*, 40 Ch. D. 594). As to the application of purchase-money of interests in land less than fee simple, see sect. 79, *post*, p. 941. The Court will not allow trustees to retain, as representing trust funds other than capital money, investments unauthorised by the trust, even though such investments are authorised by this section for capital money (*Fox* v. *Dolby* (1883), W. N. 29). As to sanctioning an application of capital subject to consents, see *Re Gisborough*, [1921] 2 Ch. 39.

Sub-sect. 1 (i).

As to what investments are by law authorised for trust money, see Trustee Act, 1925, ss. 1—7 (*post*). The tenant for life can select the particular investment (*Re Coleridge*, [1895] 2 Ch. 704).

Sub-sect. 1 (ii).

The word "incumbrances," as used in sub-sect. 1 (ii) includes a mortgage of a long term (*Re Frewen, F.* v. *James*, 38 Ch. D. 383); an annuity charged on tithes (*Re Esdaile, E.* v. *E.*, 54 L. T. 637); sewering expenses of a local authority, charged under statute on settled land and payable by instalments (*Re Legh*, [1902] 2 Ch. 274); a charge under 46 & 47 Vict. c. 61, s. 29. Tenants for life who had paid instalments of an instalment mortgage were held

15 Geo. 5, c. 18, s. 73.

entitled to be recouped out of the proceeds of the sale of the property (*Re Nepean*, [1900] 1 Ir. R. 298; compare *Re Dalison*, [1892] 3 Ch. 522; *Re Legh*, *supra*). The word would not include the future payments of a jointure rentcharge (*Re Knatchbull*, 27 Ch. D. 353), but includes the accrued arrears thereof (*Re Manchester*, [1910] 1 Ch. 115). The latter part of the clause replaces Agr. Holdings Act, 1923, s. 21.

Capital money may be applied in the discharge of an incumbrance on part of the settled land (*Re Chaytor*, 25 Ch. D. 651; but see *Re Sebright*, 33 Ch. D. 437); and may be raised out of one part to pay off incumbrances on another part, though the two parts were settled by different instruments (*Re Monson*, [1898] 1 Ch. 427; *Re Stafford, Gerard* v. *S.*, [1904] 2 Ch. 72); or, by reason of the subsequent failure of some of the limitations in one case, devolve ultimately to different persons (*Re Freme, F.* v. *Logan*, [1894] 1 Ch. 1; see also *Re Coote, C.* v. *Cadogan*, 81 L. T. 535). Compare *Hampden* v. *Buckinghamshire*, [1893] 2 Ch. 531. Money arising from heirlooms may be applied in discharge of incumbrances on the land (*Re Marlborough, M.* v. *Marjoribanks*, 32 Ch. D. 1; *Re Stafford, Gerard* v. *S.*, *supra*). As to whether capital money arising from a portion of the settled estate exclusively subject to a charge can be applied in discharge of incumbrances affecting the other portion, see *Re Stamford* (43 Ch. D. 95). Where under a settlement a term was created for the purpose (subject to an annuity to the life tenant) of discharging incumbrances, but to cease on their discharge, the purchase-money on a sale under the Act was applied in discharging the incumbrances, the Court holding that they ought not to be kept on foot and that the term ceased (*Re Richardson, R.* v. *R.*, [1900] 2 Ch. 778). The reference to charges under the Agricultural Holdings Act is new.

Sub-sect. 1 (iii).

Under sub-sect. 1 (iii) the works in payment for which capital money may be applied are works within sect. 83 and Sched. 3, and they do not include ordinary repairs (*Clarke* v. *Thornton*, 35 Ch. D. 311; *Re Tucker*, [1895] 2 Ch. 469; but see *Re Houghton*, 30 Ch. D. 101). Capital money was applied for improvements which the settlement had given the trustees power to make, but if made had thrown upon income (*Clarke* v. *Thornton*, *supra*; *Re Stamford*, 56 L. T. 484; compare the trust created in *Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711). Capital money arising from settled land exclusively subject to a charge was under the circumstances applied for the improvement of the remainder of the settled land (*Re Stamford*, 43 Ch. D. 84). Where the settlement was composed of two instruments, evidence was required that the proposed improvements were proper under both instruments (*Re Byng*, [1892] 2 Ch. 228). Capital money settled by an English settlement was applied in payment for improvements on land comprised in the settlement and situate in Scotland (*Re Gurney, Sullivan* v. *G.*, [1907] 2 Ch. 496); or in Ireland (*Re Dunraven*, *ibid.*, 417; see *Re Coote, C.* v. *Cadogan*, 81 L. T. 535). Compare sub-sect. 2, *infra*.

Sub-sect. 1 (iv).

In *Re De la Warr*, [1913] 1 Ch. 142, it had been held that capital money could not be expended in compensating a tenant under the Agricultural Holdings Act for the termination of his tenancy, which was necessary to an authorised improvement.

Sub-sect. 1 (vi) to (viii).

See, as to manorial incidents, note to L. P. Act, 1925, s. 28, *ante*, p. 619, and as to compensation rentcharges, L. P. Act, 1922, s. 138 and Sched. 13.

Sub-sect. 1 (ix).

See *ibid.*, sect. 145 and Sched. 15.

Sub-sect. 1 (xi).

As to the settlement of land purchased, see sect. 10, *ante*. The decisions on the Lands Clauses Act are not applicable in construing this clause (*Re Gerard*, [1893] 3 Ch. 252). This clause does not authorise the purchase of an equity of redemption (*Re Radnor*,

[1898] W. N. 174). A purchase of sporting rights was sanctioned (*Re Portarlington*, [1918] 1 I. R. 362). On a purchase of a mansion house an allowance out of capital for electric lighting, bells and repairs was sanctioned, as the price of the house would otherwise have been higher (*Re Blake*, [1923] 2 Ch. 128). Where rents of leaseholds were directed to be accumulated and become capital money, but to be primarily liable to be laid out in land, the directions did not fall within the Accumulation Act, 1892 (see now L. P. Act, 1925, s. 166, *ante*) (*Re Danson, Bell* v. *D.*, [1895] W. N. 102). **15 Geo. 5, c. 18, s. 73.**

Under clause (xii) cross sales of easements were authorised (*Re Brotherton, B.* v. *B.*, [1908] W. N. 56). Sub-sect. 1 (xii).

This clause re-enacts S. L. Act, 1887, s. 1.

Temporary rentcharges created under the Improvement of Land Act, 1864, could not before the passing of the S. L. Act, 1887, be paid off out of capital moneys (*Re Knatchbull*, 29 Ch. D. 588). Sub-sect. 1 (xiii).

Capital moneys may now be applied, either (1) in payment from time to time of the instalments of such rentcharges (*Re Sudeley*, 37 Ch. D. 123; *Ex parte Dyas*, 21 L. R. Ir. 369), including, it would seem, interest as well as principal (*Re Egmont*, 45 Ch. D. 395; *Re Newton*, 61 L. T. 787); or (2) in redeeming the rentcharges by one payment (*Re Egmont, supra*), in which case the payment may include not only the balance of principal, but a bonus to compensate the lender for loss of interest (*ibid.*).

The powers of the Act of 1887 were applied where the trustees of a settlement had themselves purchased the rentcharges under sect. 60 of the Act of 1864 (*Re Howard*, [1892] 2 Ch. 233); and where the improved portions of the settled estates had been sold (*ibid.*); but the Court refused to apply money arising under the Lands Clauses Act (and applicable as capital money under sect. 32 of the S. L. Act, 1882, see now sect. 76, *post*) in redeeming a charge on glebe lands (*Re Castle Bytham*, [1895] 1 Ch. 348).

The Act of 1887 did not enable the tenant for life to be recouped out of capital moneys the instalments of the rentcharges actually paid by him, whether before the Act came into operation (*Re Howard, supra*), or since (*Re Dalison*, [1892] 3 Ch. 522; *Re Bristol*, [1893] 3 Ch. 161; compare *Re Nepean*, [1900] 1 Ir. R. 298); nor a sum paid by him on a transfer of the charge in order to reduce the interest (*Re Verney*, [1898] 1 Ch. 508).

Where the works paid for by means of the rentcharge were not within the description of improvements authorised by the S. L. Act, 1882, the application of capital moneys was not allowed (*Re Newton*, 61 L. T. 787).

See also sect. 88, sub-sect. 6, *post*. Capital money is to be deemed always to have been applicable in any of the modes mentioned in this clause and in clauses (xiv), (xv) and (xvi), *infra* (Sched. 4, (10) (2), *post*).

Under S. L. Act, 1882, it was held that the liability to repair a highway *ratione tenuræ* was not an "incumbrance," and that capital money could not be applied to free the estate from the liability (*Re Hodgson, Altamont* v. *Forsyth*, [1912] 1 Ch. 784; cf. *Re Stamford and Warrington*, [1911] 1 Ch. 648). Sub-sect. 1 (xvii).

Under the present clause payment has been made to two persons who had a joint general power of appointment (*Re Winstanley*, 54 L. T. 840). When the purchase-money of settled land has been paid into Court under the L. C. C. Act, 1845, the Court (sect. 32 of S. L. Act, 1882, see now sect. 76, *post*, applying) has ordered payment out to trustees for sale as being persons empowered to give an absolute discharge (*Re Rutland*, 31 W. R. 947; 49 L. T. 196; *Re Rathmines*, 15 L. R. Ir. 576); and also to trustees appointed under the Act by the Court (*Re Wright*, 24 Ch. D. 662; *Re Harrop, ibid.*, 717; *Re* Sub-sect. 1 (xix).

15 Geo. 5, c. 18, s. 73.

Bolton, 52 L. T. 728; *Re Wootton* (1890), W. N. 158; *Re Torry Hill, Pemberton* v. *P.*, [1909] 1 Ch. 470). But the power is discretionary, and the Court may refuse to allow it (*Re Smith, Ex p. L. & N. W. R. Co.*, 40 Ch. D. 386). See also sect. 75, sub-sect. 8, *post*.

Under sect. 69 of the L. C. C. Act, 1845, it has been held that trustees with a power of sale are "persons becoming absolutely entitled" (*Re Hobson*, 7 Ch. D. 708; *Ex p. Bowman*, (1888), W. N. 179; *Re Ward*, 28 Ch. D. 100; *Re Morgan, Smith* v. *May*, [1900] 2 Ch. 474; *Re Sheffield*, [1903] 1 Ch. 208; but see *Re Smith*, 40 Ch. D. 391). Money received from sales under the S. E. Act, 1877, was paid to trustees to be held on the trusts of the settlement (*Re Morgan*, 9 Eq. 587; *Re Hemsley*, 29 L. T. 173; see *Re Evans*, 14 Ch. D. 511).

Sub-sect. 1 (xx).

Costs.

As to the meaning of the words "incidental to" in clause (xx), see *Cardigan* v. *Curzon-Howe* (41 Ch. D. 375); *Re Stamford* (43 Ch. D. 90). The tenant for life's costs of defending an action to restrain him from selling which was dismissed with costs were allowed, so far as not recovered from the plaintiff, out of capital money (*Re Llewellin, L.* v. *Williams*, 37 Ch. D. 317). So also the proper costs of an unsuccessful attempt by a tenant for life to sell (*Re Smith*, [1891] 3 Ch. 65). Where four persons out of twenty-five who together constituted the tenant for life, employed separate solicitors for the purposes of a sale, their respective costs were paid out of the purchase-money (*Smith* v. *Lancaster*, [1894] 3 Ch. 439). So also the commission charged by an estate agent for procuring a long building lease (*Re Maryon Wilson*, [1901] 1 Ch. 934), but not a short occupation lease (*Re Leveson Gower*, [1905] 2 Ch. 95). As a general rule the cost of obtaining concurrence of mortgagees of the life estate cannot be paid out of capital money (*Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375; *Re Peel*, [1910] 1 Ch. 389); nor the costs of appointing a guardian to an infant tenant for life to act in a sale (*Re Rudd* (1887), W. N. 251; see also *Re Hope*, 28 T. L. R. 93). As to surveyor's costs, see *Re Stamford* (43 Ch. D. 89); *Re Eyton* ((1888), W. N. 254). See further as to costs, sect. 113, *post*.

Increment value and reversion duties.

By Sched. 4 (10) (1), *post*, capital money is to be deemed always to have been capable of being applied in paying these duties and costs, &c., in connection with valuations, &c. under the Finance (1909—10) Act, 1910 (see *Re Smith-Bosanquet*, 107 L. T. 191; *Re Maryon-Wilson's Estates*, [1915] 1 Ch. 29).

Sub-sect. 2.

Re-enacts S. L. Act, 1882, s. 23, adding "or Wales." Compare note to sub-sect. 1 (iii), *ante*.

Power to acquire land subject to certain incumbrances.

74.—(1) Land may be acquired on a purchase or exchange to be made subject to a settlement, notwithstanding that the land is subject to any Crown rent, quit rent, chief rent, or other incident of tenure, or to any easement, right or privilege, or to any restrictive covenant, or to any liability to maintain or repair walls, fences, sea-walls, river banks, dykes, roads, streets, sewers, or drains, or to any improvement rentcharge which is capable under this Act of being redeemed out of capital money.

(2) The acquisition on a purchase or exchange before the commencement of this Act of any land subject to any such burden as aforesaid is hereby confirmed.

This section is from L. P. Act, 1922. As to redemption of improvement rentcharges see sect. 73, sub-sect. 1 (xiii), *ante*.

15 Geo. 5, c. 18, s. 75.

Regulations respecting investment, devolution, and income of securities, &c.

75.—(1) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly.

(2) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement, and any investment shall be in the names or under the control of the trustees.

(3) The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees.

(4) Any investment or other application shall not during the subsistence of the beneficial interest of the tenant for life be altered without his consent.

(5) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7) Those securities may be converted into money, which shall be capital money arising under this Act.

(8) All or any part of any capital money paid into court may, if the court thinks fit, be at any time paid out to the trustees of the settlement.

Sub-sects. 1 to 7 re-enact S. L. A., 1882, s. 22, substituting in sub-sect. 4 "the subsistence of the beneficial interest" for "the life." Sub-sect. 8 re-enacts S. L. A., 1890, s. 14. See as to the previous law, *Cookes* v. *C.*, 34 Ch. D. 498.

The option referred to in sub-sect. 1 cannot be exercised by the tenant for life unless there are trustees, who must accordingly be appointed before completion (*Hatten* v. *Russell*, 38 Ch. D. 345; *Mogridge* v. *Clapp*, [1892] 3 Ch. 400; *Re Fisher and Grazebrook*, [1898] 2 Ch. 660).

The discretion of the tenant for life as to what investments should be made of capital money, if exercised *bona fide*, cannot in general be controlled by the trustees or the Court (*Re Coleridge*, [1895] 2 Ch. 704). But where the tenant for life directed an investment which was improper though within the Act, the trustees were not

15 Geo. 5, c. 18, s. 75.

bound to invest (*Re Hunt, Bulteel* v. *Lawdeshayne*, [1905] 2 Ch. 418; and see *Re Gladwin*, [1919] 1 Ch. 232). Nor are they bound to invest on mortgage until they are themselves satisfied that the "direction" of the tenant for life has been given upon proper (1) report as to value, (2) investigation of title, and (3) advice as to the form of mortgage (*Re Hotham, H.* v. *Doughty*, [1902] 2 Ch. 575). See also *Re Peel*, [1910] 1 Ch. 389; *Re Stamford and Warrington*, [1925] Ch. 589, and sect. 98, *post*, p. 956. Compare the position of trustees purchasing freeholds, *Re Theobald*, 19 T. L. R. 536, *post*, p. 955. They are entitled to select their own brokers (*Re Cleveland*, [1902] 2 Ch. 350).

A vesting deed is not necessary in the case of capital moneys (*Re Clayton's Settled Estates*, [1926] W. N. 54).

Trustees will not be authorised to transmit capital money abroad for investment without the consent of all interested (*Re Lloyd, Edwards* v. *L.*, 54 L. T. 643).

Under sub-sect. 5, money arising from heirlooms devolves as the heirlooms would have (*Re Marlborough, M.* v. *Marjoribanks*, 32 Ch. D. 1). And if invested in land, such land will not be subject to the charges to which the other settled land is subject (*Re Marlborough and Queen Anne's Bounty*, [1897] 1 Ch. 712). Where money arising from sale of part of estate A was applied by a tenant for life in discharge of a mortgage on estate B settled on the same trusts, and on his death the estates devolved on different persons, the owners of estate A had no claim to a charge on estate B (*Re Freme, F.* v. *Logan*, [1894] 1 Ch. 1). Where a tenant for life of freeholds, with testamentary power of appointment among children, made a will in exercise of the power, and subsequently granted a lease in consideration of a premium (which was capital money under sect. 4 of the S. L. Act, 1884), the premium did not pass under the appointment, the will not being part of the settlement mentioned in sub-sect. 5 (*Beddington* v. *Baumann*, [1903] A. C. 13).

Crown.

Where proceeds of sale of land in the hands of trustees on the death of the tenant for life reverted to the settlor, who died without an heir, the Crown was held entitled to such proceeds as *bona vacantia* (*Re Bond, Panes* v. *A.-G.*, [1901] 1 Ch. 15; and see *Re Cullum*, [1924] 1 Ch. 540).

Apart from the statutory operation of sub-sect. 5, it has been laid down that to make personalty passing under a will devolve as realty, the will must contain an imperative trust for conversion (*Re Walker, Macintosh-Walker* v. *W.*, [1908] 2 Ch. 712; *Re Aspinall*, [1916] 1 Ch. 15; *Re Twopeny*, [1924] 1 Ch. 552). In *Re Sandes*, [1920] 1 I. R. 342, it was held that priorities of assignments were determined by notice (see now L. P. Act, 1925, s. 137, *ante*), the proceeds of sale being personalty as regarded strangers to the settlement.

For form of summons under the section, see R. S. L. Act, Forms 9—11, *post*. See also as to the protection of the trustees, sect. 98, *post*.

Application of money in Court under Lands Clauses and other Acts.

76. Where, under an Act, or an order or scheme confirmed by or having the force of an Act of Parliament, incorporating or applying, wholly or in part, the Lands Clauses Acts, or under any Act, public general or local or private, money is at the commencement of this Act in court, or is afterwards paid into court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorised by the Act under which the money is in court,

that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and notwithstanding anything in this Act according to the same procedure, as if the modes of investment or application authorised by this Act were authorised by the Act under which the money is in court.

15 Geo. 5, c. 18, s. 76.

Re-enacts, adding the reference to orders or schemes, S. L. Act, 1882, s. 32.

Orders have been made under this section for payment out to trustees of money which was in Court under the Lands Clauses Act (*Re Harrop*, 24 Ch. D. 717; *Re Rutland*, 31 W. R. 947); under a local Act (*Re Wright*, 24 Ch. D. 662; *Re Rathmines*, 15 L. R. Ir. 576); or under a private estates Act (*Re Bolton*, 52 L. T. 728). Compare the cases quoted, *ante*, pp. 935—936. In the last case the Court declined to direct the trustees to give notice of the investments to the remaindermen. Purchase-money of lands belonging absolutely to a charity, in Court under the Lands Clauses Act, was held within this section (*Re Byron's Charity*, 23 Ch. D. 171; *Re Bethlehem Hospitals*, 30 Ch. D. 541). Similarly purchase-money of glebe land (*Ex p. Castle Bytham*, [1895] 1 Ch. 348). Money which under a power may be laid out in the purchase of land is within the section (*Re Soltau*, [1896] 2 Ch. 629). The Court has under this section absolute discretion as to costs (*Re Hanbury*, 31 W. R. 784; 52 L. J. Ch. 687), and the costs will in general be paid by the corporation taking the land (*ibid.*; *Re Harrop*, 24 Ch. D. 717).

Application of money in hands of trustees under powers of settlement.

77. Where—

(a) under any instrument coming into operation either before or after the commencement of this Act money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the trusts declared by that instrument; or

(b) under any instrument coming into operation after the commencement of this Act money or securities or the proceeds of sale of any property is or are held by trustees on trusts creating entailed interests therein;

then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the money securities or proceeds as if they were capital money arising under this Act.

Re-enacts S. L. Act, 1882, s. 33, adding clause (b), as to which see L. P. Act, 1925, s. 130 and notes, *ante*, p. 718.

Sect. 33 was held to apply to money bequeathed to trustees in trust to lay out the same in land to be settled (*Re Mackenzie*, 23 Ch. D. 750; *Re Maberly, M.* v. *M.*, 33 Ch. D. 455; *Re Mundy*, [1891] 1 Ch. 399; see *Re Byng*, [1892] 2 Ch. 219; *Re Stafford, Gerard* v. *S.*, [1904] 2 Ch. 81). The words "money liable to be laid out in the purchase of land," mean money subject to some disposition under which it may be laid out in the purchase of land (*Re Soltau*, [1898]

15 Geo. 5, c. 18, s. 77.

2 Ch. 632). And the section has been held to apply to money which, under a power, might be applied in the purchase of land generally (*ibid.*; see *Re Child*, [1907] 2 Ch. 348); or of particular land (*Re Hill, H.* v. *Pilcher*, [1896] 1 Ch. 962); or of freehold ground rents (*Re Thomas, Weatherall* v. *T.*, [1900] 1 Ch. 319). Also to a sinking fund formed by the tenant for life under a provision in the settlement to repay money raised for improvements (*Re Sudbury, Vernon* v. *V.*, [1893] 3 Ch. 74). Also to money ordered to be applied under sect. 34 of the S. E. Act, 1877 (*Re Tennant*, 40 Ch. D. 594; see *Re Tesseyman*, [1897] W. N. 168; 77 L. T. 484); and to money in Court in an administration action, liable under the settlement to be laid out in land (*Clarke* v. *Thornton*, 35 Ch. D. 312; *Re Torry Hill, Pemberton* v. *P.*, [1909] 1 Ch. 470; see *contra, Burke* v. *Gore*, 13 L. R. Ir. 367).

When the tenant for life was an infant the trustees might, under S. L. Act, 1882, s. 60, exercise the option given by this section to the tenant for life (*Re Newcastle*, 24 Ch. D. 140; see now sect. 26, *ante*). Where there was no tenant for life, purchase-money arising under the S. E. Act, 1877, was ordered by the Court to be applied as capital money (*Re Tesseyman*, [1897] W. N. 168; 77 L. T. 484). The tenant for life can direct how the moneys are to be invested or applied (*Re Gee, Pearson-Gee* v. *Pearson*, [1895] W. N. 90; 64 L. J. Ch. 606).

Provision as to personal estate settled by reference to capital money, or on trusts corresponding with the limitations of land.

78.—(1) Where money or securities or the proceeds of sale of any property is or are by any instrument coming into operation either before or after the commencement of this Act directed to be held on trusts declared by reference to capital money arising under this Act from land settled by that instrument or any other instrument, the money securities or proceeds shall be held on the like trusts as if the same had been or represented money which had actually arisen under this Act from the settled land.

This sub-section operates without prejudice to the rights of any person claiming under a disposition for valuable consideration of any such money, securities, or proceeds, made before the commencement of this Act.

(2) Where money or securities or the proceeds of sale of any property is or are by any instrument coming into operation after the commencement of this Act directed to be held on the same trusts as, or on trusts corresponding as nearly as may be with the limitations of land settled by that instrument or any other instrument, the money, securities or proceeds shall be held on the like trusts as if the same had been or represented capital money arising under this Act from the settled land.

(3) Such money, securities, or proceeds of sale shall be paid or transferred to or retained by the trustees of the settlement of the settled land, or paid or transferred into court, and invested or applied accordingly.

(4) Where the settled land includes freehold land, the money, securities, or proceeds of sale aforesaid shall be held on the like trusts as if the same had been or represented capital money arising from the freehold land.

(5) This section has effect notwithstanding any direction in the instrument creating the trust that the trust property is not to vest absolutely in any tenant in tail or in tail male or in tail female under the limitations of the settled land who dies under a specified age, or before the happening of a specified event, but, save as aforesaid, has effect with any variations and subject to any contrary intention expressed in the instrument creating the trust. 15 Geo. 5, c. 18, s. 78.

This section is from L. P. Act, 1922, except the concluding paragraph of sub-sect. 1, which was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*). See as to referential settlements, p. 859, and sect. 32, *ante*, and sect. 91, *post*, and as to entailed interests (sub-sect. 5) L. P. Act, 1925, s. 130 and notes, *ante*, p. 718.

79. Where capital money arising under this Act is purchase-money paid in respect of— Application of money paid for lease or reversion.

(a) a lease for years; or

(b) any other estate or interest in land less than the fee simple; or

(c) a reversion dependent on any such lease, estate, or interest;

the trustees of the settlement or the court, as the case may be, and in the case of the court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

Re-enacts (omitting reference to leases for life) S. L. A., 1882, s. 34.

This section is substantially identical with sect. 74 of the Lands Clauses Act, 1845, and decisions under that Act have been treated as authorities on this section (*Cottrell* v. *C.*, 28 Ch. D. 628). On a sale of leaseholds the tenant for life was only allowed during the leasehold term an income equal to the rent previously received by him (*ibid.*; see *Re Griffith*, 49 L. T. 161). So in the case of a sale of ground rents (*Re Bowyer*, [1892] W. N. 48; and see *Askew* v. *Woodhead*, 14 Ch. D. 27; *Re Simpson, Clarke* v. *S.*, [1913] 1 Ch. 277). This section does not apply to chattels which are sold under sect. 67 (*Re Marlborough, M.* v. *Majoribanks*, 30 Ch. D. 133).

For form of summons, see R. S. L. Act, Form 18 (*post*).

80.—(1) Money, not being rent, received by way of damages or compensation for breach of any covenant by a lessee or grantee contained in any lease or grant of settled land shall, unless in any case the court on the application of the tenant for life or the trustees of the settlement otherwise directs, be deemed to be capital money arising As to money received by way of damages for breach of covenant.

15 Geo. 5, c. 18, s. 80.

under this Act, and shall be paid to or retained by the trustees of the settlement, or paid into court, and invested or applied, accordingly.

(2) In addition to the other modes in which capital money may be applied under this Act or the settlement, money so received as aforesaid or any part thereof may, if the circumstances permit, be applied at any time within twelve months after such receipt, or such extended period as the court may allow, in or towards payment of the costs of making good in whole or in part the breach of covenant in respect of which it was so received, or the consequences thereof, and the trustees of the settlement, if they think fit, may require any money so received or any part thereof to be so applied.

(3) In the application of any such money in or towards payment of the cost of making good any such breach or the consequences of any such breach as aforesaid, the work required to be done for the purpose shall be deemed to be an improvement authorised by Part I. of the Third Schedule to this Act.

(4) This section does not apply to money received by way of damages or compensation for the breach of a covenant to repay to the lessor or grantor money laid out or expended by him, or to any case in which if the money received were applied in making good the breach of covenant or the consequences thereof such application would not enure for the benefit of the settled land, or any buildings thereon.

(5) This section does not apply to money received by way of damages or compensation before the commencement of this Act, but it applies whether the lease or grant was made before or after the commencement of this Act, and whether under the powers conferred by the Settled Land Acts, 1882 to 1890, or this Act or not.

(6) The provisions of this section apply only if and as far as a contrary intention is not expressed in the settlement, and have effect subject to the terms of the settlement, and to any provisions therein contained, but a contrary intention shall not be deemed to be expressed merely by words negativing impeachment for waste.

This and the following section are from L. P. Act, 1922. In *Re Lacon, L.* v. *L.*, [1911] 2 Ch. 17, it was held that a tenant for life was entitled to retain damages for a breach of covenant to repair a demised mansion-house; and in *Re Dealtry*, [1913] W. N. 138; 108 L. T. 832, to retain damages for breach of a covenant to fill up a demised quarry. Cf. the cases as to timber quoted in notes to sect. 66, *ante*, and *Re Williams*, [1922] 2 Ch. 750 (compensation for damage by military occupation, held casual profit); *Re Bladon*, [1912] 1 Ch. 45 (compensation for extinction of licence of public-house, held capital); *Re Ward's Settled Estates*, [1919] W. N. 51; *Re Foster's Settled Estates*, [1922] 1 Ch. 348 (deposit forfeited by purchaser on uncompleted sale held capital).

15 Geo. 5, c. 18, s. 81.

As to capital arising otherwise than under the Act.

81. Any money which after the commencement of this Act arises from settled land otherwise than under this Act, as well as any money or securities in the names or under the control of the tenant for life or the trustees of the settlement, being or representing money which had arisen before the commencement of this Act from the settled land otherwise than under the Settled Land Acts, 1882 to 1890, and which ought, as between the persons interested in the settled land, to be or to have been treated as capital, shall (without prejudice to any other statutory provisions affecting the same) be deemed to be or to represent capital money arising under this Act, and shall be paid or transferred to or retained by the trustees of the settlement, or paid or transferred into court, and invested or applied, accordingly.

See Sched. 4 (11), *post*.

Land acquired may be made a substituted security for released charges.

82.—(1) Land acquired by purchase or in exchange or otherwise under the powers of this Act, may be made a substituted security for any charge from which the settled land or any part thereof has theretofore been released on the occasion and in order to the completion of a sale, exchange or other disposition:

Provided that, where a charge does not affect the whole of the settled land, the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange of land which was before the exchange subject to the charge.

(2) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any legal estate or charge by way of legal mortgage, is not concerned to inquire whether or not it is proper that the land should be subjected to such legal estate or charge.

Replaces S. L. A., 1882, s. 24 (4) to (6); sub-sect. 5 (represented by the proviso to sub-sect. 1) including not only charges taking priority over the settlement, but also charges created by the settlement itself (*Re Stamford*, 43 Ch. D. 93). Where the purchase money of heirlooms was invested in land, it was not subject to charges subsisting on the other settled land (*Re Marlborough and Queen Anne's Bounty*, [1897] 1 Ch. 712).

For "charge by way of legal mortgage," see L. P. Act, 1925, s. 87, *ante*.

Part IV.

Improvements.

Improvements with Capital Money.

Description of improvements authorised by Act.

83. Improvements authorised by this Act are the making or execution on, or in connexion with, and for

15 Geo. 5, c. 18, s. 83.

the benefit of settled land, of any of the works mentioned in the Third Schedule to this Act, or of any works for any of the purposes mentioned in that Schedule, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes.

Replaces S. L. Act, 1882, s. 25, where the improvements authorised were named in the section. See Sched. 3 and notes, *post*, p. 993.

Mode of application of capital money.

84.—(1) Capital money arising under this Act may be applied in or towards payment for any improvement authorised by this Act or by the settlement, without any scheme for the execution of the improvement being first submitted for approval to, or approved by, the trustees of the settlement or the court.

(2) Where the capital money to be expended is in the hands of the trustees of the settlement, they may apply that money in or towards payment for the whole or any part of any work or operation comprised in the improvement, on—

(i) a certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or

(ii) an order of the court directing or authorising the trustees so to apply a specified portion of the capital money:

Provided that—

(a) In the case of improvements not authorised by Part I. of the Third Schedule to this Act or by the settlement, the trustees may, if they think fit, and shall if so directed by the court, before they make any such application of capital money require that that money, or any part thereof, shall be repaid to them out of the income of the settled land by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed.

(b) No capital money shall be applied by the trustees in payment for improvements not authorised by Parts I. and II. of the Third Schedule to this Act, or by the settlement, except subject to provision for the repayment thereof being made in manner mentioned in the preceding paragraph of this proviso. 15 Geo. 5, c. 18, s. 84.

(3) Where the capital money to be expended is in court, the court may, if it thinks fit, on a report or certificate of the Minister, or of a competent engineer or able practical surveyor approved by the court, or on such other evidence as the court may think sufficient, make such order and give such directions as it thinks fit for the application of the money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement.

(4) Where the court authorises capital money to be applied in payment for any improvement or intended improvement not authorised by Part I. of the Third Schedule to this Act or by the settlement, the court, as a condition of making the order, may in any case require that the capital money or any part thereof, and shall as respects an improvement mentioned in Part III. of that Schedule (unless the improvement is authorised by the settlement), require that the whole of the capital money shall be repaid to the trustees of the settlement out of the income of the settled land by a fixed number of periodical instalments to be paid at the times appointed by the court, and may require that any incumbrancer of the estate or interest of the tenant for life shall be served with notice of the proceedings.

(5) All money received by the trustees of the settlement in respect of any instalments under this section shall be held by them as capital money arising from freehold land under the settlement, unless the court otherwise directs.

S. L. Act, 1882, s. 26, replaced by this section, required (sub-sect. 1) the submission by the tenant for life for approval to the trustees or the Court of a scheme for the execution of the improvement, showing the proposed expenditure thereon; and by sub-sect. 2, where the capital money to be expended was in the hands of trustees there was required either a certificate of the Land Commissioners (now the Minister of Agriculture and Fisheries) or a certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners or the Court, or an order of the Court. The proviso to sub-sect. 2 of the present section, and sub-sects. 4 and 5, are from L. P. Act, 1922. Sub-sect. 3 re-enacts (omitting reference to a scheme) S. L. Act, 1882, s. 26 (3). As to repayment by instalments, see also sect. 85, *post*.

Trustees' action.

In considering a scheme under S. L. Act, 1882, the trustees were not concerned with the general policy of the tenant for life; but had to see (1) that the particular improvement was within the Act,

15 Geo. 5, c. 18, s. 84.

(2) that it would be properly carried out by the scheme, and (3) that the tenant for life was acting *bona fide* on proper advice (*Re Egmont, Lefroy* v. *E.*, [1906] 2 Ch. 151). The trustees might approve although they had no capital money in hand, and might out of subsequent capital money re-imburse the tenant for life for works properly executed (*Re Norfolk, N.* v. *Herries*, [1900] 1 Ch. 461; compare *Re Lisburne*, [1901] W. N. 91). During a tenant for life's minority, the trustees might prepare and approve their own schemes (*Re Greys Court*, [1901] W. N. 60).

Court's action.

The matter may come before the Court after the trustees' approval; or, where the trustees do not approve, the Court may, on the scheme being submitted to it, authorise the trustees to comply (*Clarke* v. *Thornton*, 35 Ch. D. 313). As regards the Court's action, it must exercise its discretion and consider whether the scheme is compatible with the interests of all parties (*Re Keck*, [1904] 2 Ch. 29). Before the execution of the works, the Court will not make a prospective order, authorising future capital money to be applied (*Re Millard*, [1893] 3 Ch. 116); but will decide a legal question, *e.g.*, whether the work is within the Act (*Re Calverley*, [1904] 1 Ch. 152). It may authorise payment for executed improvements (sect. 87, *post*; see note thereon, p. 947, *post*, and see before S. L. Act, 1890, *Re Hotgkin*, 35 Ch. D. 41; *Re Broadwater*, 53 L. T. 745). Where a scheme had been previously approved the Court has allowed payment of additional expenditure properly incurred (*Re Lytton*, 38 Ch. D. 20; *Re Egmont*, [1908] W. N. 176).

Capital money in Court.

In the case of capital money in Court, the section contemplates (1) a report or certificate of the Minister of Agriculture and Fisheries (sect. 117, sub-sect. 1 (xvi) *post*), or engineer or surveyor, and (2) an order of Court. Where there were no trustees but the infant tenant in tail appeared, the Court authorised payment under S. L. Act, 1882, s. 26 (*Clarke* v. *Thornton*, 35 Ch. D. 316). See, further, the above decisions as to the action of the Court.

As regards land improvement charges, see sect. 73, sub-sect. 1 (xiii), *ante*. For forms under this section, see R. S. L. Act, Forms 12—16 (*post*).

Creation of rentcharges to discharge instalments.

85.—(1) When the tenant for life is required by the trustees to repay by instalments the capital money expended, or any part thereof, the tenant for life is by this section authorised to create out of the settled land, or any part thereof, a yearly rentcharge in favour of the trustees of the settlement sufficient in amount to discharge the said half-yearly instalments.

(2) Where an order is made requiring repayment by instalments, the settled land shall stand charged with the payment to the trustees of the settlement of a yearly rentcharge sufficient in amount to discharge the periodical instalments, and the rentcharge shall accrue from day to day, and be payable at the times appointed for payment of the periodical instalments, and shall have effect as if limited by the settlement prior to the estate of the tenant for life, and the trustees of the settlement shall have all statutory and other powers for recovery thereof.

(3) A rentcharge created by or under this section shall not be redeemed out of capital money, but may be overreached in like manner as if the same were limited by the

settlement, and shall cease if and when the land affected by the improvement ceases to be settled or is sold or exchanged, but if part of the land so affected remains subject to the settlement the rentcharge shall remain in force in regard to the settled land.

15 Geo. 5, c. 18, s. 85.

Taken from L. P. Act, 1922. As to repayment by instalments, see sect. 84, *ante*, and as to statutory powers for the recovery of rentcharges, see L. P. Act, 1925, s. 121, *ante*.

Sundry Provisions as to Improvements.

86. The tenant for life may join or concur with any other person interested in executing any improvement authorised by this Act, or in contributing to the cost thereof.

Concurrence in improvements.

Re-enacts S. L. Act, 1882, s. 27.

87. The court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, or this Act, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Settled Land Act, 1882, to the trustees of the settlement or to the court, and notwithstanding that no capital money is immediately available for the purpose.

Court may order payment for improvements executed.

Re-enacts S. L. Act, 1890, s. 15, adding the words from "and notwithstanding" to "the purpose." A scheme is not now necessary (sect. 84, sub-sect. 1, *ante*).

The Court, in exercising the jurisdiction of the section, will be very vigilant and careful, and must consider what is fair as between tenant for life and remainderman (*Re Tucker*, [1895] 2 Ch. 471). An order has been made where the works were done by the trustees (*Re Thomas, Weatherall* v. *T.*, [1900] 1 Ch. 323); and where the work was done by tenant for life, but no scheme had been prepared because trustees had then no capital money (*Re Lisburne*, [1901] W. N. 91; see *Re Norfolk, infra*).

On the other hand, under the discretion conferred by this section, the Court refused to authorise the application of capital money for improvements (*Cardigan* v. *Curzon-Howe*, 9 T. L. R. 244; *Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711). And the Court has refused to make an order for repayment of instalments of an Improvement of Land Act rentcharge paid by the tenant for life before he had required provision to be made under the S. L. Act, 1887 (see sect. 73, sub-sect. 1 (xiii), *ante*, and sect. 88, sub-sect. 6, *post*); (*Re Dalison*, [1892] 3 Ch. 522; *Re Bristol*, [1893] 3 Ch. 161; see *Re Verney*, [1898] 1 Ch. 508); or to make an order in the case of works done prior to 1883 (*Re Ormerod*, [1892] 2 Ch. 318); or to make a prospective order as to applying future capital money (*Re Bristol*, [1893] 3 Ch. 161). See as to trustees approving a scheme by anticipation, *Re Norfolk, N.* v. *Herries*, [1900] 1 Ch. 461;

15 Geo. 5, c. 18, s. 87.

Re Calverley, [1904] 1 Ch. 150; and compare *Re Lisburne*, [1901] W. N. 91; and see now the concluding words of the section. The above section applied where a scheme had been submitted and approved, but was departed from (*Re Egmont*, [1908] W. N. 176), and may apply to a case where no scheme could have been submitted (*Re Wormald, W.* v. *Ollivant*, [1908] W. N. 214).

Where a tenant for life had been mistakenly advised that an improvement was not authorised, his estate was reimbursed the expenditure which he had made (*Re St. Germans*, [1924] 2 Ch. 236).

Obligation on tenant for life and successors to maintain, insure, &c.

88.—(1) The tenant for life, and each of his successors in title having under the trust instrument (*a*) a limited estate or interest only in the settled land, shall, during such period, if any, as the Minister (*b*) by certificate in any case prescribes, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act or the enactments replaced thereby, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall at his own expense insure and keep insured the improvement in such amount, if any, as the Minister (*b*) by certificate in any case prescribes.

(2) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act or under the enactments replaced by those provisions.

(3) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Minister on or without the application of any person having under the trust instrument (*a*) any estate or interest in the settled land in possession, remainder, or otherwise, report to the Minister (*b*) the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4) The Minister (*b*) may vary any certificate made by him under this section in such manner or to such extent as circumstances appear to him to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the trust instrument (*a*), any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the trust instrument (*a*) any damages occasioned by that default or act.

(6) Where in connexion with any improvement an improvement rentcharge, as hereinbefore defined (*c*), has been created, and that rentcharge has been redeemed out of capital money, this section shall apply to the improvement as if it had been an improvement executed under this Act. 15 Geo. 5, c. 18, s. 88.

89.—The tenant for life, and each of his successors in title having under the trust instrument (*a*), a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorised by this Act, or inspect, maintain, and repair the same, and for the purposes thereof do, make, and use on the settled land, all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament. Protection as regards waste in execution and repair of improvements.

Sub-sects. 1 to 5 of sect. 88 re-enact S. L. Act, 1882, s. 28; and sub-sect. 6 replaces S. L. Act, 1887, s. 2. Sect. 89 re-enacts S. L. Act, 1882, s. 29.

(*a*) See sects. 4 and 9, *ante*. The word is substituted for "settlement."

(*b*) Of Agriculture and Fisheries (sect. 117, sub-sect. 1 (xvi), *post*).

(*c*) See sect. 73, sub-sect. 1 (xiii), *ante*.

Part V.

Miscellaneous Provisions.

90.—(1) A tenant for life— Power for tenant for life to enter into contracts.

(i) may contract to make any sale, exchange, mortgage, charge or other disposition authorised by this Act; and

(ii) may vary or rescind, with or without consideration, the contract in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and

(iii) may contract to make any lease, and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

15 Geo. 5, c. 18, s. 90.

(iv) may accept a surrender of a contract for a lease or a grant in fee simple at a rent, in like manner and on the like terms in and on which he might accept a surrender of a lease or a regrant (*d*), and thereupon may make a new or other contract for or relative to a lease or leases, or a grant or grants in fee simple at a rent, in like manner and on the like terms in and on which he might make a new or other lease or grant, or new or other leases or grants, where a lease or a grant in fee simple at a rent had been executed; and

(v) may enter into a contract for or relating to the execution of any improvement authorised by this Act, and may vary or rescind any such contract; and

(vi) may, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind any such contract.

(2) Every contract, including a contract arising by reason of the exercise of an option (*e*), shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, or statutory owner (*f*), and may be carried into effect by any such successor, but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3) The court may, on the application of the tenant for life, or statutory owner (*f*), or of any such successor as aforesaid, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4) A preliminary contract under this Act for or relating to a lease, and a contract conferring an option (*e*), shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof, or to the land the subject of the option.

(5) All money, not being rent, received on the exercise by the tenant for life or statutory owner (*f*) of the powers conferred by subsection (1) of this section, shall, unless the court on an application made within six months after the receipt of the money, or within such further time as the court may in special circumstances allow, otherwise directs, be capital money arising under this Act.

This section replaces S. L. A., 1882, s. 31. References to grants at a rent and options are added; and under sect. 31 consideration in money for the varying or rescinding of a contract was in all cases capital money (see now sub-sect. 5). A forfeited deposit was held to

be capital (*Re Ward's Settled Estates*, [1919] W. N. 51; *Re Foster's Settled Estates*, [1922] 1 Ch. 348).

(*d*) See sect. 52, *ante*.

(*e*) See sect. 51, *ante*.

(*f*) See sect. 117, sub-sect. 1 (xxvi), *post*.

On a summons under this section nothing can be decided against persons not parties to the contract (*Re Ailesbury*, [1893] W. N. 140).

A tenant for life may convey so as to effectuate a contract made by his predecessor (sect. 63, *ante*, p. 921). In connection with sub-sect. 4, see L. P. Act, 1925, s. 44 (9), *ante*, p. 631; and in connection with sub-sect. 1 (i) (v) and (vi), see *Re Cleveland* ([1902] 2 Ch. 352).

Where an order of Court has to be obtained in relation to an improvement (see sect. 84, *ante*) any contract for the execution of such improvement must be entered into by the tenant for life at his own risk (*Re Keck*, [1904] 2 Ch. 29).

For form of summons, see R. S. L. Act, Form 17 (*post*).

Provisions as to different estates settled upon the same limitations.

91.—(1) Where estates are settled by different settlements upon the same limitations, whether by reference or otherwise, the following provisions shall have effect:—

(i) The estates or any two or more of them, as the case may require, may be treated as one aggregate estate, in which case the aggregate estate shall be the settled land for all the purposes of this Act;

(ii) Where the trustees for the purposes of this Act of the two or several settlements are the same persons they shall be the trustees of the settlement of the aggregate estate for all the purposes of this Act, and all or any part of the capital money arising from one of the estates may be applied by the direction of the tenant for life or statutory owner (*g*) as if the same had arisen from any other of the estates;

(iii) Where the trustees for the purposes of this Act of the settlements or of any two or more of them are not the same persons—

(a) any notice required to be given by this Act to the trustees of the settlement and to the solicitor of such trustees shall be given to the trustees of every settlement which comprises any part of the land to which such notice relates and to the solicitor of such trustees;

(b) any capital money arising on any sale, exchange, lease, mortgage, charge, or other disposition of land comprised in more than one settlement, shall be apportioned between the trustees of the different settlements in such manner as the tenant for life or statutory owner (*g*) may think fit;

(c) all or any part of the capital money arising from the land comprised in one of the

15 Geo. 5, c. 18, s. 91.

settlements may be paid by the trustees of that settlement, by such direction as aforesaid, to the trustees of any of the other settlements, to be applied by such last-mentioned trustees as if the same had arisen from land comprised in that other settlement:

(iv) For the purposes of this subsection, money liable to be laid out in the purchase of land to be settled upon the same limitations as other land may be applied and dealt with in like manner in all respects as if land had been purchased and settled, and the money were capital money arising therefrom.

(2) Estates shall be deemed to be settled upon the same limitations, notwithstanding that any of them may be subject to incumbrances, charges, or powers of charging to which the other or others of them may not be subject:

Provided that, in any such case as last aforesaid, the powers of this section relating to the payment or application of capital money shall not, unless the settlement under which the capital money is held otherwise provides, be exercisable without an order of the court.

(3) This section has effect without prejudice to any appointment made by the court before the commencement of this Act of trustees of the settlement of an aggregate estate, and to the power of the court in any case after such commencement to make any such appointment, and where any such appointment has been made before such commencement, or is made thereafter, this section has effect as if the trustees so appointed and their successors in office were the trustees for the purposes of this Act of each of the settlements constituting the settlement of the aggregate estate, and there were no other trustees thereof for the purposes of this Act.

(4) In this section "estate" means the land, capital money, and securities representing capital money for the time being subject to a particular settlement.

This section is from L. P. Act, 1922. See as to settlements by reference, p. 859, *ante*; and as to trustees of such settlements, sect. 32, *ante*.

(*g*) See sect. 117, sub-sect. 1 (xxvi), *post*.

Proceedings for protection or recovery of land settled or claimed as settled.

92. The court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for the protection of settled land, or of any action or proceeding taken or proposed to be taken for the recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or

to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement. 15 Geo. 5, c. 18, s. 92.

Re-enacts S. L. Act, 1882, s. 36.

Under this section the costs of proceedings before H. L. to establish a claim to an earldom were paid out of the settled property (*Re Aylesford*, 32 Ch. D. 162); also, under the general jurisdiction of the Court, the costs of Parliamentary opposition previous to 1883 (*Re Ormrod*, [1892] 2 Ch. 318), or of legal proceedings (*Hamilton* v. *Tighe*, [1898] 1 I. R. 123).

As to applications to the Court after litigation has been commenced, see *Re Yorke, Barlow* v. *Y.*, [1911] 1 Ch. 370. The section extends to costs incurred in connection with proceedings never actually taken (*Re Wilkie, Wade* v. *Wilkie*, [1914] 1 Ch. 77). Proceedings as to seating accommodation and burial rights in a parish church are within the section (*Re Mosley*, 56 S. J. 325). As to tenant for life's costs on a petition for payment out under the L. C. Acts, see *Re Piggin*, [1913] 2 Ch. 326. The Court directed the payment out of capital of the costs of a survey of, and notices to repair respecting, houses let on ground rents, notwithstanding a direction in the will that costs of management should be paid out of income (*Re Tubbs, Dyke* v. *T.*, [1915] 2 Ch. 137). For form of order, see Seton, 7th ed. 1776.

Reference of questions to Court.

93. If a question arises or a doubt is entertained—

(a) respecting the exercise or intended exercise of any of the powers conferred by this Act, or any enactment replaced by this Act, or the settlement, or any matter relating thereto; or

(b) as to the person in whose favour a vesting deed or assent (*h*) ought to be executed, or as to the contents thereof; or

(c) otherwise in relation to property subject to a settlement;

the tenant for life or statutory owner (*i*) or the trustees of the settlement, or any other person interested under the settlement, may apply to the court for its decision or directions thereon, or for the sanction of the court to any conditional contract, and the court may make such order or give such directions respecting the matter as the court thinks fit.

Replaces S. L. Act, 1882, s. 44, which empowered the Court to give directions if differences arose between the tenant for life and trustees. See sect. 97 and notes, *post*, p. 953; as to costs, sect. 113 and notes, *post*, p. 974; and for form of summons, R. S. L. Act, Form 20, *post*.

(*h*) See sects. 4, 5, and 8, *ante*, and sect. 117, sub-sect. 1 (xxxi), *post*.

(*i*) See sect. 117, sub sect. 1 (xxvi), *post*.

Part VI.

General Provisions as to Trustees.

Number of trustees to act.

94.—(1) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer

15 Geo. 5, c. 18, s. 94.

than two persons as trustees of a settlement, unless the trustee is a trust corporation.

(2) Subject as aforesaid the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

S. L. Act, 1882, s. 39, replaced by this section, permitted the payment of capital money to a sole trustee if the settlement authorised his receipt of it (see *Re Garnett-Orme and Hargreave*, 25 Ch. D. 595). Capital moneys could be paid to the Public Trustee as a sole trustee (*Re Leslie's Estates*, [1911] 1 Ch. 611). For "trust corporation," see p. 794, *ante*; and for retrospective provisions as to receipts, &c., by trust corporations, see Sched. 4 (12), *post*, p. 1000. Cf. Trustee Act, 1925, ss. 14 (2), 37 (2), *post*.

Trustees' receipts.

95. The receipt or direction in writing of or by the trustees of the settlement, or where a sole trustee is a trust corporation, of or by that trustee, or of or by the personal representatives of the last surviving or continuing trustee, for or relating to any money or securities, paid or transferred to or by the direction of the trustees, trustee, or representatives, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

Replaces S. L. Act, 1882, s. 40, adding reference to directions by trustees and substituting "where a sole trustee is a trust corporation" for "where one trustee is empowered to act" (see note to preceding section).

Under this section trustees appointed under sect. 34 can give a good discharge (*Cookes* v. *C.*, 34 Ch. D. 498; *Hatten* v. *Russell*, 38 Ch. D. 342; *Pyne* v. *Phillips*, [1895] W. N. 8). Compare the provision as to trustees' receipts, Trustee Act, 1925, s. 14, *post*.

Protection of each trustee individually.

96. Each person who is for the time being a trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Re-enacts S. L. Act, 1882, s. 41. As to the indemnity of trustees generally, see note to Trustee Act, 1925, s. 30, *post*, p. 1050.

15 Geo. 5, c. 18, s. 97.

Protection of trustees generally.

97. The trustees of a settlement, or any of them—

(a) are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and

(b) in case of a purchase of land with capital money arising under this Act, or of an exchange, lease, or other disposition, are not liable for adopting any contract made by the tenant for life or statutory owner, or bound to inquire as to the propriety of the purchase, exchange, lease, or other disposition, or answerable as regards any price, consideration, or fine; and

(c) are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode; and

(d) are not liable in respect of purchase-money paid by them by the direction of the tenant for life or statutory owner to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any money paid by them by the direction of the tenant for life or statutory owner on the purchase, exchange, lease, or other disposition.

Re-enacts S. L. Act, 1882, s. 42, adding "or other disposition" and "or statutory owner" (see sect. 117, sub-sect. 1 (v) and (xxvi), *post*) and omitting reference to partition.

The trustees have no such duty to control the tenant for life in the case of a sale as would make them liable if it was an improper one. But they may properly commence proceedings in the case of a sale they think improvident (*Hatten* v. *Russell*, 38 Ch. D. 344); and ought to do so in the case of a fraudulent sale (*Wheelwright* v. *Walker*, 23 Ch. D. 762). They were intended to impose a check upon the powers conferred on the tenant for life (*Re Kemp*, 24 Ch. D. 487; *Re Hotchkin*, 35 Ch. D. 44). And where the tenant for life directs an investment of capital money which is improper, they may submit it to the Court (*Re Hunt, Bulteel* v. *Lawdeshayne*, [1906] 2 Ch. 11). On a summons by the tenant for life desiring to exercise some power, they should not as a rule support the application, but hold an even hand (*Re Hotchkin*, 35 Ch. D. 43; *Re Broadwater*, 53 L. T. 745). When they appeared by the same counsel as the tenant for life on an appeal which was dismissed, they were not given their costs out of the estate (*Re Broadwater, supra*). A trustee, who is respondent to an appeal by a tenant for life, may be heard in support of the appeal (*Re Ailesbury*, [1892] 1 Ch. 526).

In the case of a purchase, exchange, partition, or lease of land, trustees have a special protection under the above section. They may, however, be entitled, or bound, to inquire into title and value, upon a purchase with capital money of freeholds (*Re Theobald*, 19 Times L. R. 536); or of leaseholds (*Re Hunt, Bulteel* v.

15 Geo. 5, c. 18, s. 98.

Lawdeshayne, [1905] 2 Ch. 418; [1906] 2 Ch. 11). As to their position where a tenant for life requires an investment, on mortgage of capital money, see *Re Hotham, H.* v. *Doughty*, [1902] 2 Ch. 575, quoted under sect. 75, *ante*, p. 938; and sect. 98, *post*.

Protection of trustees in particular cases.

98.—(1) Where the tenant for life or statutory owner (*k*) directs capital money to be invested on any authorised security or investment, the trustees of the settlement shall not be liable for the acts of any agent employed by the tenant for life or statutory owner (*k*) in connexion with the transaction, or for not employing a separate agent in or about the valuation of the subject of the security or the investigation of the title thereto, or for the form of the security or of any deed conveying the subject thereof to the trustees.

(2) The trustees of the settlement shall not be liable for paying or applying any capital money by the direction of the tenant for life or statutory owner (*k*) for any authorised purpose.

(3) The trustees of the settlement shall not be liable in any way on account of any vesting instrument (*l*) or other documents of title relating to the settled land, other than securities for capital money, being placed in the possession of the tenant for life or statutory owner (*k*):

Provided that where, if the settlement were not disclosed, it would appear that the tenant for life had a general power of appointment over, or was absolutely and beneficially entitled to the settled land, the trustees of the settlement shall, before they deliver the documents to him, require that notice of the last or only principal vesting instrument (*m*) be written on one of the documents under which the tenant for life acquired his title, and may, if the documents are not in their possession, require such notice to be written as aforesaid, but, in the latter case, they shall not be liable in any way for not requiring the notice to be written.

(4) This section applies to dealings and matters effected before as well as after the commencement of this Act.

This and the next section are from L. P. Act, 1922. As to investing or applying capital money by the direction of the tenant for life, see sect. 75, *ante*, p. 937.

(*k*) See sect. 117, sub-sect. 1 (xxvi), *post*.

(*l*) See *ibid.* (xxxi).

(*m*) See *ibid.* and sect. 5, *ante*.

Indemnities to personal representatives and others.

99. Personal representatives, trustees, or other persons who have in good faith, pursuant to this Act, executed a vesting deed, assent (*n*), or other conveyance (*o*) of the settled land, or a deed of discharge of trustees, shall be absolutely discharged from all liability in respect of the equitable interests and powers taking effect under the

settlement and shall be entitled to be kept indemnified at the cost of the trust estate from all liabilities affecting the settled land, but the person to whom the settled land is conveyed (not being a purchaser taking free therefrom) shall hold the settled land upon the trusts, if any, affecting the same. 15 Geo. 5, c. 18, s. 99.

(*n*) See sects. 4, 5, and 8, *ante*.
(*o*) See sect. 117, sub-sect. 1 (v), *post*.

100. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them. Trustees' reimbursements.

Re-enacts S. L. Act, 1882, s. 43. See Trustee Act, 1925, s. 30 and note, *post*.

101.—(1) Save as otherwise expressly provided by this Act, a tenant for life or statutory owner, (*p*) when intending to make a sale, exchange, lease, mortgage, or charge or to grant an option— Notice to trustees.

(a) shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees severally, each at his usual or last known place of abode in the United Kingdom (*q*); and

(b) shall give a like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life or statutory owner, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom (*q*);

every letter under this section being posted not less than one month before the making or granting by the tenant for life or statutory owner (*p*) of the sale, exchange, lease, mortgage, charge, or option, or of a contract for the same:

Provided that a notice under this section shall not be valid unless at the date thereof the trustee is a trust corporation, (*r*) or the number of trustees is not less than two.

(2) The notice required by this section of intention to make a sale, exchange, or lease, or to grant an option, may be notice of a general intention in that behalf.

(3) The tenant for life or statutory owner is (*p*), upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, or leases effected, or in progress, or immediately intended.

(4) Any trustee, by writing under his hand, may waive

15 Geo. 5, c. 18, s. 101.

notice either in any particular case, or generally, and may accept less than one month's notice.

(5) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

(*p*) See sect. 117, sub-sect. 1 (xxvi), *post*.
(*q*) Great Britain and Northern Ireland (*ibid.* (xxxii)).
(*r*) See p. 794, *ante*.

Sub-sects. 1 and 5 replace S. L. Act, 1882, s. 45, and the remainder of the section S. L. Act, 1884, s. 5 (1) to (3), which did not in terms apply to a mortgage or charge. "Unless the trustee is a trust corporation" is substituted in the proviso to sub-sect. 1 for "unless a contrary intention is expressed in the settlement" (see Sched. 4 (12), *post*; and cf. sects. 94 and 95, *ante*).

No notice need be given in respect of a lease not exceeding twenty-one years (sect. 42, sub-sect. 5, *ante*, p. 903). As to notice in cases to which the section does not apply, see *Re Ray* (25 Ch. D. 464). As to options see sect. 51, *ante*.

A notice under this section is good if given before completion (*Marlborough* v. *Sartoris*, 32 Ch. D. 621). No notice was necessary where persons had been appointed under S. L. Act, 1882, s. 60 (see now sect. 26, *ante*), to carry out a sale (*Re Dudley*, 35 Ch. D. 338). The committee of a lunatic cannot give a notice without leave of the Court (*Re Ray*, 25 Ch. D. 464).

As between the tenant for life and a purchaser from him, the notice is a matter with which the purchaser is not concerned (*Marlborough* v. *Sartoris*, 32 Ch. D. 623; *Mogridge* v. *Clapp*, [1892] 3 Ch. 395; see *Re Fisher and Grazebrook*, [1898] 2 Ch. 661). As to whether a purchaser can safely complete who has actual knowledge that no notice has been given, see *Hatten* v. *Russell*, 38 Ch. D. 344; *Mogridge* v. *Clapp*, [1892] 3 Ch. 396, 401; *Re Fisher and Grazebrook*, *supra*. Where a tenant by the curtesy granted a building lease, as absolute owner, there being no trustees for the purpose of the S. L. Act, the lessee got a good selling title, being protected by sub-sect. 3 of this section (*Mogridge* v. *Clapp*, [1892] 3 Ch. 382; see *Chandler* v. *Bradley*, [1897] 1 Ch. 315).

As between the tenant for life and a remainderman, the tenant for life has been restrained from selling until proper notice has been given (*Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Bentley*, *Wade* v. *Wilson*, 54 L. J. Ch. 782; 33 W. R. 610).

Management of land during minority or pending contingency.

102.—(1) If and as long as any person who is entitled to a beneficial interest in possession affecting land is an infant, the trustees appointed for this purpose by the settlement, or if there are none so appointed, then the trustees of the settlement, unless the settlement or the order of the court whereby they or their predecessors in office were appointed to be such trustees expressly provides to the contrary, or if there are none, then any persons appointed as trustees for this purpose by the court on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land on behalf of the infant, and in every such case the subsequent provisions of this section shall apply.

(2) The trustees shall manage or superintend the management of the land, with full power— 15 Geo. 5, c. 18, s. 102.

(a) to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise; and

(b) to erect, pull down, rebuild, and repair houses, and other buildings and erections; and

(c) to continue the working of mines, minerals, and quarries which have usually been worked; and

(d) to drain or otherwise improve the land or any part thereof; and

(e) to insure against loss by fire; and

(f) to make allowances to and arrangements with tenants and others; and

(g) to determine tenancies, and to accept surrenders of leases and tenancies; and

(h) generally to deal with the land in a proper and due course of management;

but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4) This section has effect subject to an express appointment by the settlement, or the court, of trustees for the purposes of this section or of any enactment replaced by this section.

(5) Where any person is contingently entitled to land, this section shall, subject to any prior interests or charges affecting that land, apply until his interest vests, or, if his interest vests during his minority, until he attains the age of twenty-one years.

This subsection applies only where a person becomes contingently entitled under an instrument coming into operation after the commencement of this Act.

(6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest of the infant or person contingently entitled as aforesaid arises, and has effect subject to the terms of that instrument and to the provisions therein contained.

15 Geo. 5, c. 18, s. 102.

Sub-sects. 1 to 3 and 6 replace Conv. Act, 1881, s. 42 (1) to (3) and (7), the present amendment re-enacting Conv. Act, 1911, s. 14. That section applied to female infants only if unmarried, and the words in sub-sect. 1 from "then the trustees of the settlement" to "provides to the contrary" are substituted for "then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale." The remainder of the present section is new. Sub-sects. 4 and 5 of C. A. 1881, s. 42, relating to maintenance, are replaced by Trustee Act, 1925, s. 31, *post*, p. 1051.

C. A. 1881, s. 42, has been held applicable to the case of an infant taking land by descent (*Re Cowley*, [1901] 1 Ch. 38; *Re Glover*, [1899] 1 I. R. 337).

Trustees for the purpose of the S. L. Acts who could, under sect. 60 of the S. L. Act, 1882 (see now sect. 26, *ante*), exercise the statutory power of sale of an infant tenant for life, were not trustees with power of sale within sect. 42 of C. A. 1881 (*Re Helyar, H* v. *Beckett*, [1902] 1 Ch. 391). It was said that sub-sects. 2 and 3 seemed to exclude any power to pay expenses of management out of *corpus* (*Re Jackson, J.* v. *Talbot*, 21 Ch. D. 787, where costs of repairs were raised by mortgage of an infant's estate).

Where out of the income of the tenant for life, who was an infant, the trustees had paid the premiums on a fire insurance of the settled mansion-house, the remaindermen were entitled under 14 Geo. 3, c. 78, s. 83, to have the policy money applied in rebuilding (*Re Quicke, Poltimore* v. *Q.*, [1908] 1 Ch. 887). But money recovered on a chattel policy similarly effected belonged to the infant (*ibid.*); see Trustee Act, 1925, ss. 19 and 20, *post*, p. 1037. Trustees for the purpose of C. A. 1881, s. 42, were appointed by the Court (*Tuthill* v. *T.*, [1902] 1 Ir. R. 429).

The section gives trustees a discretion as to whether they shall enter into possession (*Re Lethbridge*, [1917] W. N. 243).

As to the appointment, discharge, and retirement of trustees, see Trustee Act, 1925, s. 64, and Sched. 1 (3), pp. 1103 and 1110, *post*.

Part VII.

Restrictions, Savings, and Protection of Purchasers.

Legal estate in settled land not to vest in trustee in bankruptcy of estate owner.

103. The legal estate in settled land shall not vest in the trustee in bankruptcy of an estate owner unless and until the estate owner becomes absolutely and beneficially entitled to the settled land free from all limitations, powers, and charges taking effect under the settlement.

This section is new. "Estate owner" means the owner of a legal estate (sect. 117, sub-sect. 1 (xi), *post*).

Powers not assignable, and contract not to exercise powers void.

104.—(1) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

This subsection applies notwithstanding that the estate or interest of the tenant for life under the settlement was not in possession when the assignment was made or took effect by operation of law. 15 Geo. 5, c. 18, s. 104.

(2) A contract by a tenant for life not to exercise his powers under this Act or any of them shall be void.

(3) Where an assignment for value of the estate or interest of the tenant for life was made before the commencement of this Act, this section shall operate without prejudice to the rights of the assignee, and in that case the assignee's rights shall not be affected without his consent, except that—

(a) unless the assignee is actually in possession of the settled land or the part thereof affected, his consent shall not be requisite for the making of leases thereof by the tenant for life or statutory owner, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act; and

(b) the consent of the assignee shall not be required to an investment of capital money for the time being affected by the assignment in securities authorised by statute for the investment of trust money.

(4) Where such an assignment for value is made or comes into operation after the commencement of this Act, the consent of the assignee shall not be requisite for the exercise by the tenant for life of any of the powers conferred by this Act:

Provided that—

(a) the assignee shall be entitled to the same or the like estate or interest in or charge on the land, money, or securities for the time being representing the land, money, or securities comprised in the assignment, as he had by virtue of the assignment in the last-mentioned land, money, or securities; and

(b) if the assignment so provides, or if it takes effect by operation of the law of bankruptcy, and after notice thereof to the trustees of the settlement, no investment or application of capital money for the time being affected by the assignment shall be made without the consent of the assignee, except an investment in securities authorised by statute for the investment of trust money; and

(c) notice of the intended transaction shall, unless the assignment otherwise provides, be given to the assignee, but a purchaser shall not be con-

15 Geo. 5, c. 18, s. 104.

cerned to see or inquire whether such notice has been given.

(5) Where such an assignment for value was made before the commencement of this Act, then on the exercise by the tenant for life after such commencement of any of the powers conferred by this Act—

(a) a purchaser shall not be concerned to see or inquire whether the consent of the assignee has been obtained; and

(b) the provisions of paragraph (a) of the last subsection shall apply for the benefit of the assignee.

(6) A trustee or personal representative who is an assignee for value shall have power to consent to the exercise by the tenant for life of his powers under this Act, or to any such investment or application of capital money as aforesaid, and to bind by such consent all persons interested in the trust estate, or the estate of the testator or intestate.

(7) If by the original assignment, or by any subsequent disposition, the estate or interest assigned or created by the original assignment, or any part thereof, or any derivative interest is settled on persons in succession, whether subject to any prior charge or not, and there is no trustee or personal representative in whom the entirety of the estate or interest so settled is vested. then the person for the time being entitled in possession under the limitations of that settlement, whether as trustee or beneficiary, or who would, if of full age, be so entitled, and notwithstanding any charge or incumbrance subsisting or to arise under such settlement, shall have power to consent to the exercise by the tenant for life of his powers under this Act, or to any such investment or application of capital money as aforesaid, and to bind by such consent all persons interested or to become interested under such settlement.

(8) Where an assignee for value, or any person who has power to consent as aforesaid under this section, is an infant, the consent may be given on his behalf by his parents or parent or testamentary or other guardian in the order named.

(9) The court shall have power to authorise any person interested under any assignment to consent to the exercise by the tenant for life of his powers under this Act, or to any such investment or application of capital money as aforesaid, on behalf of himself and all other persons interested, or who may become interested under such assignment.

(10) An assignment by operation of the law of bankruptcy, where the assignment comes into operation after the commencement of this Act, shall be deemed to be an assignment for value for the purposes of this section.

15 Geo. 5, c. 18, s. 104.

(11) An instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an assignment for value for the purposes of this section:

Provided that this subsection shall not have effect with respect to any disposition made before the eighteenth day of August, eighteen hundred and ninety, if inconsistent with the nature or terms of the disposition.

(12) This section extends to assignments made or coming into operation before or after the commencement of this Act, and in this section "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, "assignee" has a corresponding meaning, and "assignee for value" includes persons deriving title under the original assignee.

Sub-sects. 1 and 2 (adding the concluding clause of sub-sect. 1, which is retrospective—Sched. 4 (13) (1), *post*) re-enact S. L. Act, 1882, s. 50 (1) and (2); sub-sect. 12 re-enacts sub-sect. 4 of that section, adding the definition of "assignee for value," which is retrospective (Sched. 4 (13) (2), *post*); and sub-sect. 11 re-enacts S. L. Act, 1890, s. 4. The remainder of the present section is new. For the retrospective effect of sub-sects. 6 and 7, see Sched. 4 (13) (3) and (4), *post*. For "statutory owner," see sect. 117, sub-sect. 1 (xxvi), *post*. See as to "assignment," *Re Trafford*, (1915) 1 Ch. 9.

Sub-sect. 3 of S. L. Act, 1882, s. 50, was as follows:—

"(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act."

Sub-sect. 1.

The complete destruction of a life estate, as on a disentailment and resettlement where the old life estate is not restored, did not destroy the powers of the tenant for life as tenant for life under the original settlement (*Re Mundy and Roper*, [1899] 1 Ch. 275, 296; see now sect. 22, *ante*). As to the effect of a resettlement on a tenant for life's powers, and as to the merger of a life estate, see notes to sects. 22 and 3, *ante*; and as to the latter, see sect. 105, *post*. The bankruptcy of a tenant for life does not prevent the exercise of his powers under the Act (*Re Mansel* (1884), W. N. 209; *Re Ailesbury*, [1892] 1 Ch. 535). The Court, however, has refused to sanction the sale of a mansion-house without the consent of the tenant for life's mortgagees (*Re Sebright*, 33 Ch. D. 429); which they are free to give or withhold (*Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341; see *Re Ailesbury*, [1893] W. N. 140).

The tenant for life's conveyance is subject to charges as mentioned in sect. 72, *ante*, p. 928, where see note. A mortgagee of the life estate who has consented to the tenant for life selling need not concur in the conveyance (*Re Dickin and Kelsall*, [1908] 1 Ch. 213).

15 Geo. 5, c. 18, s. 104.

As to a tenant for life's covenant, see *Re Hale and Smyth*, 55 L. T. 151, quoted *ante*, p. 875.

In connection with the latter part of sub-sect. 1, see sect. 19, sub-sect. 4 (*ante*, p. 874); and compare the note as to the extinguishment of powers appendant (*ante*, p. 354).

See also, as to purchasers of the tenant for life's beneficial interest, sect. 111, *post*.

Sub-sect. 3. As to authorised trust investments, see Trustee Act, 1925, ss. 1 *et seq.*, *post*.

Sub-sect. 7. In *Re Mountgarret and Moore*, [1915] 1 Ch. 443, it had been held that the trustees of a will devising an assigned life estate were assignees for value within S. L. Act, 1882, s. 50 (3) (*supra*), and entitled to consent to a sale by the tenant for life. See now sub-sect. 12; and for the retrospective effect of the definition of "assignee for value" in that sub-section, and of sub-sects. 6 and 7, see Sched. 4 (13), *post*.

Sub-sect. 11. This provision is not a positive enactment that every instrument of the kind described shall be one of the instruments creating the settlement for all the purposes of the Act, but is limited to the purpose of excluding the operation of the section (*Re Du Cane and Nettlefold*, [1898] 2 Ch. 96; see, however, *Re Tibbits*, [1897] 2 Ch. 149). See also *Re Ailesbury*, [1893] W. N. 140. The date named is that of the passing of S. L. Act, 1890.

Effect of surrender of life estate to the next remainderman.

105.—(1) Where the estate or interest of a tenant for life under the settlement has been or is absolutely assured with intent to extinguish the same, either before or after the commencement of this Act, to the person next entitled in remainder or reversion under the settlement, then, [if and when such remainderman or reversioner would, if the tenant for life were dead, be or have the powers of a tenant for life under this Act,] the statutory powers of the tenant for life under this Act shall, in reference to the property affected by the assurance, and notwithstanding the provisions of the last preceding section, cease to be exercisable by him, and the statutory powers shall thenceforth become exercisable as if he were dead, but without prejudice to any incumbrance affecting the estate or interest assured, and to the rights to which any incumbrancer would have been entitled if those powers had remained exercisable by the tenant for life.

This subsection applies whether or not any term of years or charge intervenes, or the estate of the remainderman or reversioner is liable to be defeated, and whether or not the estate or interest of the tenant for life under the settlement was in possession at the date of the assurance.

This subsection does not prejudice anything done by the tenant for life before the commencement of this Act, in exercise of any power operating under the Settled Land Acts, 1882 to 1890, or, unless the assurance provides to the contrary, operate to accelerate any such intervening term of years or charge as aforesaid.

(2) In this section "assurance" means any surrender, conveyance, assignment or appointment under a power

(whether vested in any person solely, or jointly in two or more persons) which operates in equity to extinguish the estate or interest of the tenant for life, and "assured" has a corresponding meaning. 15 Geo. 5, c. 18, s. 105.

This section is from L. P. Act, 1922. The bracketed words in sub-sect. 1 were repealed by L. P. (Amendment) Act, 1926, s. 7 (see p. 595, *ante*). As to questions arising under the S. L. Acts, 1882 to 1890, respecting the merger of life estates, see note to sect. 3, *ante*, p. 860, and cases there quoted.

Prohibition or limitation against exercise of powers void, and provision against forfeiture.

106.—(1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted—

(a) purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life or statutory owner to exercise any power under this Act, or his right to require the settled land to be vested in him; or

(b) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him;

that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same.

(3) Notwithstanding anything in a settlement, the exercise by the tenant for life or statutory owner of any power under this Act shall not occasion a forfeiture.

Sub-sects. 1 and 2 of this section re-enact S. L. Act, 1882, s. 51, and sub-sect. 3 re-enacts *ibid.*, s. 52. References to statutory owners (sect. 117, sub-sect. 1 (xxvi) *post*) and to the right of a tenant for life or statutory owner to require the settled land to be vested in him (sects. 7 and 8, *ante*) are added.

15 Geo. 5, c. 18, s. 106.

This section was not intended to enlarge a particular estate not properly an estate for life (*Re Hazle*, 29 Ch. D. 84). To make it apply there must be found in the settlement a limitation, which but for the attempted prohibition would constitute a tenant for life within this Act (*Re Atkinson, A.* v. *Bruce*, 31 Ch. D. 581).

A condition of forfeiture for non-residence does not prevent a lease of a mansion-house (*Re Thompson*, 21 L. R. Ir. 109), or a sale (*Re Paget*, 30 Ch. D. 162; see *Re Brown*, 27 Ch. D. 179; *Re Richardson, R.* v. *R.*, [1904] 2 Ch. 777; and compare *Re Eastman*, 68 L. J. Ch. 122); and does not attach to the proceeds of sale (*Re Paget supra*). But such a condition is not rendered void under this section, unless it interferes with the exercise of the powers of the tenant for life (*Re Haynes, Kemp* v. *H.*, 37 Ch. D. 307; *Re Trenchard, T.* v. *T.*, [1902] 1 Ch. 378; see also *Re Simpson, Clarke* v. *S.*, [1913] 1 Ch. 277; and *O'Reilly* v. *Bellew*, [1924] 1 I. R. 1). A provision of this nature was held void under the section (*Re Dalrymple, Bircham* v. *Springfield*, 49 W. R. 627).

A proviso depriving a tenant for life of real estate of certain benefits in personal estate in the event of his "selling" or becoming "disentitled to the possession of" the real estate is void, whether contained in the settlement of the real estate (*Re Ames, A.* v. *A.*, [1893] 2 Ch. 479; see *Re Eastman, supra*), or in the will of a person other than the settlor (*Re Smith, Grose Smith* v. *Bridger*, [1899] 1 Ch. 331).

A provision binding the tenant for life to recoup to the trustees money applied by them under the Act for improvements would be void under this section (*Re Sudbury, Vernon* v. *V.*, [1893] 3 Ch. 78).

Tenant for life trustee for all parties interested.

107.—(1) A tenant for life or statutory owner shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

(2) The provision by a tenant for life or statutory owner, at his own expense, of dwellings available for the working classes on any settled land shall not be deemed to be an injury to any interest in reversion or remainder in that land, but such provision shall not be made by a tenant for life or statutory owner without the previous approval in writing of the trustees of the settlement.

Sub-sect. 1 re-enacts S. L. Act, 1882, s. 53, and sub-sect. 2 re-enacts sect. 7, sub-sect. 2 of the Housing, &c., Act, 1909, "or statutory owner" (sect. 117, sub-sect. 1 (xxvi), *post*) being added (cf. *Re Stamford and Warrington, Payne* v. *Grey*, [1916] 1 Ch. 404).

The object of this section is to protect the material interests of all the parties entitled, and to prevent the tenant for life from doing anything in the exercise of his powers which will damage those interests (*Re Ailesbury*, [1892] 1 Ch. 540; *Re Stafford, Gerard* v. *S.*, [1904] 2 Ch. 83). He should consider not merely pecuniary interests, but also sentimental feelings (*Re Ailesbury*, [1892] 1 Ch. 536, 541; *Re Hope, De Cetto* v. *H.*, [1899] 2 Ch. 679). He may exercise his powers for his own benefit (*Re Sebright*, 33 Ch. D. 436; *Wheelwright* v. *Walker*, 23 Ch. D. 759); but not for his own benefit solely, or for the benefit of a stranger (*Cardigan* v. *Curzon-Howe*,

30 Ch. D. 539; *Re Chawner*, [1892] 2 Ch. 195; *Sutherland* v. *S.*, [1893] 3 Ch. 169; *Middlemas* v. *Stevens*, [1901] 1 Ch. 574). He is bound to exercise his discretion as if he were an independent trustee for himself and all the other members of the family (*Re Radnor*, 45 Ch. D. 417). The fact that he gets a benefit is not sufficient to prevent him from exercising the requisite discretion (*Re Stamford*, 56 L. T. 484). *Prima facie* that discretion ought to prevail (*Re Stamford*, 43 Ch. D. 95; *Re Radnor*, 45 Ch. D. 417; *Re Ailesbury*, [1892] 1 Ch. 536; *Re Coleridge*, [1895] 2 Ch. 707), *e.g.*, in the general policy as to improvements (*Re Egmont, Lefroy* v. *E.*, [1906] 2 Ch. 161).

The Court, however, may interfere if it sees that, in spite of his honesty, the tenant for life is acting injuriously towards those whom he is bound to protect (*Re Richardson, R.* v. *R.*, [1900] 2 Ch. 791; *Hampden* v. *Buckinghamshire*, [1893] 2 Ch. 544). Thus, where the settled land included public-houses, the tenant for life could not grant leases of these so as to preclude the sale of intoxicating liquors (*Re Somers, Cocks* v. *Somerset*, 11 Times L. R. 567); and he has been restrained from mortgaging one part of settled land, to the prejudice of annuities charged thereon, in order to pay off incumbrances on another part (*Hampden* v. *Buckinghamshire*, [1893] 2 Ch. 531; compare *Re Monson*, [1898] 1 Ch. 427). A tenant for life will be personally answerable for the improper or improvident exercise of his powers (*Re Ailesbury*, [1892] 1 Ch. 536; *Re Marlborough, M.* v. *Marjoribanks*, 32 Ch. D. 14; *Re Norfolk*, [1900] 1 Ch. 467; see *Hatten* v. *Russell*, 38 Ch. D. 345; *Wheelwright* v. *Walker*, 23 Ch. D. 762; *Norton* v. *Johnstone*, 30 Ch. D. 651). See as to the bearing of the section on the payment off out of capital moneys of incumbrances payable (under the trusts of the settlement) out of rents and profits, *Re Knatchbull*, 29 Ch. D. 588; *Re Richardson, R.* v. *R.*, [1900] 2 Ch. 778.

The fiduciary character of a tenant for life has been held to prevent him from selling at a price to be fixed by another (*Re Wilton*, [1907] 1 Ch. 55); and from directing an improper investment in leaseholds (*Re Hunt, Bulteel* v. *Lawdeshayne*, [1905] 2 Ch. 423; compare *Re Peel*, [1910] 1 Ch. 389).

The duty imposed by this section on the tenant for life does not affect the title of a purchaser without notice of any breach of such duty (*Re Ailesbury*, [1892] 1 Ch. 536; see *Mogridge* v. *Clapp*, [1892] 3 Ch. 396, and sect. 110, *post*). But a lease granted by a tenant for life in consideration of a money payment to himself was void (*Chandler* v. *Bradley*, [1897] 1 Ch. 315). So also a lease granted solely for the benefit of his wife (*Sutherland* v. *S.*, [1893] 3 Ch. 169).

Under this section a tenant for life has rather the responsibilities than the rights of a trustee (*Re Llewellin, L.* v. *Williams*, 37 Ch. D. 325; see *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 379; *Re Gerard*, [1893] 3 Ch. 265), and accordingly is not entitled to all costs and expenses (*Sebright* v. *Thornton* (1885), W. N. 176; *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375; see *Re Beck*, 24 Ch. D. 608; *Re Llewellin, supra*). See further, as to the costs of the tenant for life, the note to sect. 73, sub-sect. 1 (xx) (*ante*, p. 936), and the note to sect. 113 (*post*, p. 975).

The doctrine of *Keech* v. *Sandford*, 2 Wh. & Tu. L. C. 806, was applied to a lease obtained by a tenant for life (*Lloyd-Jones* v. *Clark-Lloyd*, [1919] 1 Ch. 424).

In the case of successive legal interests in chattels the first taker is, subject to his own life interest, in the position of a trustee or bailee for the subsequent takers (*Re Swan, Witham* v. *S.*, [1915] 1 Ch. 829). A tenant for life and a statutory owner are within the

15 Geo. 5, c. 18, s. 107. Trustee Act, 1925, s. 25 (*post*, p. 1042), permitting the delegation of trusts during absence from the United Kingdom.

Saving for and exercise of other powers.

108.—(1) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or (save as hereinafter provided) by trustees with his consent, or on his request, or by his direction, or otherwise, and the powers given by this Act are cumulative.

(2) In case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life or statutory owner exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation or appointment) relating to the settled land thereby conferred on the trustees of the settlement or other persons exercisable for any purpose, whether or not provided for in this Act, shall, after the commencement of this Act, be exercisable by the tenant for life or statutory owner as if it were an additional power conferred on the tenant for life within the next following section of this Act and not otherwise.

(3) If a question arises or a doubt is entertained respecting any matter within this section, the tenant for life or statutory owner, or the trustees of the settlement, or any other person interested, under the settlement may apply to the court for its decision thereon, and the court may make such order respecting the matter as the court thinks fit.

This section replaces S. L. Act, 1882, s. 56. The bracketed words in sub-sect. 1 and " or statutory owner " (sect. 117, sub-sect. 1 (xxvi), *post*), are added; and the second clause of sub-sect. 2 is substituted for " and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act."

Instances of powers by statute exercisable by a tenant for life or by trustees with his consent will be found in the Fines and Recoveries Act, s. 15, *ante*, p. 310 (leases by tenant in tail, see sect. 20, sub-sect. 1 (i), *ante*); in the repealed Lord Cranworth's Act, ss. 1 and 10, and S. E. Act, 1877, s. 46, and in the L. C. C. Act, 1845, s. 7.

A statute may constitute the settlement or form part thereof (sect. 1, sub-sect. 1, *ante*, p. 855). In sub-sect. 1 of the present section it seems to be distinguished from it. A private statute did not form part of the settlement where the land was settled by will and the statute did not incorporate the will or contain any limitations to persons in succession, but gave powers to the will trustees (*Talbot* v. *Scarisbrick*, [1908] 1 Ch. 812). Cf. the definition of " instrument " (sect. 117, sub-sect. 1 (viii), *post*). The restriction in a

private Act on a trustee's power of sale did not limit the tenant for life's power under this Act (*Re Chaytor*, 25 Ch. D. 651).

As to the joint operation of powers in the settlement and the powers in the Act, see *Re Newcastle* (24 Ch. D. 129); and compare *Re Sudbury, Vernon* v. *V.* ([1893] 3 Ch. 74). Where an order had already been made under the S. E. Act, 1877, the powers of the S. L. Act, 1882, were not cumulative (*Re Poole*, 50 L. T. 585; 32 W. R. 956; see *Re Barrs-Haden*, 49 L. T. 661; 32 W. R. 194).

A case of conflict within sub-sect. 2 was held to arise in *Clarke* v. *Thornton* (35 Ch. D. 315), where the statutory power of a tenant for life to have capital money expended in improvements was held to override a power given by the settlement to trustees to apply income for that purpose (see *Re Stamford*, 56 L. T. 484); also in a case where a provision for payment of the rents and profits "after payment thereout of all incidental expenses and outgoings" was held not to prevent the application of capital moneys in reconstructing the drains of leasehold houses (*Re Thomas, Weatherall* v. *T.*, [1900] 1 Ch. 319; compare *Re Sudbury, Vernon* v. *V.*, [1893] 3 Ch. 74; and see *Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711).

It has been said, however, that the provisions referred to in this sub-section are provisions connected with the execution of the power (*e.g.*, consent of a third person); not with the results of such execution (*Lonsdale* v. *Lowther*, [1900] 2 Ch. 697). So a power of leasing given by the settlement and more beneficial in result to the tenant for life was presumed to have been exercised in preference to the statutory power (*ibid.*). With regard to the provision (*supra*) of S. L. Act, 1882, s. 56 (2), as to consent of the tenant for life, that consent was not necessary to the exercise by trustees of an absolute trust for sale (*Taylor* v. *Poncia*, 25 Ch. D. 646); or of powers in a private Act, which did not form part of the settlement (*Talbot* v. *Scarisbrick*, [1908] 1 Ch. 812); but was necessary to the exercise by trustees of a power of sale in the settlement (*Re Clitheroe*, 31 Ch. D. 135; *Re Osborne and Bright*, [1902] 1 Ch. 335; but see *Re Hone and Parker*, [1922] 2 Ch. 424). An order for sale overrode the necessity for any such consent (*Taylor* v. *Poncia, supra*). The consent of one of several persons constituting the tenant for life was sufficient (S. L. Act, 1884, s. 6); but not where the several persons were tenants for life of separate undivided shares (see *Re Osborne and Bright, supra*).

The power given by sub-sect. 2 of S. L. Act, 1882, s. 56, to the tenant for life to consent or refuse to consent to the exercise of a power was held to be one of the powers of a tenant for life under the Act (*Re Newcastle*, 24 Ch. D. 139). And accordingly where the tenant for life was an infant, the consent required by sub-sect. 2 might under sect. 60 (see now sect. 26, *ante*) be given by the trustees (*ibid.* 139, 140). Where he was a lunatic so found, the consent could, it seems, be given by his committee (sect. 62 of S. L. Act, 1882. See now sect. 28, *ante*). Where he was a lunatic not so found, it could also, it seems, be given by the quasi committee appointed under sect. 116 of the Lunacy Act, 1890, subject to the direction of the Judge in Lunacy (Lunacy Act, 1908, s. 1). Before that Act it was held that such a power of giving consent did not fall within sect. 128 of the Lunacy Act, 1890, *post*; and accordingly could not be exercised by the quasi committee (*Re De Moleyns and Harris*, [1908] 1 Ch. 110).

For form of summons, see Form 21, *post*, p. 1012.

Saving for additional or larger

109.—(1) Nothing in this Act precludes a settlor from conferring on the tenant for life, or (save as provided by the last preceding section) on the trustees of the settle-

15 Geo. 5, c. 18, s. 109.

ment, any powers additional to or larger than those conferred by this Act.

powers under settlement.

(2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, and, if relating to the settled land, as if they were conferred by this Act on a tenant for life.

Sub-sect. 1 re-enacts S. L. Act, 1882, s. 57 (1), adding the bracketed words. Sub-sect. 2 re-enacts sub-sect. 2 of that section, substituting the words after "conferred by this Act" for "unless a contrary intention is expressed in the settlement."

See as to "additional or larger powers," *Re Westminster*, [1920] 2 Ch. 445; and as to a tenant for life's right to exercise additional powers under a settlement and re-settlement, see *Re Cowley Settled Estates*, [1926] Ch. 725.

Protection of purchasers, &c.

110.—(1) On a sale, exchange, lease, mortgage, charge, or other disposition, a purchaser dealing in good faith with a tenant for life or statutory owner shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life or statutory owner, and to have complied with all the requisitions of this Act.

(2) A purchaser of a legal estate in settled land shall not, except as hereby expressly provided, be bound or entitled to call for the production of the trust instrument or any information concerning that instrument or any ad valorem stamp duty thereon, and whether or not he has notice of its contents he shall, save as hereinafter provided, be bound and entitled if the last or only principal vesting instrument contains the statements and particulars required by this Act to assume that—

(a) the person in whom the land is by the said instrument vested or declared to be vested is the tenant for life or statutory owner and has all the powers of a tenant for life under this Act, including such additional or larger powers, if any, as are therein mentioned;

(b) the persons by the said instrument stated to be the trustees of the settlement, or their successors appearing to be duly appointed, are the properly constituted trustees of the settlement;

(c) the statements and particulars required by this Act and contained (expressly or by reference) in the said instrument were correct at the date thereof;

(d) the statements contained in any deed executed in accordance with this Act declaring who are the trustees of the settlement for the purposes of this Act are correct;

(e) the statements contained in any deed of discharge, executed in accordance with this Act, are correct: 15 Geo. 5, c. 18, s. 110.

Provided that, as regards the first vesting instrument executed for the purpose of giving effect to—

(a) a settlement subsisting at the commencement of this Act; or

(b) an instrument which by virtue of this Act is deemed to be a settlement; or

(c) a settlement which by virtue of this Act is deemed to have been made by any person after the commencement of this Act; or

(d) an instrument inter vivos intended to create a settlement of a legal estate in land which is executed after the commencement of this Act and does not comply with the requirements of this Act with respect to the method of effecting such a settlement;

a purchaser shall be concerned to see—

(i) that the land disposed of to him is comprised in such settlement or instrument;

(ii) that the person in whom the settled land is by such vesting instrument vested, or declared to be vested, is the person in whom it ought to be vested as tenant for life or statutory owner;

(iii) that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees of the settlement.

(3) A purchaser of a legal estate in settled land from a personal representative shall be entitled to act on the following assumptions:—

(i) If the capital money, if any, payable in respect of the transaction is paid to the personal representative, that such representative is acting under his statutory or other powers and requires the money for purposes of administration;

(ii) If such capital money is, by the direction of the personal representative, paid to persons who are stated to be the trustees of a settlement, that such persons are the duly constituted trustees of the settlement for the purposes of this Act, and that the personal representative is acting under his statutory powers during a minority;

(iii) In any other case, that the personal representative is acting under his statutory or other powers.

(4) Where no capital money arises under a transaction, a disposition by a tenant for life or statutory owner shall, in favour of a purchaser of a legal estate, have effect under this Act notwithstanding that at the date of the transaction there are no trustees of the settlement.

15 Geo. 5, c. 18, s. 110.

(5) If a conveyance of or an assent relating to land formerly subject to a vesting instrument does not state who are the trustees of the settlement for the purposes of this Act, a purchaser of a legal estate shall be bound and entitled to act on the assumption that the person in whom the land was thereby vested was entitled to the land free from all limitations, powers, and charges taking effect under that settlement, absolutely and beneficially, or, if so expressed in the conveyance or assent, as personal representative, or trustee for sale or otherwise, and that every statement of fact in such conveyance or assent is correct.

Sub-sect. 1 re-enacts S. L. Act, 1882, s. 54, adding "or other disposition" (sect. 117, sub-sect. 1 (v), *post*), and "or statutory owner" (*ibid.* (xxvi)). For "purchaser," see *ibid.* (xxi). The remainder of the section is new.

Sub-sect. 1. "Good faith" involves a belief that all is being regularly and properly done (*Chandler* v. *Bradley*, [1897] 1 Ch. 323). A. purchasing from a tenant for life is not bound to inquire whether the vendor has had a valuation (*Hurrell* v. *Littlejohn*, [1904] 1 Ch. 694); and an immediate re-sale by A. at an advanced price is not alone sufficient evidence of bad faith on his part (*ibid.* 689). A. dealing in good faith with the tenant for life is not concerned to inquire as to notices to trustees (sect. 101, sub-sect. 5, *ante*). The mere knowledge that there were no trustees seems not to have prevented A. from being protected by sect. 54 (*Mogridge* v. *Clapp*), [1892] 3 Ch. 396, 401; see *Fisher* v. *Grazebrook*, [1898] 2 Ch. 661).

Where a person pays a sum of money to the tenant for life to obtain a lease he is not protected by this section (*Chandler* v. *Bradley*, [1897] 1 Ch. 315; see also *Sutherland* v. *S.*, [1893] 3 Ch. 193). The section only applies to the grant of a lease, not to a subsequent transfer (*Re Handman and Wilcox*, [1902] 1 Ch. 601).

Sub-sect. 2. For "trust instrument," "vesting instrument," and "principal vesting instrument," see sect. 117, sub-sect. 1 (xxxi), *post*; and as to deeds of discharge, see sect. 17, *ante*. As to the instruments (b), (c) and (d) referred to in the proviso to the sub-section, see sect. 9, *ante*.

Sub-sect. 5. For "vesting instrument," see sect. 117, sub-sect. 1 (xxxi), *post*; and as to assents, sect. 8, *ante*.

Purchaser of beneficial interest of tenant for life to have remedies of a legal owner.

111. Where—

(a) at the commencement of this Act the legal beneficial interest of a tenant for life under a settlement is vested in a purchaser; or

(b) after the commencement of this Act a tenant for life conveys or deals with his beneficial interest in possession in favour of a purchaser, and the interest so conveyed or created would, but for the restrictions imposed by statute on the creation of legal estates, have been a legal interest;

the purchaser shall (without prejudice to the powers conferred by this Act on the tenant for life) have and may exercise all the same rights and remedies as he would have had or have been entitled to exercise if the interest had

remained or been a legal interest and the reversion, if any, on any leases or tenancies derived out of the settled land had been vested in him: 15 Geo. 5. c. 18, s. 111.

Provided that, where the conveyance or dealing is effected after the commencement of this Act, the purchaser shall not be entitled to the possession of the documents of title relating to the settled land, but shall have the same rights with respect thereto as if the tenant for life had given to him a statutory acknowledgment of his right to production and delivery of copies thereof, and a statutory undertaking for the safe custody thereof.

The tenant for life shall not deliver any such documents to a purchaser of his beneficial interest, who is not also a purchaser of the whole of the settled land to which such documents relate.

This section is from L. P. Act, 1922. The only estates in land capable of subsisting or of being conveyed or created at law are an estate in fee simple absolute in possession and a term of years absolute (L. P. Act, 1925, s. 1 (1), *ante*). See sect. 64 of that Act for the statutory acknowledgment of right to production, &c., and undertaking for safe custody.

Exercise of powers; limitation of provisions, &c.

112.—(1) Where a power of sale, exchange, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or statutory owner or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(2) Where any provision in this Act refers to sale, purchase, exchange, mortgaging, charging, leasing, or other disposition or dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, it shall (unless the contrary appears) be construed as extending only to sales, purchases, exchanges, mortgages, charges, leases, dispositions, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

Re-enacts (adding "or statutory owner" (sect. 117, sub-sect. 1 (xxvi), *post*), and in sub-sect. 2 "disposition" (*ibid.* (v)) and "mortgaging," "charging,") S. L. Act, 1882, s. 55 (2) (3).

A tenant for life selling may enter into the usual covenants for title (*Re Ray*, [1896] 1 Ch. 468, 479; see also *Re Llewellin, L.* v. *Williams*, 37 Ch. D. 327; *Re Smith*, [1891] 3 Ch. 65).

Part VIII.

Court, Ministry of Agriculture and Fisheries, Procedure.

Jurisdiction and procedure.

113.—(1) All matters within the jurisdiction of the court under this Act shall, subject to the enactments for the time being in force with respect to the procedure of

15 Geo. 5, c. 18, s. 113.

the Supreme Court of Judicature, be assigned to the Chancery Division of the High Court.

(2) The powers of the court may, as regards land in the County Palatine of Lancaster or the County Palatine of Durham, be exercised also by the respective Courts of Chancery of those Counties Palatine.

(3) The powers of the court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the court, or from which the capital money to be dealt with in the court arises under this Act, or in connexion with which the personal chattels to be dealt with in the court are settled.

(4) Payment of money into court effectually exonerates therefrom the person making the payment.

(5) Every application to the court under this Act shall, subject to any rules of court to the contrary, be by summons at Chambers.

(6) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(7) On any application notice shall be served on such persons, if any, as the court thinks fit.

(8) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

(9) The provisions of the Trustee Act, 1925, relating to vesting orders and orders appointing a person to convey shall apply to all vesting orders authorised to be made by this Act.

This section replaces S. L. Act, 1882, s. 46. Sub-sect. 2 re-enacts, as to the Palatine Court of Durham, the Palatine Court of Durham Act, 1889, s. 10. See as to the relation between the rules of the Palatine Court of Lancaster and those of the High Court, *Hale Spinning Co.* v. *Leigh*, [1919] 1 Ch. 260.

Sub-sect. 3. As to applications in the County Court, see County Court Rules, 1889, Ord. 38, and as to appeals from orders of County Courts under the Act, see Ord. 54D, r. 5 (Annual Practice, 1926, p. 1004).

Sub-sect. 4. Under S. L. Act Rules, No. 14, *post*, p. 1005, a person paying capital money into Court may deduct costs of paying in (see Form X). A purchaser taking out a summons in an action for

15 Geo. 5, c. 18, s. 113.

leave to pay the purchase-money into Court was allowed to deduct his costs (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540).

Sub-sect. 5.

See as to applications by petition under S. L. Act Rules, 1882, *Re Torry Hill, Pemberton* v. *P.*, [1909] 1 Ch. 468; *Re Houghton*, 30 Ch. D. 102; *Re Bethlehem Hospitals*, 30 Ch. D. 541.

Sub-sects. 6 and 7.

As to service, see R. S. L. Act, Nos. 4, 5, and 6, *post*.

Sub-sect. 8. Costs.

Sub-sect. 8 gives the Court discretion as to costs of parties to applications under the Act; and sect. 114 (*post*) mentions the sources from which such costs may be paid. There are also special provisions as to costs in sect. 76, *ante*, p. 938 (see *Re Hanbury*, 31 W. R. 784) and sect. 92, *ante*, p. 952. In all cases not provided for by the Act or rules, the existing practice of the Court as to costs applies to proceedings under the Act (S. L. Act Rules, No. 15, *post*, p. 1005). Questions under the Act have been decided in specific performance actions, where the rules as to costs in those actions have been followed (*Hatten* v. *Russell*, 38 Ch. D. 334; *Marlborough* v. *Sartoris*, 32 Ch. D. 616). In one case an action was brought by a tenant for life against trustees and others to determine questions as to his title to sell under this Act, in which he was given party and party costs (*Sebright* v. *Thornton* (1885), W. N. 176; where see as to costs of mortgagees). As to costs of actions commenced by originating summons, in which questions under the Act were determined, see *Re Atkinson, A.* v. *Bruce* (30 Ch. D. 613); *Re Strangways, Hickley* v. *S.* (34 Ch. D. 433); *Re Llewellin, L.* v. *Williams* (37 Ch. D. 328); *Re Powell, Allaway* v. *Oakley* ((1884), W. N. 67).

The costs of a summons taken out in an administration action to decide questions under this Act may be made costs in that action (*Constable* v. *C.*, 54 L. T. 610; see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540), or may be paid out of the estate (*Taylor* v. *Poncia*, 25 Ch. D. 651).

As regards summonses, the costs of all parties of a summons by tenant for life, either wholly or partially successful, were paid out of the settled estate (*Re Morgan*, 24 Ch. D. 117; *Re Paget*, 30 Ch. D. 165; see *Re Ailesbury*, [1892] 1 Ch. 548). For form of usual order in such cases, see S. L. Act Rules, Form 3, *post*, p. 1007. The tenant for life, however, may have to pay his own costs (*Re Tucker*, [1895] 2 Ch. 468), or the costs of the mortgagees of his life estate (*Re Smith*, [1891] 3 Ch. 76; *Sebright* v. *Thornton* (1885), W. N. 176; compare *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375; *Re Peel*, [1910] 1 Ch. 389). The costs of an unsuccessful summons by tenant for life may be paid out of the estate (*Re Knatchbull*, 27 Ch. D. 349; see *Re James*, 51 L. T. 596; *Re Sebright*, 33 Ch. D. 442); but the tenant for life may, if not successful, have to pay all the costs, if there is no fund available for the purpose (*Re Beaumont*, 58 L. T. 916; see *Re Bristol*, [1893] 3 Ch. 161); or if the fund is held not within the S. L. Acts (*Re Bath and Wells*, [1899] 2 Ch. 138). The costs of an unsuccessful summons by persons claiming to be tenant for life were paid out of the estate (*Re Horne*, 39 Ch. D. 84; see *Re Atkinson, A.* v. *Bruce*, 30 Ch. D. 613).

Where on a summons taken out by the trustees it was decided that a tenant for life could not sell under the Act, the tenant for life had to pay his own costs (*Re Collinge*, 36 Ch. D. 519). Where two trustees appeared by different counsel on opposite sides, both, having acted reasonably, were given costs out of the estate (*Re Ailesbury*, [1892] 1 Ch. 548). Trustees, however, who appeared by the same counsel as the tenant for life, on an application by him, had to pay their own costs (*Re Broadwater*, 53 L. T. 745).

All the costs of an appeal were given out of the estate when it was a case proper to be decided by the Appeal Court (*Re Jones*, 26 Ch. D. 744; see *Re Ailesbury*, [1892] 1 Ch. 548). A person claiming

15 Geo. 5, c. 18, s. 113.

to be tenant for life had to pay all the costs of an unsuccessful appeal (*Re Strangways, Hickley* v. *S.*, 34 Ch. D. 433). A tenant for life paid his own costs of an unsuccessful appeal, and a remainderman paid his own costs, the trustees being given costs out of the estate (*Re Sebright*, 33 Ch. D. 445). An unsuccessful appeal by a tenant for life was dismissed with costs (*Re Hope, De Cetto* v. *H.*, [1899] 2 Ch. 679). And where the trustees and remainderman appealed against an order sanctioning a sale under sect. 67, the appeal was dismissed with costs (*Re Radnor*, 45 Ch. D. 423).

A tenant for life successfully applying to be let into possession was, in one case, not ordered to pay the costs of remaindermen (*Re Newen, N.* v. *Barnes*, [1894] 2 Ch. 297; see, however, *Re Hunt, Pollard* v. *Geake*, [1900] W. N. 65; [1901] W. N. 144). In another case where no complaint was made against the trustees he had to pay their costs as well as his own (*Re Bagot, B.* v. *Kittoe*, [1894] 1 Ch. 177).

Scale.

Costs were allowed on the higher scale in *Re Chaytor* (25 Ch. D. 651.)

Charges and expenses.

Under the words "charges and expenses," the expenses of an abortive attempt to sell have been ordered to be paid out of the settled property (*Re Smith*, [1891] 3 Ch. 65).

Sub-sect. 9.

See sects. 44—50 of that Act, *post*.

Payment of costs out of settled property.

114. Where the court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the court, be raised and paid—

(a) out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement; or

(b) out of securities representing such money, or out of income of any such money or securities;

(c) out of any accumulations of income of land, money, or securities; or

(d) by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations; or

(e) by means of a legal mortgage of the settled land or any part thereof to be made by such person as the court directs;

or partly in one of those modes and partly in another or others, or in any such other mode as the court thinks fit.

Re-enacts S. L. Act, 1882, s. 47. "Securities" (sect. 117, sub-sect. 1 (xxiii), *post*), is substituted for "investments," and "legal mortgage" for words relating to different modes of mortgaging. (See L. P. Act, 1925, ss. 85 *et seq.*, *ante*.)

See general note as to costs under sect. 113 (*ante*, p. 975), *Re Smith*, ([1891] 3 Ch. 165); *Williams* v. *Jenkins*, ([1894] W. N. 176; 13 R. 92); and see form of summons in *Re Aylesford* (32 Ch. D. 163). See also *Hamilton* v. *Tighe* ([1898] 1 I. R. 123).

Powers of the Minister of Agriculture.

115.—(1) The Minister shall, by virtue of this Act, have for the purposes of any Act, public general or local

or private, making provision for the execution of improvements on settled land, all such powers and authorities as he has for the purposes of the Improvement of Land Act, 1864. 15 Geo. 5, c. 18, s. 115. 27 & 28 Vict. c. 114.

(2) The provisions of the last-mentioned Act relating to proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Minister under any Act making provision as last aforesaid.

(3) The provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the Minister as successor of the Land Commissioners for England shall extend and apply to the business transacted by or under the direction of the Minister under any Act, public general or local or private, by which any power or duty is conferred or imposed on him as such successor.

Replaces S. L. Act, 1882, s. 48 (6). The "Minister" is the Minister of Agriculture and Fisheries (sect. 117, sub-sect. 1 (xvi), *post*). See the Ministry of Agriculture and Fisheries Act, 1919, and the Board of Agriculture and Fisheries Acts, 1889 and 1903.

Filing of certificates, &c., at the Ministry of Agriculture.

116.—(1) Every certificate and report approved and made by the Minister under this Act shall be filed in the office of the Minister of Agriculture and Fisheries.

(2) An office copy of any certificate or report so filed shall be delivered out of such office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

Replaces S. L. Act, 1882, s. 49. See preceding section.

Part IX.

Supplementary Provisions.

Definitions.

117.—(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

(i) "Building purposes" include the erecting and the improving of, and the adding to, and the repairing of buildings; and a "building lease" is a lease for any building purposes or purposes connected therewith (*s*);

(ii) "Capital money arising under this Act" means

15 Geo. 5, c. 18, s. 117.

capital money arising under the powers and provisions of this Act or the Acts replaced by this Act, and receivable for the trusts and purposes of the settlement and includes securities representing capital money (*t*);

(iii) "Death duty" means estate duty, succession duty, legacy duty, and every other duty leviable or payable on death;

(iv) "Determinable fee" means a fee determinable whether by limitation or condition;

(v) "Disposition" and "conveyance" include a mortgage, charge by way of legal mortgage, lease, assent, vesting declaration, vesting instrument, disclaimer, release, and every other assurance of property or of an interest therein by any instrument, except a will, and "dispose of" and "convey" have corresponding meanings;

(vi) "Dower" includes "freebench";

(vii) "Hereditaments" mean real property which on an intestacy might before the commencement of this Act have devolved on an heir (*u*);

(viii) "Instrument" does not include a statute unless the statute creates a settlement;

(ix) "Land" includes land of any tenure, and mines and minerals whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, and any estate or interest in land not being an undivided share in land (*v*);

(x) "Lease" includes an agreement for a lease, and "forestry lease" means a lease to the Forestry Commissioners for any purpose for which they are authorised to acquire land by the Forestry Act, 1919;

9 & 10 Geo. 5, c. 58.

(xi) "Legal mortgage" means a mortgage by demise or sub-demise or a charge by way of legal mortgage, and "legal mortgagee" has a corresponding meaning; "legal estate" means an estate interest or charge in or over land (subsisting or created at law) which is by statute authorised to subsist or to be created at law; and "equitable interests"

mean all other interests and charges in or over land or in the proceeds of sale thereof; an equitable interest "capable of subsisting at law" means such an equitable interest as could validly subsist at law, if clothed with the legal estate; and "estate owner" means the owner of a legal estate; 15 Geo. 5, c. 18, s. 117.

(xii) "Limitation" includes a trust, and "trust" includes an implied or constructive trust;

(xiii) "Lunatic" includes a lunatic whether so found or not and in relation to a lunatic not so found, "committee" includes a person on whom the powers of a committee are conferred under section one of the Lunacy Act, 1908; and "defective" means every person affected by the provisions of section one hundred and sixteen of the Lunacy Act, 1890, as extended by section sixty-four of the Mental Deficiency Act, 1913, and for whose benefit a receiver has been appointed; 8 Edw. 7, c. 47. 53 Vict. c. 5. 3 & 4 Geo. 5, c. 28.

(xiv) "Manor" includes lordship, and reputed manor or lordship; and "manorial incident" has the same meaning as in the Law of Property Act, 1922 (*w*);

(xv) "Mines and minerals" mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and "mining purposes" include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works suitable for those purposes; and a "mining lease" is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes (*x*);

(xvi) "Minister" means the Minister of Agriculture and Fisheries;

(xvii) "Notice" includes constructive notice;

(xviii) "Personal representative" means the executor, original or by representation, or administrator, for the time being of a deceased person, and where there are special

15 Geo. 5, c. 18, s. 117.

personal representatives for the purposes of settled land means those personal representatives (*y*);

(xix) "Possession" includes receipt of rents and profits, or the right to receive the same, if any; and "income" includes rents and profits;

(xx) "Property" includes any thing in action, and any interest in real or personal property;

(xxi) "Purchaser" means a purchaser in good faith for value, and includes a lessee, mortgagee or other person who in good faith acquires an interest in settled land for value; and in reference to a legal estate includes a chargee by way of legal mortgage;

(xxii) "Rent" includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, "payment" includes delivery; and "fine" includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift (*z*);

(xxiii) "Securities" include stocks, funds, and shares (*a*);

(xxiv) "Settled land" includes land which is deemed to be settled land; "settlement" includes an instrument or instruments which under this Act or the Acts which it replaces is or are deemed to be or which together constitute a settlement, and a settlement which is deemed to have been made by any person or to be subsisting for the purposes of this Act; "a settlement subsisting at the commencement of this Act" includes a settlement created by virtue of this Act immediately on the commencement thereof; and "trustees of the settlement" mean the trustees thereof for the purposes of this Act howsoever appointed or constituted;

(xxv) "Small dwellings" mean dwelling-houses of a rateable value not exceeding one hundred pounds per annum;

(xxvi) "Statutory owner" means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no tenant for life, have the powers of a tenant for life under this Act, but does not include the trustees of the settlement, where

by virtue of an order of the court or otherwise the trustees have power to convey the settled land in the name of the tenant for life; 15 Geo. 5, c. 18, s. 117.

(xxvii) "Steward" includes deputy steward, or other proper officer, of a manor;

(xxviii) "Tenant for life" includes a person (not being a statutory owner) who has the powers of a tenant for life under this Act, and also (where the context requires) one of two or more persons who together constitute the tenant for life, or have the powers of a tenant for life; and "tenant in tail" includes a person entitled to an entailed interest in any property; and "entailed interest" has the same meaning as in the Law of Property Act, 1925 (*b*);

(xxix) A "term of years absolute" means a term of years, taking effect either in possession or in reversion, with or without impeachment for waste, whether at a rent or not and whether subject or not to another legal estate, and whether certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest), but does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created after the commencement of this Act, a term of years which is not expressed to take effect in possession within twenty-one years after the creation thereof where required by statute to take effect within that period; and in this definition the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year (*c*);

(xxx) "Trust corporation" (*d*) "trust for sale" "trustees for sale" and "power to postpone a sale" have the same meanings as in the Law of Property Act, 1925;

(xxxi) In relation to settled land "vesting deed" or "vesting order" means the instrument whereby settled land is conveyed to or vested or declared to be vested in a tenant for life or statutory owner; "vesting assent" means

15 Geo. 5, c. 18, s. 117.

the instrument whereby a personal representative, after the death of a tenant for life or statutory owner, or the survivor of two or more tenants for life or statutory owners, vests settled land in a person entitled as tenant for life or statutory owner; "vesting instrument" means a vesting deed, a vesting assent or, where the land affected remains settled land, a vesting order; "principal vesting instrument" includes any vesting instrument other than a subsidiary vesting deed; and "trust instrument" means the instrument whereby the trusts of the settled land are declared, and includes any two or more such instruments and a settlement or instrument which is deemed to be a trust instrument;

(xxxii) "United Kingdom" means Great Britain and Northern Ireland;

(xxxiii) "Will" includes codicil.

(2) Where an equitable interest in or power over property arises by statute or operation of law, references to the "creation" of an interest or power include any interest or power so arising.

(3) References to registration under the Land Charges Act, 1925, apply to any registration made under any statute which is by the Land Charges Act, 1925, to have effect as if the registration had been made under that Act.

S. L. Act, 1882, s. 2 (10), contained definitions of "building purposes," "income," "manor," "mines and minerals," "rent" and "fine," "securities," "steward," and "will" (adding "and other testamentary instrument and a writing in the nature of a will"), identical with those in the present section. "Land" in S. L. Act, 1882, included incorporeal hereditaments, also an undivided share in land; and "possession" included receipt of income (see *Re Jones*, 26 Ch. D. 740). For definition of "settlement" in S. L. Act, 1882, see p. 857, *ante*.

Sub-sect. 1.

"Building purposes."

"Capital money arising under this Act."

(*s*) See *Re Ellesmere*, [1898] W. N. 18.

(*t*) Sects. 42 (4), 47, 49 (2), 51 (5), 52 (7), 54 (4), 55 (2), 56 (4), 57 (3), 61, 62 (2), 66, 67, 71, 75 (7), 79, 80 and 90 (5) indicate sources from which capital money may be derived; as do Trustee Act, 1925, s. 20, *post*, p. 1037; Land Registration Act, 1925, s. 84, *post*, p. 1184; and L. P. Act, 1925, s. 35, *ante*, p. 625. As to moneys which may be treated as capital moneys, see sects. 76, 77, 78, 81, *ante*; *Re Mackenzie* (23 Ch. D. 750); *Re Tennant* (40 Ch. D. 594); *Re Mundy* ([1891] 1 Ch. 406); *Clarke* v. *Thornton* (35 Ch. D. 314); *Re Rosher, Briant* v. *R.* ([1899] W. N. 134). Moneys arising from an exercise of the powers of a tenant for life under sect. 38 are capital moneys (*Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375).

"Hereditaments."

(*u*) See Admon. of Estates Act, 1925, s. 45, *ante*.

"Land."

(*v*) Land includes a dignity which descends to heirs, such as a baronetcy (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Aylesford*, 32 Ch. D. 162), tithes (*Re Esdaile, E.* v. *E.*, 54 L. T. 637),

and a perpetual rentcharge (*Re Bective*, 27 L. R. Ir. 364). The question whether an easement (which has been said to be an incorporeal hereditament, *ante*, p. 6) was included in "land," under S. L. Act, 1882 (*supra*), was raised in *Re Brotherton, B.* v. *B.*, [1907] W. N. 230; [1908] W. N. 56. See the present definition. 15 Geo. 5, c. 18, s. 117.

(*w*) See note to L. P. Act, 1925, s. 28, *ante*, p. 619. "Manorial incidents."

(*x*) A grant to lessees of minerals of the right to let down the surface is a grant for mining purposes within the definition (*Sitwell* v. *Londesborough*, [1905] 1 Ch. 464). See as to a mining lease, *Re Revely*, 11 W. R. 744. And as to the meaning of mines and minerals, see *ante*, p. 112. "Mines and minerals."

(*y*) As to special representatives for settled land, see Admon. of Estates Act, 1925, ss. 22—24, *ante*. "Personal representative."

(*z*) As to fines, see note to L. P. Act, 1925, s. 144, *ante*, and *Chandler* v. *Bradley*, [1897] 1 Ch. 315. "Rent."

(*a*) As to the meaning of "securities" generally, see *Re Rayner, R.* v. *R.*, [1904] 1 Ch. 176, and other cases quoted, *post*, p. 1025. "Securities."

(*b*) As to entailed interests, see L. P. Act, 1925, s. 130, *ante*. "Tenant for life."

(*c*) As to terms required to take effect in possession within twenty-one years, see L. P. Act, 1925, s. 149 (3), *ante*. "Term of years absolute."

(*d*) For "trust corporation," see p. 794, *ante*.

See L. Charges Act, 1925, s. 24, and Schedule, *ante*.

Sub-sect. 3.

Retrospective amendment of certain provisions of Settled Land Acts.

118. For the purpose of removing certain doubts as to the construction and operation of the Settled Land Acts, 1882 to 1890, and validating past transactions, the provisions contained in the Fourth Schedule to this Act shall have effect.

Subject as aforesaid, this Act does not affect the validity of anything done or any order made or directions given by the court before the commencement of this Act.

See the Fourth Schedule, *post*, p. 998.

Repeals, savings, and construction.

119.—(1) The Acts mentioned in the Fifth Schedule to this Act are hereby repealed, to the extent specified in the third column of that Schedule:

Provided that, without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889:— 52 & 53 Vict. c. 63.

(a) Nothing in this repeal shall affect the validity or legality of any dealing in land or other transaction completed before the commencement of this Act, or any title or right acquired or appointment made before the commencement of this Act, but, subject as aforesaid, this Act shall, except where otherwise expressly provided, apply to and in respect of settlements and other instruments whether made or coming into operation before or after the commencement of this Act;

(b) Nothing in this repeal shall affect any rules, orders, or other instruments made under any enactment so repealed, but all such rules, orders and instruments shall continue in force as if made under the corresponding enactment in this Act;

15 Geo. 5, c. 18, s. 119.

(c) References in any document to any enactment repealed by this Act shall be construed as references to this Act or the corresponding enactment in this Act.

(2) References in any statute to the Settled Estates Act, 1877, and to any enactment which it replaced shall be construed as references to this Act.

(3) This Act, as respects registered land, takes effect subject to the provisions of the Land Registration Act, 1925.

Sub-sect. 2.

The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), replaced the following Acts:—

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120.....	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77.....	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45.....	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33.....	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30.....	The Settled Estates Act, 1876.

Sub-sect. 3.

See sects. 86 *et seq.* of that Act, *post*. See also sect. 2, subsect. 1.

Short title, commencement and extent.

120.—(1) This Act may be cited as the Settled Land Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act extends to England and Wales only.

The Settled Land Acts, 1882 to 1890, extended to Ireland (S. L. Act, 1882, ss. 1 (3) and 65).

SCHEDULES.

FIRST SCHEDULE.

Section 15.

FORMS OF INSTRUMENTS.

Form No. 1.

Vesting Deed for giving effect to a Settlement subsisting at the Commencement of this Act.

This Vesting Deed is made [&c.] between *X.* of [&c.] and *Y.* of [&c.] (hereinafter called the trustees) of the one part and *T.L.* of [&c.] of the other part.

15 Geo. 5, c. 18, sch. 1.

[*Recite the Settlement under which T.L. is a tenant for life of full age in possession of the freeholds and leaseholds respectively described in the First and Second Schedules and has power to appoint new trustees, and the trustees are trustees for the purposes of the Settled Land Act*, 1925, *also the request by T.L. that the trustees should execute the requisite vesting deed.*]

Now for giving effect to the requirements of the Settled Land Act, 1925, this deed witnesseth as follows:—

1. The trustees as Trustees hereby declare that—

All and singular the hereditaments and premises respectively mentioned in the First and Second Schedules hereto and all other (if any) the premises capable of being vested by this declaration which are now by any means subject to the limitations of the recited settlement are vested in the said *T.L.* as to the freehold hereditaments mentioned in the First Schedule hereto in fee simple, and as to the leasehold hereditaments mentioned in the Second Schedule hereto, for all the residue of the terms of years for which the same are respectively held.

2. The said *T.L.* shall stand possessed of the premises upon the trusts and subject to the powers and provisions upon and subject to which under the recited settlement or otherwise the same ought to be held from time to time.

3. The trustees are the trustees of the settlement for the purposes of the Settled Land Act, 1925.

4. The following additional or larger powers are conferred by the said settlement in relation to the settled land, and by virtue of the Settled Land Act, 1925, operate and are exercisable as if conferred by that Act on a tenant for life [*Here insert the additional powers*].

5. [*Add the usual covenant by T.L. with the trustees to pay the rent in respect of leasehold hereditaments, observe the lessee's covenants and keep the trustees indemnified.*]

6. The power to appoint a new trustee or new trustees of the settlement is vested in the said *T.L.* during his life.

In witness [&c.]

[Note.—Add the schedules. In the first part of the First Schedule give particulars of the manors, advowsons and other incorporeal hereditaments. In the second part give particulars of the freehold land referring, if practicable, to annexed plans, so that the vesting deed may ultimately become a convenient root of title. Unless this is done the deeds referred to will for purposes of the parcels remain part of the title. In the Second Schedule give particulars of the dates of and parties to the leases of the leasehold hereditaments, and short particulars of the properties demised, the terms and the rents. If there are any mortgages having priority to the settlement these should

15 Geo. 5, c. 18, sch. 1.

be mentioned in another schedule and referred to in the recitals.]

Form No. 2.

Vesting Deed on the Settlement of Land.

This Vesting Deed made [&c.] between *John H.* of [&c.] of the first part, *Jane W.* of [&c.] of the second part, and *X.* of [&c.], *Y.* of [&c.], and *Z.* of [&c.] (hereinafter called the trustees) of the third part.

Witnesseth and it is hereby declared as follows:—

1. In consideration of the intended marriage between *John H.* and *Jane W.* the said *John H.* as Settlor hereby declares that

All that (*setting out the parcels by reference to a schedule or otherwise*) are vested in *John H.* in fee simple (*or in the case of leaseholds refer to the terms*).

Upon the trusts declared concerning the same by a Trust Instrument bearing even date with but intended to be executed contemporaneously with these presents and made between the same parties and in the same order as these presents or upon such other trusts as the same ought to be held from time to time.

2. The trustees are the trustees of the settlement for the purposes of the Settled Land Act, 1925.

3. The following additional or larger powers are conferred by the said trust instrument in relation to the settled land and by virtue of the Settled Land Act, 1925, operate and are exercisable as if conferred by that Act on a tenant for life. [*Here insert the additional powers.*]

4. The power of appointing a new trustee or new trustees of the settlement is vested in the said [*John H.*] during his life.

In witness [&c.].

Form No. 3.

Trust Instrument on the Settlement of Land.

This Trust Instrument is made [&c.] between *John H.* of [&c.] (hereinafter called the Settlor) of the first part, *Jane W.* of [&c.] of the second part, and *X.* of [&c.], *Y.* of [&c.], and Z. of [&c.] (hereinafter called the trustees) of the third part.

Whereas by a deed (hereinafter called the Vesting Deed) bearing even date with but executed contemporaneously with these presents, and made between the same parties and in the same order as these presents, certain hereditaments situated at in the county of were vested in the Settlor

Upon the trusts declared concerning the same by a trust instrument of even date therein referred to (meaning these presents). 15 Geo. 5, c. 18, sch. 1.

Now in consideration of the intended marriage between the Settlor and *Jane W.*, this Deed witnesseth as follows:—

1. The Settlor hereby agrees that he will hold the hereditaments and property comprised in the Vesting Deed In trust for himself until the solemnisation of the said marriage and thereafter Upon the trusts following, that is to say:—

2. Upon trust for the Settlor during his life without impeachment of waste with remainder Upon trust if *Jane W.* survives him that she shall receive out of the premises during the residue of her life a yearly jointure rentcharge of [&c.] and subject thereto Upon trust for the trustees for a term of 800 years from the date of the death of the Settlor without impeachment of waste Upon the trusts hereinafter declared concerning the same And subject to the said term and the trusts thereof Upon trust for the first and other sons of the said intended marriage successively according to seniority in tail male with remainder [&c.] *with an ultimate remainder in trust for the Settlor in fee simple.*

[*Here add the requisite trusts of the portions term, and any other proper provisions including the appointment of the trustees to be trustees of the settlement for the purposes of the Settled Land Act*, 1925, *extension of Settled Land Act powers, and a power for the tenant for life for the time being of full age to appoint new trustees of the settlement.*]

In witness [&c.].

[Note.—The Vesting Deed and the Trust Instrument can be executed as escrows till the marriage.]

Form No. 4.

Subsidiary Vesting Deed on Sale when the Land is Purchased with Capital Money.

This Subsidiary Vesting Deed is made [&c.] between *Henry V.* of [&c.] (hereinafter called the Vendor) of the first part, *X.* of [&c.], *Y.* of [&c.], and *Z.* of [&c.] (hereinafter called the trustees) of the second part, and *John H.* [&c.] (hereinafter called the Purchaser) of the third part.

Whereas the Vendor is entitled for an estate in fee simple in possession free from incumbrances to the hereditaments hereinafter conveyed and has agreed to sell the same to the Purchaser at the price of pounds.

And whereas by a principal vesting deed (hereinafter

15 Geo. 5, c. 18, sch. 1.

called the principal deed) dated [&c.], and made [&c.] [*Form No.* 2], certain hereditaments were vested in the Purchaser Upon the trusts of a trust instrument of even date therewith, and by [endorsements on] the principal deed the trustees were stated to be the trustees of the settlement for the purposes of the Settled Land Act, 1925.

Now this Deed witnesseth as follows:—

1. In consideration of the sum of pounds now paid to the Vendor by the trustees by the direction of the Purchaser (the receipt of which sum the Vendor hereby acknowledges) the Vendor as Beneficial Owner hereby conveys unto the Purchaser All those [&c.].

To hold unto the Purchaser [in fee simple] upon and subject to the same trusts and powers as are declared by the principal deed by reference as aforesaid with respect to the hereditaments therein comprised.

2 and 3. [*Same as* 2 *and* 4 *in Form No.* 2].

In witness [&c.].

Note.—On a purchase of a term of years absolute out of capital money, the term must be conveyed to the tenant for life, if any, of full age, instead of to the trustees of the settlement. If there is a minority the land will be conveyed to the personal representatives or to the Settled Land Act trustees.

Form No. 5.

Vesting Assent by Personal Representative.

1. *E.F.* of [&c.] and *G.H.* of [&c.] as the personal representatives of *X.Y.*, late of [&c.] deceased, do this day of 19 hereby, As Personal Representatives, assent to the vesting in *C.D.* of [&c.] of [All that farm, &c.] *or* [All the property described in the Schedule hereto] for all the estate or interest of the said *X.Y.* at the time of his death [*or*, for an estate in fee simple].

2. The premises are vested in the said *C.D.* upon the trusts declared concerning the same by [&c.].

3. The said *E.F.* and *G.H.* are the trustees of the settlement for the purposes of the Settled Land Act, 1925.

4 and 5. [*Same as* 3 *and* 4 *in Form No.* 2].

As witness, [&c.].

Note.—The expression "conveyance" includes an assent, but an assent will relate back to the death unless a contrary intention appears.

An assent will not be properly postponed merely because death duty remains to be paid. The representatives have only to be satisfied (*e.g.* where the tenant for life has directed payment out of capital money or has executed a mortgage

for raising the money as and when an instalment becomes due) that the duty will be paid.

SECOND SCHEDULE.

Section 37.

Transitional Provisions affecting Existing Settlements.

Paragraph 1.

Provisions for vesting legal estate in tenant for Life or Statutory Owner.

1.—(1) A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument (*a*).

(2) As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner (*b*), shall at the cost of the trust estate, execute a principal vesting deed (*c*) (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner, and including themselves if they are the statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid and, if more than one, as joint tenants (*cc*).

(3) If there are no trustees of the settlement then (in default of a person able and willing to appoint such trustees), an application shall be made to the court (*d*) by the tenant for life or statutory owner (*b*), or by any other person interested, for the appointment of such trustees.

(4) If default is made in the execution of any such principal vesting deed, the provisions of this Act relating to vesting orders of settled land (*e*) shall apply in like manner as if the trustees of the settlement were persons in whom the settled land is wrongly vested.

(5) This paragraph does not apply where, at the commencement of this Act, settled land is held at law or in equity in undivided shares vested in possession.

(6) In the case of settlements subsisting at the commencement of this Act, all the estates, interests and powers thereby limited which are not by statute otherwise converted into

15 Geo. 5, c. 18, sch. 2.

equitable interests or powers (*f*), shall, as from the date of the principal vesting deed or the vesting order, take effect only in equity. This sub-paragraph shall not apply to any legal estate or interest vested in a mortgagee or other purchaser for money or money's worth.

The concluding portion, from "This sub-paragraph," was added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

(7) This paragraph does not apply where settled land is vested in personal representatives at the commencement of this Act, or where settled land becomes vested in personal representatives before a principal vesting deed (*c*) has been executed pursuant to this paragraph.

(8) No ad valorem stamp duty shall be payable in respect of a vesting deed or order made for giving effect to an existing settlement.

Paragraph 2.

PROVISIONS WHERE SETTLED LAND IS AT COMMENCEMENT OF ACT VESTED IN PERSONAL REPRESENTATIVES.

2.—(1) Where settled land remains at the commencement of this Act vested in the personal representatives of a person who dies before such commencement, or becomes vested in personal representatives before a principal vesting deed (*c*) has been executed pursuant to the last preceding paragraph, the personal representatives shall hold the settled land on trust, if and when required so to do, to convey the same to the person who, under the trust instrument, or by virtue of this Act, is the tenant for life or statutory owner (*b*) and, if more than one, as joint tenants.

(2) A conveyance under this paragraph shall be made at the cost of the trust estate and may be made by an assent in writing signed by the personal representatives which shall operate as a conveyance (*g*). No stamp duty is payable in respect of a vesting assent.

(3) The obligation to convey settled land imposed on the personal representatives by this paragraph is subject and without prejudice—

(a) to their rights and powers for purposes of administration, and

(b) to their being satisfied that provision has been or will be made for the payment of any unpaid death duties in respect of the land or any interest therein for which they are accountable, and any interest and costs in respect of such duties, or that they are otherwise effectually indemnified against such duties, interest and costs.

(4) A conveyance under this paragraph shall—

(a) if by deed, be a principal vesting deed (*c*), and

(b) if by an assent, be a vesting assent (*h*), which shall contain the like statements and particulars as are required by this Act in the case of a principal vesting deed.

(5) Nothing contained in this paragraph affects the rights of personal representatives to transfer or create such legal estates to take effect in priority to a conveyance under this paragraph as may be required for giving effect to the obligations imposed on them by statute.

(6) A conveyance by personal representatives under this paragraph, if made by deed, may contain a reservation to themselves of a term of years absolute (*i*) in the land conveyed upon trusts for indemnifying them against any unpaid death duties in respect of the land conveyed or any interest therein, and any interest and costs in respect of such duties.

(7) Nothing contained in this paragraph affects any right which a person entitled to an equitable charge for securing money actually raised, and affecting the whole estate the subject of the settlement, may have to require effect to be given thereto by a legal mortgage, before the execution of a conveyance under this section.

Paragraph 3.

PROVISIONS AS TO INFANTS.

3.—(1) Where, at the commencement of this Act, an infant is beneficially entitled to land in possession for an estate in fee simple or for a term of years absolute (*i*), or would, if of full age, be a tenant for life or have the powers of a tenant for life, the settled land shall, by virtue of this Act, vest in the trustees (if any) of the settlement upon such trusts as may be requisite for giving effect to the rights of the infant and other persons (if any) interested:

Provided that, if there are no such trustees, then—

(i) Pending their appointment, the settled land shall, by virtue of this Act, vest in the Public Trustee upon the trusts aforesaid:

(ii) The Public Trustee shall not be entitled to act in the trust, or charge any fee, or be liable in any manner unless and until requested in writing to act on behalf of the infant by his parents or parent or testamentary or other guardian in the order named:

(iii) After the Public Trustee has been so requested to act, and has accepted the trust, he shall become the trustee of the settlement, and no

15 Geo. 5, c. 18, sch. 3.

trustee shall (except by an order of the court) be appointed in his place without his consent:

(iv) If there is no other person able and willing to appoint trustees the parents or parent or testamentary or other guardian of the infant, if respectively able and willing to act, shall (in the order named) have power by deed to appoint trustees of the settlement in place of the Public Trustee in like manner as if the Public Trustee had refused to act in the trust, and to vest the settled land in them on the trusts aforesaid, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees, and the vesting of trust property (*k*) shall apply as if the persons aforesaid (in the order named) had been nominated by the settlement for the purpose of appointing new trustees thereof; and in default of any such appointment the infant by his next friend, may, at any time during the minority, apply to the court for the appointment of trustees of the settlement, and the court may make such order as it thinks fit, and if thereby trustees of the settlement are appointed, the settled land shall, by virtue of this Act, vest in the trustees as joint tenants upon the trusts aforesaid:

Provided that in favour of a purchaser a statement in the deed of appointment that the father or mother or both are dead or are unable or unwilling to make the appointment shall be conclusive evidence of the fact stated.

(v) If land to which an infant is beneficially entitled in possession for an estate in fee simple or for a term of years absolute (*c*) vests in the Public Trustee, but the Public Trustee does not become the trustee of the settlement, and trustees of the settlement are not appointed in his place, then, if and when the infant attains the age of twenty-one years, the land shall vest in him.

(2) The provisions of this paragraph shall extend to the legal estate in the settled land, except where such legal estate is, at or immediately after the commencement of this Act, vested in personal representatives, in which case this paragraph shall have effect without prejudice to the provisions of paragraph two of this Schedule.

(3) Where, at the commencement of this Act, any persons appointed under section sixty of the Settled Land Act, 1882 (*l*), have power to act generally or for any specific

purpose on behalf of an infant, then those persons shall, by virtue of this Act, become and be the trustees of the settlement. 15 Geo. 5, c. 18, sch. 2.

(4) Notwithstanding that the settled land is by virtue of this paragraph vested in the trustees of the settlement, they shall, at the cost of the trust estate, in accordance with this Act, execute a principal vesting deed declaring that the settled land is vested in them.

(5) This paragraph does not apply where an infant is beneficially entitled in possession to land for an estate in fee simple or for a term of years absolute jointly with a person of full age (for which case provision is made in the Law of Property Act, 1925) (*m*), but it applies to two or more infants entitled as aforesaid jointly.

(6) This paragraph does not apply where an infant would, if of full age, constitute the tenant for life or have the powers of a tenant for life together with another person of full age, but it applies to two or more infants who would, if all of them were of full age, together constitute the tenant for life or have the powers of a tenant for life.

(*a*) See sects. 4 and 117, sub-sect. 1 (xxxi), *ante*.
(*b*) See sect. 117, sub-sect. 1 (xxvi), *ante*.
(*c*) See sect. 5, *ante*.
(*cc*) It is not necessary that the whole of the settled land should be comprised in one principal vesting deed; different parcels may be comprised in separate deeds (*Re Clayton's Settled Estates*, [1926] 2 Ch. 279). A vesting deed is not necessary in the case of capital moneys (*ibid.*).
(*d*) See sect. 113, sub-sect. 5, *ante*.
(*e*) See sects. 12 and 113, sub-sect. 9, *ante*.
(*f*) See L. P. Act, 1925, s. 1, and Sched. 1, Part I., *ante*.
(*g*) Cf. sect 8, *ante*.
(*h*) See sect. 117, sub-sect. 1 (xxxi), *ante*.
(*i*) See *ibid.* (xxix).
(*k*) See Trustee Act, 1925, ss. 36, 40, *post*.
(*l*) See note to sect. 26, *ante*.
(*m*) See L. P. Act, 1925, Sched. 1, Part III. (2), *ante*.

THIRD SCHEDULE.

Section 83.

Part I.

Improvements, the costs of which are not liable to be replaced by instalments.

(i) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii) Bridges:

(iii) Irrigation; warping:

15 Geo. 5, c. 18, sch. 3.

(iv) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(v) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(vi) Groynes; sea walls; defences against water:

(vii) Inclosing; straightening of fences; re-division of fields:

(viii) Reclamation; dry warping:

(ix) Farm roads; private roads; roads or streets in villages or towns:

(x) Clearing; trenching; planting:

(xi) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not:

(xii) Farmhouses, offices, and outbuildings, and other buildings for farm purposes:

(xiii) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiv) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

(xv) Tramways; railways; canals; docks:

(xvi) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvii) Markets and market-places:

(xviii) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(xix) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(xx) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xxi) Reconstruction, enlargement, or improvement of any of those works:

(xxii) The provision of small dwellings, either by means of building new buildings or by means of the reconstruction, enlargement, or improvement of existing buildings, if that provision of small dwellings is, in the

opinion of the court, not injurious to the settled land or is agreed to by the tenant for life and the trustees of the settlement:

(xxiii) Additions to or alterations in buildings reasonably necessary or proper to enable the same to be let:

(xxiv) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof:

(xxv) The rebuilding of the principal mansion house on the settled land:

Provided that the sum to be applied under this head shall not exceed one-half of the annual rental of the settled land.

Part II.

Improvements, the Costs of which the Trustees of the Settlement or the Court may require to be replaced by Instalments.

(i) Residential houses for land or mineral agents, managers, clerks, bailiffs, woodmen, gamekeepers and other persons employed on the settled land, or in connexion with the management or development thereof:

(ii) Any offices, workshops and other buildings of a permanent nature required in connexion with the management or development of the settled land or any part thereof:

(iii) The erection and building of dwelling houses, shops, buildings for religious, educational, literary, scientific, or public purposes, market places, market houses, places of amusement and entertainment, gasworks, electric light or power works, or any other works necessary or proper in connexion with the development of the settled land, or any part thereof as a building estate:

(iv) Restoration or reconstruction of buildings damaged or destroyed by dry rot:

(v) Structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let:

(vi) Boring for water and other preliminary works in connexion therewith.

15 Geo. 5, c. 18, sch. 3.

Part III.

Improvements, the Costs of which the Trustees of the Settlement and the Court must require to be replaced by Instalments.

(i) Heating, hydraulic or electric power apparatus for buildings, and engines, pumps, lifts, rams, boilers, flues, and other works required or used in connexion therewith:

(ii) Engine houses, engines, gasometers, dynamos, accumulators, cables, pipes, wiring, switchboards, plant and other works required for the installation of electric, gas, or other artificial light, in connexion with any principal mansion house, or other house or buildings; but not electric lamps, gas fittings, or decorative fittings required in any such house or building:

(iii) Steam rollers, traction engines, motor lorries and moveable machinery for farming or other purposes.

See sects. 83—85, *ante*. The list of improvements in Part I. repeats that in S. L. A., 1882, s. 25, with the addition of (ii), (xxiii), (xxiv) and (xxv), taken from S. L. A., 1890, s. 13, and (xxii), which is similar to the provisions of the Housing, &c., Act, 1909, s. 7, repealed by this Act (cf. ss. 57 and 107 (2), *ante*). See also sect. 73, sub-sect. 1 (iv), *ante*.

The making of an absolute order under sect. 55 of the Improvement of Land Act, 1864, is not alone sufficient to show that the particular works are improvements within this Schedule (*Re Newton*, 61 L. T. 787); but the Commissioners' sanction may be evidence of this (*Re Verney*, [1898] 1 Ch. 508).

Even where the settlement authorised the application of income for the purpose, capital money was allowed to be applied for improvements (*Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Stamford*, 56 L. T. 484; *Re Thomas*, *Weatherall* v. *T.*, [1900] 1 Ch. 323). But where improvement powers in a settlement differed from those in the S. L. Acts, and the tenant for life resorted to the settlement powers, he was bound to continue payments prescribed by them (*Re Sudbury*, *Vernon* v. *V.*, [1893] 3 Ch. 74; see *Vine* v. *Raleigh*, [1891] 2 Ch. 25).

As to the application of capital money in building in particular, the general jurisdiction of the Court as to the expenditure of money on land has not been ousted by the S. L. Acts (*Re Montagu*, *Derbyshire* v. *M.*, [1897] 1 Ch. 686). But they afford a guide as to what expenditure should be allowed (*Re De Teissier*, [1893] 1 Ch. 153). As regards the general jurisdiction, the C. A. has laid down that in cases not amounting to salvage the Court cannot order money to be raised out of a settled estate and applied in pulling down and rebuilding houses on the estate (*Re Montagu*, *Derbyshire* v. *M.*, [1897] 2 Ch. 8). Orders have been made where a case of salvage was established (*Conway* v. *Fenton*, 40 Ch. D. 512; *Re Jackson*, *J.* v. *Talbot*, 21 Ch. D. 786; *Neill* v. *N.*, [1904] 1 I. R. 513; see *Hibbert* v. *Cooke*, 1 Sim. & Stu. 552; *Frith* v. *Cameron*, 12 Eq. 169; *Re Household*, 27 Ch. D. 553); and otherwise refused (*Re De Teissier*, *supra*; *Re De Tabley*, *Leighton* v. *L.*, [1896] W. N. 162; *Re Montagu*, *supra*; *Re Willis*, *W.* v. *W.*, [1902] 1 Ch. 15; *Re Legh*, [1902] 2 Ch. 274; *Re Hawker*, 66 L. J. Ch. 341). Questions, however, as to the application of capital money under the S. L. Acts must be determined entirely

by those Acts (*Re Gerard*, [1893] 3 Ch. 257; *Re Aldam* [1902] 2 Ch. 56). Cf. sect. 64, *ante*. 15 Geo. 5, c. 18, sch. 3.

The improvements authorised by the S. L. Acts were intended to be improvements calculated to render the land more remunerative (*Re Gerard*, [1893] 3 Ch. 262). The following improvements have been held authorised: A sea wall (*Re Bethlehem Hospitals*, 30 Ch. D. 541, clause (v); cf. sect. 55, sub-sect. 1 (ii), *ante*); garden wall (*Re Dunraven*, [1907] 2 Ch. 417, clause (vii)); fencing (*Re Verney*, [1898] 1 Ch. 508, clause (vii)); farm buildings (*Re Newton*, [1890] W. N. 24; 61 L. T. 787, clause (xii)); re-roofing farm buildings (*Re Verney*, [1898] 1 Ch. 512, clauses (xii), (xxi); see, however, *Re Newton, supra*); a carriage drive, but not a garden path (*Re Windham*, [1912] 2 Ch. 75; clause (ix)); fire extinguishment apparatus (*Re Dunraven*, [1907] 2 Ch. 417, clause (xiv)); water supply works (*Re Lytton*, 38 Ch. D. 20, clause (xiv); see, however, *Re Tucker*, [1895] 2 Ch. 468), and see sect. 54, *ante*; improvements at a mineral spring (*Re Hotchkin*, 35 Ch. D. 41, clauses (xiv), (xxi)); an estate office (*Re De Crespigny*, [1914] 1 Ch. 227), and a golf course (*Re De la Warr* 27 Times L. R. 534, but see *S. C.*, [1913] 1 Ch. 142, clause (xviii)); pumps for mines (*Re Mundy*, [1891] 1 Ch. 399), and additions to plant and equipment (*Re Hanbury's Estates*, [1913] 1 Ch. 50, clauses (xx), (xxi)); reconstructing the drainage of leasehold houses (*Re Thomas, Weatherall* v. *Thomas*, [1900] 1 Ch. 319; clauses (i) (xxi)); the complete drainage of a mansion-house (*Re Leconfield*, [1907] 2 Ch. 340; see *Re Houghton*, 30 Ch. D. 102; *Re Tucker*, [1895] 2 Ch. 468). See also as to drainage works executed under Public Health Acts upon freeholds, *Re Barney, Harrison* v. *B.* ([1894] 3 Ch. 562); and upon leaseholds, *Re Lever, Cordwell* v. *L.* ([1897] 1 Ch. 32); *Re Copland, Johns* v. *Carden* ([1900] 1 Ch. 326).

The following works were held not within sect. 25 of S. L. Act, 1882: Ordinary repairs (*Clarke* v. *Thornton*, 35 Ch. D. 307); *partial* drainage of mansion-house (*Re Tucker*, [1895] 2 Ch. 468); additions to a mansion to improve its appearance (*Re Gerard*, [1893] 3 Ch. 252); the building of stables (*ibid.*); a private chapel (*ibid.*); an agent's house (*ibid.*); see now Part II. (i); heating apparatus for a mansion (*Re Gaskell*, [1894] 1 Ch. 485); engine-house for electric light (*Re Leconfield*, [1907] 2 Ch. 340); see now Part III.; silos (*Re Broadwater*, 53 L. T. 745).

The jurisdiction under clause (xxiii) depends not on whether there is to be an immediate letting, but on whether there is a present intention to let as distinguished from an intention to occupy (*Stanford* v. *Roberts*, [1901] 1 Ch. 440; see *Re De Teissier, De T.* v. *De T.*, [1893] 1 Ch. 153; *Re Gerard*, [1893] 3 Ch. 260, 264, 267). Where the occupying tenant will quit unless additions are made, then additions are within the provision (*Re Calverley*, [1904] 1 Ch. 154). The additions and alterations referred to in the provision must be structural (*Re Clarke*, [1902] 2 Ch. 330). Additions and alterations in stables came within it (*Re Gerard*, [1893] 3 Ch. 260); and a new floor for the basement of a house (*Stanford* v. *Roberts, supra*); also a new roof and a change in the main entrance (*Re Gaskell*, [1894] 1 Ch. 485); and new drainage (*Standing* v. *Gray*, [1903] 1 I. R. 49). But not heating apparatus (*Re Gaskell, supra*); nor electric lighting installation (*Re Blagrave*, [1903] 1 Ch. 560; see *Re Leconfield*, [1907] 2 Ch. 340; *Re Gossling, G.* v. *Freake*, 87 L. T. 62, and see now Part III.); nor the lengthening of mill shafting (*Re Harrington*, 75 L. J. Ch. 460). The provision does not apply to the erection of a new building in place of an old building (*Re Leveson Gower*, [1905] 2 Ch. 95). See now Part II. (v). Clause (xxiii).

Clause (xxv) might apply to stables, &c. (*Re Gerard*, [1893] 3 Ch. 260, 261, 264, 268; see *Re Dunham Massey*, 22 Times L. R. 595); Clause (xxv).

15 Geo. 5, c. 18, sch. 3.

but did not apply to a distant laundry (*Re Dunraven*, [1907] 2 Ch. 417). As to what is "rebuilding," see *Re De Teissier*, [1893] 1 Ch. 158; *Re Walker*, [1894] 1 Ch. 189, where the rebuilding was executed before S. L. Act, 1890; *Re Wright*, 83 L. T. 159. The "annual rental of the settled land" includes the rent of all the land in the settlement (*Re Gerard*, [1893] 3 Ch. 268); and the income of any capital money (*Re De Teissier*, [1893] 1 Ch. 153); and the amount of the rent usually paid for a farm for the moment unoccupied (*Re Walker*, [1894] 1 Ch. 189); but not the rental value of settled land occupied by the tenant for life (*ibid.*). See, as to vacant land, *Re Windham*, [1912] 2 Ch. 75; mortgage interest, tithes, land tax, drainage, rates and rentcharges should not be deducted, but property tax should be deducted (*Re Windham, supra, contra.*, *Re Fife*, [1922] 2 Ch. 348). The cost of repairs should not be taken into account (*Re Kensington*, 21 Times L. R. 351). The provision was applied in *Re Legh*, [1902] 2 Ch. 274.

Section 118.

FOURTH SCHEDULE.

Retrospective Amendments of the Settled Land Acts, 1882 to 1890.

Shifting of incumbrances.

1. The power conferred by section five of the Settled Land Act, 1882, of shifting incumbrances on a sale, exchange, or partition, shall be deemed always to have authorised a charge on all or any part of the capital money or securities representing capital money arising from the transaction or otherwise subject to the settlement, and incumbrance in section five aforesaid shall be deemed always to have included any incumbrance, whether capable of being overreached on the exercise by the tenant for life of the powers conferred by the Settled Land Acts, 1882 to 1890, or not.

See sect. 69, *ante*.

Rate of interest on incumbrances.

2. In the case of an incumbrance affecting the settled land, or any part thereof, the tenant for life shall be deemed always to have had power, with the consent of the incumbrancer, to vary the rate of interest charged, and any of the other provisions of the instrument (if any) creating the incumbrance.

See sect. 70, *ante*.

Dedication for streets, open spaces, &c.

3.—(1) Section sixteen of the Settled Land Act, 1882, shall be deemed always to have had effect, as if the words "after or" had been inserted after the words "On or," and the words "or the development of the settled land, or any part thereof, as a building estate, or at any other

reasonable time" had been inserted after the words "building lease." 15 Geo. 5, c. 18, sch. 4.

(2) A tenant for life shall be deemed always to have had power—

(a) to enter into any agreement for the recompense to be made for any part of the settled land required for the widening of a highway under section eighty-two of the Highway Act, 1835, or otherwise; 5 & 6 Will. 4, c. 50.

(b) to consent to the diversion of any highway over the settled land under section eighty-five of that Act or otherwise; and

(c) to consent to any such road as is mentioned in section thirty-six of the Highway Act, 1862, being declared a public highway; 25 & 26 Vict. c. 61.

and any agreement or consent so made or given shall be deemed to have been as valid and effectual, for all purposes, as if made or given by an absolute owner of the settled land, provided that any money received or receivable in respect of such agreement or consent was or is paid to the trustees of the settlement or into court as capital money.

See sect. 56, *ante*.

Separate dealings with surface and minerals.

4. Subsection (1) of section seventeen of the Settled Land Act, 1882, shall be deemed always to have had effect, as if the words "or mining" had not been contained therein, and the words "or other authorised disposition" had been inserted therein after the word "lease."

See sect. 50, *ante*.

Powers on sale, &c.

5. On a sale or other disposition made before the commencement of this Act under the powers of the Settled Land Acts, 1882 to 1890, the powers conferred by subsection (1) of section forty-nine of this Act shall be deemed to have been exercisable.

Sale of timber and fixtures at a valuation.

6. In favour of a purchaser, a sale made before the commencement of this Act shall not be deemed to have been invalidated by reason only of any such stipulation as mentioned in subsection (2) of section forty-nine of this Act, provided that the amount of the valuation was paid to the trustees of the settlement or into court.

Raising of money.

7. Where under the Settled Land Acts, 1882 to 1890, power was given to raise money for any purpose, the power shall be deemed always to have included power to raise the money properly required for the payment of the costs of the transaction.

See sect. 71, sub-sect. 1, *ante*.

15 Geo. 5, c. 18, sch. 4.

8. A person entitled to an estate or interest, whether legal or equitable, in settled land shall in the circumstances mentioned in section twenty-two of this Act be deemed always to have been entitled to such estate and interest and to exercise such powers as in that section mentioned.

Provision where interest in settled land is restored.

Referential settlements.

9. Where a settlement has before the commencement of this Act taken effect by reference to another settlement, the trustees who would by virtue of section thirty-two of this Act be the trustees of the settlement by reference shall be deemed always to have been the trustees of such settlement.

Application of capital money.

10.—(1) Capital money arising under the Settled Land Acts, 1882 to 1890, shall be deemed always to have been capable of being applied in paying any increment value duty which a tenant for life had power to charge on the settled land under section thirty-nine of the Finance (1909-10) Act, 1910, and any reversion duty, and any costs and expenditure incurred by the tenant for life, or the trustees of the settlement, in connexion with any valuation under the said Act, or with the assessment and ascertainment of the amount of any increment value duty which a tenant for life had power to charge as aforesaid, or any reversion duty.

10 Edw. 7, c. 8.

See *Re Smith-Bosanquet*, 107 L. T. 191; *Re Maryon Wilson's Estates*, [1915] 1 Ch. 29. Reversion duty is no longer chargeable (Finance Act, 1920, s. 57).

(2) Capital money arising under the Settled Land Acts, 1882 to 1890, shall be deemed always to have been capable of being applied in any of the modes mentioned in paragraphs (xiii) to (xvi) inclusive of subsection (1) of section seventy-three of this Act as well as in the modes authorised by section twenty-one of the Settled Land Act, 1882.

As to capital arising otherwise than under the Settled Land Acts.

11. Where before the commencement of this Act any money arising from settled land, otherwise than under the Settled Land Acts, 1882 to 1890, which ought, as between the persons interested in the settled land, to have been treated as capital, has been invested, applied, or otherwise dealt with as if it had been capital money arising under those Acts, such investment, application, or other dealing shall be deemed to have been valid.

See sect. 81, *ante*.

Power for Public Trustee to give receipts

12. Where the Public Trustee or any other trust corporation was sole trustee of a settlement, the corporation shall, notwithstanding anything to the contrary contained in sections thirty-nine and forty-five of the Settled Land

Act, 1882, or the settlement, be deemed always to have had power to give receipts, accept notices, and otherwise act alone as trustee of the settlement for all the purposes of the Settled Land Acts, 1882 to 1890. 15 Geo. 5, c. 18, sch. 4. and accept notices.

See sects. 94, 95, 101, *ante*, and as to "trust corporation," p. 794. *ante*.

13.—(1) Section fifty of the Settled Land Act, 1882, shall be deemed always to have applied, notwithstanding that the estate or interest of the tenant for life under the settlement was not in possession when the assignment was made, or took effect by operation of law. Assignments of tenant for life's interest.

See sect. 104, sub-sect. 1, *ante*.

(2) The expression "assignee for value" in subsection (3) of section fifty of the Settled Land Act, 1882, shall be deemed always to have included persons deriving title under the original assignee.

See *ibid.*, sub-sect. 12.

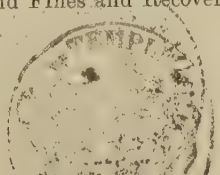
(3) A trustee or personal representative who is an assignee for value shall be deemed always to have had power to consent to the exercise by the tenant for life of his powers under the Settled Land Acts, 1882 to 1890.

See *ibid.*, sub-sect. 6.

(4) A person for the time being entitled in possession under the limitations of such settlement as is mentioned in subsection (7) of section one hundred and four of this Act shall in the circumstances in that subsection mentioned, be deemed always to have had power to consent to the exercise by the tenant for life of his powers under the Settled Land Acts, 1882 to 1890, and to bind by such consent all persons interested or to become interested under the settlement.

14. It shall be deemed always to have been sufficient to enable the fee simple to be disposed of or dealt with under the Settled Land Acts, 1882 to 1890, by the owner of a base fee as defined by the Fines and Recoveries Act, 1833, or fee determinable whether by limitation or condition, or the tenant for life thereof, if there were at the time of the transaction trustees for the purposes of those Acts or any of them of the settlement consisting of the instrument whereby the estate tail or determinable fee was created, and the capital money (if any) arising on such disposition or dealing was or is paid to such trustees or into court. As to base fees.

See sect. 20, sub-sect. 1 (iii), *ante*, and Fines and Recoveries Act, 1833, s. 1, *ante*, p. 307.



15 Geo. 5, c. 18, sch. 4.

Amendment of sect. 58, sub-sect. 1 (ix) of the Act of 1882.

15. Paragraph (ix) of subsection (1) of section fifty-eight of the Settled Land Act, 1882, shall be deemed always to have had effect as if in that paragraph—

(a) "trust" included an implied or constructive trust;

(b) "forfeiture" included cesser or determination by any means;

(c) after the words "expenses of management" there had been inserted the words "or to a trust for accumulation of income for any purpose";

but not so as to render invalid or prejudice any title or right acquired before the commencement of this Act.

See sect. 20, sub-sect. 1 (viii), *ante*.

Married woman, infant, &c.

16. Sections fifty-nine and sixty of the Settled Land Act, 1882, shall be deemed always to have applied, although the infant was a married woman; and section fifty-nine aforesaid shall be deemed always to have extended to any leasehold interest whether at a rent or not.

See sect. 26, *ante*.

Section 119.

FIFTH SCHEDULE.

Enactments repealed.

Session and Chapter.	Short Title.	Extent of Repeal.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Section thirteen.
40 & 41 Vict. c. 18.	The Settled Estates Act, 1877.	The whole Act.
44 & 45 Vict. c. 41.	The Conveyancing Act, 1881.	Subsections (1) (2) (3) and (7) of section forty-two.
45 & 46 Vict. c. 38.	The Settled Land Act, 1882.	The whole Act except section thirty (*n*).
47 & 48 Vict. c. 18.	The Settled Land Act, 1884.	The whole Act.
50 & 51 Vict. c. 30.	The Settled Land Acts (Amendment) Act, 1887.	The whole Act.
51 & 52 Vict. c. 42.	The Mortmain and Charitable Uses Act, 1888.	Subsections (6) and (9) of section four and sections five and nine, so far as those subsections and sections relate to assurances executed after the commencement of this Act.
52 & 53 Vict. c. 47.	The Palatine Court of Durham Act, 1889.	In section ten the words "The Settled Land Act, 1882, and the Settled Land Act, 1884."
53 & 54 Vict. c. 69.	The Settled Land Act, 1890.	The whole Act.

FIFTH SCHEDULE—*continued.*

Session and Chapter.	Short Title.	Extent of Repeal.
53 & 54 Vict. c. 70.	The Housing of the Working Classes Act, 1890.	Subsection (1) of section seventy-four.
8 Edw. 7, c. 36.	The Small Holdings and Allotments Act, 1908.	Subsections (4) and (5) of section forty.
9 Edw. 7, c. 44.	The Housing, Town Planning, &c., Act, 1909.	Section seven.
1 & 2 Geo. 5, c. 37.	The Conveyancing Act, 1911.	Section fourteen.
9 & 10 Geo. 5, c. 35.	The Housing, Town Planning, &c., Act, 1919.	Section thirty-one.
9 & 10 Geo. 5, c. 59.	The Land Settlement (Facilities) Act, 1919.	Section twenty-nine.
11 & 12 Geo. 5, c. 20.	The Tithe Annuities Apportionment Act, 1921.	Section two.
12 & 13 Geo. 5, c. 16.	The Law of Property Act, 1922.	Section three, so far as it relates to equitable interests and powers arising under a settlement; sections four, ten and thirteen so far as they relate to settled land; the first paragraph of subsection (4) of section seven; sections twelve and twenty-six; subsection (2) of section twenty-eight; sections thirty-five to forty-two; Part II. except such of the provisions thereof as are applied to universities and college estates so far as they apply thereto, and as respects section forty-three except so far as it relates to glebes; section eighty-six. Part II. of the First Schedule so far as it relates to settled land. The Third Schedule so far as it relates to settled land. The Fifth Schedule. In the Sixth Schedule paragraphs one and three and sub-paragraphs (1) (3) and (4) of paragraph four. In the Ninth Schedule Forms Nos. 1 to 4, inclusive, and No. 8 so far as it relates to settled land. The Tenth Schedule.
13 & 14 Geo. 5, c. 9.	The Agricultural Holdings Act, 1923.	Section twenty-one.
15 Geo. 5, c. 5.	The Law of Property (Amendment) Act, 1924.	Section four and the Fourth Schedule.

(*n*) S. L. Act, 1882, s. 30, extends the enumeration of improvements in sect. 9 of the Improvement of Land Act, 1864, so as to comprise all improvements authorised by S. L. Act, 1882.

Rules.

RULES UNDER THE SETTLED LAND ACT, 1882 (*o*).

Interpretation.

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

Application to be by summons.

2. All applications to the Court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the Judge, no further costs shall be allowed than would be allowed upon a summons.

An application for payment out of Court to S. L. Act trustees of a fund exceeding £1000, which had not arisen under the S. L. Acts was properly made by petition (*Re Torry-Hill, Pemberton* v. *P.*, [1909] 1 Ch. 468).

Forms.

3. The forms in the appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form 1 in the Appendix.

Service.

4. The persons to be served with notice of applications to the Court shall, in the first instance, be as follows:—

[Sects. 65, 79.] In the case of applications by the tenant for life under sects. 15 and 34, the trustees.

[Sect. 34.] In the case of applications under sect. 38, the trustees (if any), and the tenant for life if not the applicant.

[Sect. 93.] In the case of applications under sect. 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The Judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in Chambers (Appendix, Form 23) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the Judge directs. The Judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the Judge, any application is to be served (*p*).

(*o*) Sect. 119, sub-sect. 1 (b), *ante*, provides that rules, orders, and other instruments made under enactments repealed by the Act (which include the S. L. A., 1882, except s. 30—see note (*n*), *supra*) shall continue in force. References to the corresponding sections of the present Act are added in brackets.

(*p*) The Court dispensed with service on the children of the tenant for life, who were sufficiently represented by the trustees (*Re Brown*, 27 Ch. D. 186).

Rules.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the Judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. 8 in the Appendix. Title.

8. Any sale authorised or directed by the Court under the Act, shall be carried into effect out of Court, unless the Judge shall otherwise order, and generally in such manner as the Judge may direct. Sales.

9. Where the Court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the Judge unless the Judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorises any such lease or grant in any particular case, or where the Court authorises a lease under sect. 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the Judge at Chambers without directing the lease or grant to be settled by the Judge. Leases, &c., under sect. 10. (sect. 46). [Sect. 65.]

10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at Chambers for leave to pay the money into Court. (Appendix, Forms 9, 10, 11.) Payment into Court.

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into Court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into Court may contain directions for investment of the money on any securities authorised by sect. 21, sub-sect. 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent, to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises, is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the Court may be invested. [Sect. 73 (1).]

13. Money paid into Court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms 9, 10 and 11.)

14. Any person paying into Court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into Court.

15. In all cases not provided for by the Act or these rules, the existing practice of the court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act. Practice generally.

16. The fees and allowances to solicitors of the Court in respect of proceedings under the Act shall be those provided by the Rules of the Fees.

Rules.

Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the Court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to Court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after December 31, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX.

[For modifications of these forms, see Dan. Ch. Forms (6th ed.), 1194 *et seq.*]

Form I.—Title of Proceedings.

In the High Court of Justice, Chancery Division,
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other Judge before whom the application is to be heard.*]

In the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the will of dated *or, as the case may be*].

And in the matter of the Settled Land Act, 1882.

Form II.—Formal Part of Summons.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of *A. B.*, the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of *A. B.*, the tenant for life [*or as the case may be*] under the above-mentioned settlement an infant, by *X. Y.*, his testamentary guardian [*or*, guardian appointed by order dated the , *or* next friend].

Or, (*c.*) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or (*d.*) On the part of *G. H.*, the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

Or, (*e.*) On the part of *I. J.*, the purchaser of the lands [*or*, the timber upon the lands, or chattels, *or as the case may be*], settled by the above-mentioned settlement.

Or, (*f.*) On the part of *I. J.*, the lessee under a mining lease dated the , 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under sect. 18 [sect. 71] of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the day of 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons (if any) on whom the summons is to be served.*)

Form III.—Summons under Sect 10 [Sect. 46] for General Leasing Powers.

Title and formal parts as in Forms I. and II. *a* or *b*.

1. That the applicant [*or in the case of an infant* that the said *X. Y.* during the infancy of the said *A. B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to sect. 10 of the said Act be authorised from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sects. 7 to 9 of the said Act]. [Sects. 42, 44, 45.]

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

Form IV.—Summons under Sects. 10 [Sect. 46] or 15 (*q*) for Authority to grant a particular Lease where the Tenant for Life has entered into a Contract.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to sect. 10 [*or* 15] of the above-mentioned Act be approved, and that the said *A. B.* [*or X. Y.*] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

(*q*) Sect. 15 of S. L. Act, 1882, was repealed by S. L. Act, 1890. See sect. 65, *ante*, p. 921.

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Form V.—Summons under Sects. 10 [Sect. 46] or 15 (see note (*q*)) **for Authority to grant a particular Lease when no Contract has been entered into.**

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to sect. 10 [*or* 15] of the above-mentioned Act be approved, and that the applicant [*or* the said *X. Y.*] may be authorised to execute the same.

2. (*Add application for costs as in Form III.* 2.)

Form VI.—Summons under Sects. 15 (see note (*q*) *supra*), **35 [Sect. 66], or 37 [Sect. 67], for a Sale out of Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.**

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant [*or in the case of an infant* the said *X. Y.*] may be authorised to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or, if this Form is not applicable as in Form III.* 2.

Form VII.—Summons under Sects. 15 (see note (*q*) *supra*), **35 [Sect 66], or 37 [Sect. 67], for Sale by the Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.**

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III.* 2.)

Form VIII.—Affidavit verifying Title.

Title as in Form I.

I, , of , make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses

Forms.

[*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail, *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

2. (*If it is the fact.*) The said *A. B.* is an infant of the age of years or thereabouts.

3. *C. D.*, of , and *E. F.*, of , are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned Act].

Form IX.—Summons under Sect. 22 [Sect. 75] by Purchaser for Payment into Court of Purchase-money of Settled Land, Timber, or Chattels.

Title as in Form I.

Formal parts as in Form II. *e.*

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase-money of the said A. estate [*or as the case may be*] settled by the said settlement [*or* will, &c.].

2. That such directions may be given for the investment of the said sums when paid into Court, and the accumulation or payment of the dividends of the securities, representing the same, as the Court may think proper.

Form X.—Summons under Sect. 22 [Sect. 75] for Payment into Court by Lessee under a Mining Lease (see Sect. 11) [Sect. 47.]

Title as in Form I.

Formal parts as in Form II. *f.*

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement, dated the and made between [*or* the will, &c.] mineral rents under lease, dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending less £ the costs of payment into Court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into Court to the credit aforesaid, so much of the rents payable by him under the said lease as is by sect. 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into Court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement, during his life or until further order.

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Form XI.—Summons under Sect. 22 [Sect. 75] for Payment into Court by Mortgagee (see Sect. 18) [Sect. 71].

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into Court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or* the will, &c.] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2) (*r*).

(*r*) This reference is inaccurate; see, however, Form IX. 2, and Form X. 3.

Form XII.—Summons under Sect. 26, Sub-sect. 1 (*s*).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the land settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

(*s*) A scheme is not now required. See sect. 84, *ante*, p. 944.

Form XIII.—Summons under Sect. 26, Sub-sect. 2 (ii) [Sect. 84, Sub-sect. 2 (i)] for appointment of an Engineer or Surveyor.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M. N.* of engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of sect. 26, sub-sect. 2 (ii) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

Form XIV.—Nomination of an Engineer or Surveyor by the Trustees.

Title as in Form I.

We *C. D.* of and *E. F.* of the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of engineer [*or* surveyor], for the purposes of sect. 26, sub-sect. 2 (ii) [sect. 84, sub-sect. 2 (i)] of the said Act.

(Signed) *C. D.*
E. F.

Form XV.—Summons under Sect. 26, Sub-sect. 2 (iii) [Sect. 84, Sub-sect. 2 (ii)].

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *C. D.* and *E. F.* the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said Act.

2. (*Add application for costs as in Form III.* 2.)

Form XVI.—Summons under Sect. 26, Sub-sect. 3 [Sect. 84, Sub-sect. 3].

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of £ may be ordered to be raised out of the in Court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III.* 2.)

Form XVII.—Summons under Sect. 31 [Sect. 90].

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the Judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

Form XVIII.—Summons under Sect. 34 [Sect. 79] for application of Money paid for a Lease or Reversion.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to sect. 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the Court may think fit.

2. (*Add application for costs as in Form III.* 2.)

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Form XIX.—Summons under Sect. 38 [Sect. 34] for the Appointment of New Trustees.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.
2. (*Add application for costs as in Form III.* 2.)

See *Re Harrop*, 24 Ch. D. 719; *Re Simpson, Re Whitchurch*, [1897] 1 Ch. 256; Seton, 7th ed. 1773.

Form XX.—Summons under Sect. 44 [Sect. 93].

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).
2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

Form XXI.—Summons under Sect. 56 [Sect. 108] for Advice and Direction.

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the Judge on the following questions:—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts.*)

for the opinion, advice, and direction of the Judge on the facts and questions submitted by the statement left in my Chambers this day.

(*Add application for costs as in Form III.* 2.)

[Form XXII relates to Sect. 60 of S. L. A., 1882, not reproduced in the present Act (see Sect 26, *ante*).]

Form XXIII.—Summons for Directions as to Service of a Petition.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of , 18 .

TITLES OF SUMMONSES.

Where an Originating Summons is issued under the authority of an Act of Parliament giving summary jurisdiction or rules of Court, the summons must be entitled in a substantial matter (as the first title) and also in the matter of the particular Act as well as any general Act applicable—such as the Settled Land Acts, 1882 to 1890. (See Dan. Ch. Forms, 6th ed., 1191—2 and 1199—1200.)

THE APPORTIONMENT ACT, 1870.

33 & 34 Vict. c. 35.

An Act for the better Apportionment of Rents and other Periodical Payments. [1st August, 1870.]

33 & 34 Vict. c. 35, s. 1.

Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed in the eleventh year of the reign of his late Majesty King George the Second (chapter nineteen), and in the session of Parliament holden in the fourth and fifth years of his late Majesty King William the Fourth (chapter twenty-two), and in the session of Parliament held in the sixth and seventh years of his late Majesty King William the Fourth (chapter seventy-one), and in the session of Parliament held in the fourteenth and fifteenth years of her present Majesty (chapter twenty-five), and in the session of Parliament held in the twenty-third and twenty-fourth years of her present Majesty (chapter one hundred and fifty-four):

And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences:

Be it therefore enacted as follows:

Short title.

1.—This Act may be cited for all purposes as "The Apportionment Act, 1870."

Rents and periodical payments shall accrue from day to day and be apportionable in respect of time.

2.—From and after the passing of this act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

As to questions of apportionment arising before August 1, 1870, see the Apportionment Act, 1834; Shelford's R. P. Stat. 8th ed. 542; Tudor's L. C. Real Prop., 50—54, 4th ed.

The question frequently raised under the old law whether such a determination of the interest had occurred as would give rise to an apportionment (see *Shipperdson* v. *Tower*, 8 Jur. 485) cannot arise under the Act of 1870 (*Clive* v. *C.*, 7 Ch. 433).

The fact that interest on money lent is treated as accruing from day to day was applied as illustrating the question whether a mortgage debt payable at a future time was "producing income" in the

meantime within the meaning of a will (*Re Lewis, Davies* v. *Harrison*, [1907] 2 Ch. 303). **33 & 34 Vict. c. 35, s. 2.**

Application of Act,

Where the event on which apportionment is claimed occurs after the passing of the Act, the Act applies whether the instrument comes into operation before or after the Act (*Re Cline*, 18 Eq. 213). So held in the case of a will (*Lawrence* v. *L.*, 26 Ch. D. 795; *Patching* v. *Barnett*, 43 L. T. 50; see *Capron* v. *C.*, 17 Eq. 288; *Hasluck* v. *Pedley*, 19 Eq. 271; *Constable* v. *C.*, 11 Ch. D. 681; where codicils were executed after the Act; see, however, *Jones* v. *Ogle*, 8 Ch. 192). So held also in the case of an order of Court (*Re Thacker* (1873), W. N. 10).

The Act does not bind the Crown, against which accordingly there is no apportionment of annual sums payable as Crown debts (*Rochester* v. *Lefanu*, [1906] 2 Ch. 513). But the Act applies as between the estate of a testator and a person claiming under a specific gift of real estate (*Hasluck* v. *Pedley*, 19 Eq. 271; *Constable* v. *C.*, 11 Ch. D. 681) and of personal estate (*Re Griffith, Carr* v. *G.*, 12 Ch. D. 655; *Pollock* v. *P.*, 18 Eq. 329; *Re Oppenheimer, O.* v. *Boatman*, [1907] 1 Ch. 399). Similarly the Act applies between tenant for life and remainderman (*Re Cline*, 18 Eq. 213; *Pollock* v. *P.*, *ibid.* 329; *Re Muirhead, M.* v. *Hill*, [1916] 2 Ch. 181). For cases where the testator has given directions against apportionment, see sect. 7, *post*.

as between vendor and purchaser,

As between vendor and purchaser the words of sect. 2 seem wide enough to give rise to an apportionment of rent when not provided for by the contract. See, however, *Re Keillor* (I. R. 6 Eq. 329), where a purchaser of land was held liable to all rent payable after the purchase; and *Black* v. *Homersham* (4 Ex. D. 24), where a purchaser of shares was held entitled to all dividends declared after the contract. As to the apportionment of expenses, the rule which in the absence of express stipulation applies between vendor and purchaser is stated, *Re Highett and Bird*, [1902] 2 Ch. 217. See further Dart, V. & P. 7th ed.

Where a condition on a sale of leaseholds provided that the purchaser should have possession on a certain day, all outgoings up to that day being cleared by the vendors, the vendors were held bound to pay an apportioned part of the current rent (*Lawes* v. *Gibson*, 1 Eq. 135).

Where land in occupation of a tenant was conveyed, it was held under the old law that while the conveyance did not pass arrears of rent previously due (*Flight* v. *Bentley*, 7 Sim. 151), it passed all the grantor's interest in rent not then due (*Flinn* v. *Callow*, 1 M. & Gr. 589). See *Plews* v. *Samuel*, [1904] 1 Ch. 464.

as between landlord and tenant.

As between landlord and tenant, where, during a quarter, a succession occurs among the persons entitled to the reversion, the case falls within the proviso at the end of sect. 4, and only one action can be brought for the entire rent. But where the succession occurs among the persons entitled to the term, the reversioner can sue each person liable for his proportion of rent, but for no greater sum. So held where the trustee of a bankrupt tenant entered and subsequently assigned over during a current quarter (*Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 40 L. T. 558; *Hopkinson* v. *Lovering*, 11 Q. B. D. 92). The Act, in fact, not only affects the rights of recipients of rent, but apportions the liability to pay rent (*Re Howell*, [1895] 1 Q. B. 847; *Rochester* v. *Lefanu*, [1906] 2 Ch. 513; see *Re Leake*, [1902] 2 I. R. 339; *Glass* v. *Patterson*, [1902] 2 I. R. 660). Where a tenant is evicted by title paramount during a quarter, the Act applies, and the tenant is liable for an apportioned part up to eviction (*Elvidge* v. *Meldon*, 24 L. R. Ir. 91; see *Hartcup* v. *Bell*, 1 Cab. & El. 19). And the same rule seems to obtain where a landlord lawfully evicts

33 & 34 Vict. c. 35, s. 2.

his own tenant (see *Ellis* v. *Rowbotham*, [1900] 1 Q. B. 743, and sect. 3 of the Act; see formerly *Oldershaw* v. *Holt*, 12 Ad. & E. 590); but not where the eviction is wrongful (*Clapham* v. *Draper*, 1 Cab. & El. 484). Where rent was payable in advance, it was not apportioned, it being said that the Act was only intended to apply to sums which are accruing, but have not accrued, due when the apportionment is said to be required (*Ellis* v. *Rowbotham*, [1900] 1 Q. B. 744).

On the construction of a will, a direction to forgive a tenant all rents "due and owing" at the testator's death, was held to relate to rent not up to the death, but only to the last rent day before the death (*Re Lucas, Parish* v. *Hudson*, 54 L. T. 30; but see *Re Ford, Myers* v. *Molesworth*, [1911] 1 Ch. 455, where a bequest of all arrears of rents due at the death was held to mean apportioned gross rents up to the date of death); and it has been held that rent cannot, before it has become payable, be attached under a garnishee order (*Barnett* v. *Eastman*, 67 L. J. Q. B. 517). On the other hand, where a tenant becomes bankrupt during a quarter, rent up to the adjudication is rent "accrued due" within sect. 42 of the Bankruptcy Act, 1883 (see now B. Act, 1914, s. 35); and the landlord upon the expiry of the quarter may distrain (*Re Howell*, [1895] 1 Q. B. 844; see *Re Wilson*, 62 L. J. Q. B. 628).

In the case of a company, a claim for rent for the expired portion of a current quarter is not a debt on which before the end of the quarter a winding-up petition can be founded (*United Club Co.*, 60 L. T. 665). Where a company holding a lease is wound up, the lessor may prove for a proportionate part of the rent up to the winding-up order or resolution as if the rent grew due from day to day (Winding-up Rules, 1909, rule 96; see *South Kensington Stores*, 17 Ch. D. 161; *Shackell* v. *Chorlton*, [1895] 1 Ch. 378).

The right specially conferred by the Landlord and Tenant Act, 1851, s. 1, upon a remainderman to an apportioned part of the rent under a lease granted by a tenant for life seems now to belong to him under the general provisions of this Act.

In the ordinary case of rents issuing out of land, a mortgagee entering is entitled to rents then accrued due, but not paid over. And this right has not been interfered with by the Act (*Anderson* v. *Butler's Wharf*, 48 L. J. Ch. 824).

In the case of an annuity charged on the land of a tenant for life and secured by a term, it was held under the old law that, unless the annuitant had entered into possession, he could not claim arrears of his annuity out of apportioned rents belonging to the tenant for life's estate (*Paget* v. *Anglesey*, 17 Eq. 283).

Payments apportionable.

Under this Act an apportionment has been made of rents (*Capron* v. *C.*, 17 Eq. 288; *Roscingrave* v. *Burke*, Ir. R. 7 Eq. 186; see *South Kensington Stores*, 17 Ch. D. 161; *Ellis* v. *Rowbotham*, [1900] 1 Q. B. 740); annual sums payable by a bishop in commutation of tenths (*Rochester* v. *Lefanu*, [1906] 2 Ch. 513); dividends on stock (*Pollock* v. *P.*, 18 Eq. 329); dividends payable by a company registered under the Cos. Act, 1862 (*Re Lysaght, L.* v. *L.*, [1898] 1 Ch. 115); an occasional bonus on shares in an unincorporated life assurance society which was held to be a public company within sect. 5 (*Re Griffith, Carr* v. *G.*, 12 Ch. D. 655); a salary (*Treacy* v. *Corcoran*, Ir. R. 8 C. L. 40); but not of profits arising from a newspaper (*Re Cox*, 9 Ch. D. 159); nor of the profits of a private trading partnership (*Jones* v. *Ogle*, 8 Ch. D. 192); nor of parish rates (*Re Wearmouth Co.*, 19 Ch. D. 640); nor an annuity payable in advance (*Trevalion* v. *Anderton*, 66 L. J. Q. B. 489).

The Act was held not to apply to income given by a will so long

as the beneficiary should not attempt to assign or charge it (*Re Jenkins, Williams* v. *J.*, [1915] 1 Ch. 46). 33 & 34 Vict. c. 35, s. 2.

Where directors of a company were under the articles entitled to "receive by way of remuneration in each year" £5,000, they were only entitled in respect of a complete year, and the Act did not apply (*Salton* v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775; see *Re Shaws Bryant & Co.*, [1901] W. N. 124; *Re McConnell*, [1901] 1 Ch. 728; *Inman* v. *Ackroyd*, [1901] 1 Q. B. 613; see *Moriarty* v. *Regents, &c., Co.*, [1921] 2 K. B. 766).

No apportionment of income will be made as between tenant for life and remainderman with reference to the variation in price of stock arising from the distance of a period of sale or investment from the day of payment of dividend (*Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitbred*, 1 Eq. 266; *Re Clarke, Barker* v. *Perowne*, 18 Ch. D. 160). Where, after the death of a life tenant, stock was sold "cum div." for distribution, the life tenant's estate was not entitled under this Act to receive out of the price anything in respect of the dividend (*Bulkeley* v. *Stephens*, [1896] 2 Ch. 241). Where, however, capital money was invested in stock on which at the date of purchase a dividend had been earned and declared but not paid, the tenant for life was not entitled to it (*Re Peel*, [1910] 1 Ch. 389).

The apportionment contemplated by the above Act is one in respect of time. As to the apportionment (in a different sense) of rent service and rentcharges in certain cases, see Law of Prop. Act, 1925, ss. 70 and 140, *ante*, pp. 662, 727.

Apportioned part of rent, &c., shall be payable when the next entire portion shall have become due.

3.—The apportioned part of any such rent, annuity, dividend or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Persons shall have the same remedies for recovering apportioned parts as for entire portions.

Proviso as to rents reserved in certain cases.

4.—All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or con-

33 & 34 Vict. c. 35, s. 4.

tinuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity.

See *Swansea Bank* v. *Thomas*, 4 Ex. D. 94, *ante*, p. 1015.

Interpretation of terms

5.—In the construction of this Act—

The word "rents" includes rent-service, rent-charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

The word "annuities" includes salaries and pensions.

The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies (*a*), divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made (*b*), but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

(*a*) See the note to sect. 2; and in particular *Jones* v. *Ogle*, 8 Ch. 192; *Re Griffith, Carr* v. *G.*, 12 Ch. D. 655. The words include companies registered under the Companies Act, 1862 (*Re Lysaght, L.* v. *L.*, [1898] 1 Ch. 115); and companies registered as "private companies" under the Companies (Consolidation) Act, 1908, s. 121 (*Re White, Theobald* v. *W.*, [1913] 1 Ch. 231). To be within the definition a payment must be declared or expressed to be made for or in respect of some definite period (*Re Jowitt, J.* v. *Keeling*, [1922] 2 Ch. 442).

(*b*) It was held under the old law that for the purpose of apportionment a dividend was to be taken as payable on the day on which it was actually payable, and not on the day on which it was declared (*Hartley* v. *Allen*, 27 L. J. Ch. 621). The Act does not apply to cumulative dividends (*Re Wakley, W.* v. *Vachell*, [1920] 2 Ch. 205).

Act not to apply to policies of assurance:

6.—Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

nor where stipulation made to the contrary.

7.—The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.

15 Geo. 5, c. 35, s. 7.

It was held under the similar words of sect. 3 of Apportionment Act, 1834, that inference from the whole tenor and context of the will was not sufficient to exclude the operation of the Act (*Tyrrell* v. *Clark*, 2 Drew. 86). But an express gift of the income of property will have that effect (*Re Cleveland, Wolmer* v. *Forester*, [1894] 1 Ch. 165; *Re Lysaght, L.* v. *L.*, [1898] 1 Ch. 115; *Re Meredith, Stone* v. *M.*, 67 L. J. Ch. 409; 78 L. T. 492; *Roseingrave* v. *Burke*, 7 Ir. R. Eq. 190; see *Jones* v. *Ogle*, 8 Ch. 115). But a power to postpone a sale with a direction that income shall meanwhile be applied as income is not a "stipulation" (*Re Edwards, Newbery* v. *E.*, [1918] 1 Ch. 142).

It seems that the "express stipulation" must be contained in the will or other instrument of gift. It was not found in the articles of a company in which the testator held shares (*Re Oppenheimer, O.* v. *Boatman*, [1907] 1 Ch. 399).

TRUSTEES.

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I.—Trustee Act, 1925. 15 Geo. 5, c. 19.

An Act to consolidate certain enactments relating to trustees in England and Wales. (*a*) [9th April, 1925.]

Part I.

Investments.

Authorised investments.

1.—(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

(a) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom;

(b) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section thirty-three of the Finance Act, 1896;

56 & 57 Vict. c. 28.

(c) In the stock of the Bank of England or the Bank of Ireland;

(d) In India Seven, Five and a half, Four and a half, Three and a half, Three and Two and a half per cent. stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

(e) In any securities the interest of which is for the time being guaranteed by Parliament;

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District, or in metropolitan water stock;

(g) In the debenture or rentcharge, or guaranteed or

preference, stock of any railway company in the United Kingdom incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum on its ordinary stock; 15 Geo. 5, c. 19, s. 1.

(h) In the stock of any railway or canal company in the United Kingdom whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in paragraph (g) of this subsection, either alone or jointly with any other railway company;

(i) In the debenture stock of any company owning or operating a railway in India the interest in sterling on which is paid or guaranteed by the Secretary of State in Council of India;

(j) In the "B" annuities of the Eastern Bengal, the East Indian, the Scinde Punjaub and Delhi, Great Indian Peninsula and Madras Railways, or in any securities substituted therefor, and any like annuities which may at any time after the commencement of this Act be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company;

(k) In the stock of any company owning or operating a railway in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed;

(l) In the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five per centum on its ordinary stock;

(m) In nominal or inscribed stock issued, or to be issued, under the authority of any Act of Parliament or Provisional Order, by the corporation

15 Geo. 5, c. 19, s. 1.

of any municipal borough in the United Kingdom having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council in the United Kingdom;

(n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded eighty per centum of the amount authorised by law to be levied;

63 & 64 Vict. c. 62.

(o) In any stocks, funds, or securities authorised under the Colonial Stock Act, 1900, or any Act extending the same, but subject to any restrictions thereby imposed;

9 & 10 Geo. 5, c. 99.

(p) In any local bonds issued under the Housing (Additional Powers) Act, 1919, and mortgages of any fund or rate granted after the passing of that Act under the authority of any Act or Provisional Order by a local authority (including a county council) which is authorised to issue local bonds under that Act;

(q) In any stock or securities issued in respect of any loan raised by the Government of Northern Ireland;

(r) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the court;

and may also from time to time vary any such investment.

(2) For the purposes of this section—

(a) the London and North Eastern Railway Company, the Southern Railway Company, the London Midland and Scottish Railway Company, and the Great Western Railway Company shall each be treated as if it were a railway company in Great Britain incorporated by a special Act of Parliament which had in each of the ten years immediately before the date of amalgamation paid a dividend at a rate of not less than three per centum on its ordinary stock, and, for the

purposes of this provision the date of amalgamation means— 15 Geo. 5, c. 19, s. 1.

(i) as respects the London and North Eastern Railway Company and the Southern Railway Company the first day of January, nineteen hundred and twenty-three; and

(ii) as respects the London Midland and Scottish Railway Company and the Great Western Railway Company the first day of July, nineteen hundred and twenty-three;

(b) a railway or canal company in Northern Ireland whose system is situate partly in Northern Ireland and partly in the Irish Free State shall not be deemed to be a railway or canal company in Northern Ireland.

(*a*) This Act replaces, with alterations and additions, the Trustee Act, 1893 (56 & 57 Vict. c. 53). As to limitation of time in actions against trustees, see the Trustee Act, 1888, pp. 283 *et seq.*, *ante*. As to the application of the present Act, see sect. 69, sub-sect. 1, *post*.

This section replaces Trustee Act, 1893, s. 1, with alterations noted *infra*.

Sub-sect. 1.

The corresponding clause of Trustee Act, 1893, s. 1 (1), gave the power of investment, "unless expressly forbidden by the instrument, if any, creating the trust," and similar provisions were contained in other sections of the Act.

Effect of provisions in the trust document.

Sect. 69, sub-sect. 2 of the present Act, *post*, provides that the powers conferred by the Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument. Under the Trustee Act, 1893, where there was an express prohibition of a particular investment by the settlor, the Court would not sanction it (*Ovey* v. *O.*, [1900] 2 Ch. 524). But such a prohibition was not inferred from a direction to keep trust funds and invest them in a particular way (*Re Burke*, *B.* v. *B.*, [1908] 2 Ch. 248). Apart from emergency, the Court would not sanction an unauthorised change of investment merely on the ground of advantage (*Re Tollemache*, [1903] 1 Ch. 955), but see now sect. 57 and note, *post*. Where a testator directed his trustees to set apart as an annuity fund any investment authorised by his will, the Trust Investment Act, 1889, did not enable the trustees to set apart investments authorised by that Act (*Re Owthwaite*, *O.* v. *Taylor*, [1891] 3 Ch. 934).

As to a trustee's liability for continuing an investment which has ceased to be authorised, see sect. 4, *post*.

Who are trustees.

Trustees are defined in sect. 68, *post*, p. 1107. A corporation incorporated for a charity was a trustee of the funds within the Trustee Investment Act, 1889 (*Re Manchester Royal Infirmary*, 43 Ch. D. 420; see *Re Clergy Orphan Corporation*, 18 Eq. 280). The funds of a building society may be invested in any trustee investments (Building Societies Act, 1894, s. 17; see, before that Act, *Re National, &c., Building Society*, 43 Ch. D. 431).

(a) "Public stocks of the Bank of England" in a will was held to mean stocks forming part of the National Debt (*Re Hill*, *Fettes*

15 Geo. 5, c. 19, s. 1.

v. *H.*, [1914] W. N. 132). "United Kingdom" means Great Britain and Northern Ireland (sect. 68, sub-sect. 20, *post*); and see sub-sect. 2 (b), *supra*.

Real securities.

(b) As to investments on "real securities," terms of years do not as a general rule answer that description (*Re Boyd*, 14 Ch. D. 627). Under the Trust (Scotland) Amendment Act, 1884, bonds of the Greenock Harbour Trustees were held not to be "real or heritable securities" (*Hutton* v. *Annan*, [1898] A. C. 289). Investments by trustees on real securities are further dealt with in sects. 5, 8, and 9, *post*; Lewin, 12th ed. 372. As to "charge by way of legal mortgage," see L. P. Act, 1925, s. 87, *ante*. The Finance Act, 1896, s. 33, gives a charge to an owner who redeems land tax on land.

Indian investments.

(d) (i) and (k) The investments mentioned in paragraphs (d) (i) and (k) of sect. 1 of the Trustee Act, 1893, and in the corresponding provisions of any enactment replaced by it, are to be deemed always to have included investments mentioned in paragraphs (d) (i) and (k) of the present sub-section (Sched. 1 (1), *post*). The paragraphs in the Trustee Act, 1893, s. 1, were as follows:—

"(d) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

"(i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

"(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:"

(f) Metropolitan water stock is added (see Metropolis Water Act, 1902 (2 Edw. 7, c. 41)).

Companies.

(l) As regards provisions in trust documents for investing in the securities of companies, the words "company incorporated by Act of Parliament" included a company incorporated by charter granted in pursuance of an Act of Parliament (*Elve* v. *Boyton*, [1891] 1 Ch. 501; see *Wakefield* v. *W.*, [1907] 2 K. B. 270); but not a company registered under the Companies Acts (*Re Smith, Davidson* v. *Myrtle*, [1896] 2 Ch. 590). On the other hand, the words "railway or other public company carrying on business in the United Kingdom" included companies registered under the Companies Acts (*Rickett* v. *Sharp*, 45 Ch. D. 28; see *Re Lysaght, L.* v. *L.*, [1898] 1 Ch. 115); and the words "company in the United Kingdom" included a company so registered and having its head office (where its directors met) in England, although its operations were abroad (*Re Hilton, Gibbes* v. *Hale-Hinton*, [1909] 2 Ch. 548). In one case the words "corporation or company" were not confined to corporations or companies formed or registered in the United Kingdom (*Re Stanley, Tennant* v. *S.*, [1906] 1 Ch. 131). In another case the words "railway or other public company" were on the context so confined (*Re Castlehow, Lamonby* v. *Carter*, [1903] 1 Ch. 352; cf. *Re White*, quoted *ante*, p. 1018, and *Dunbar* v. *Harvey*, [1913] 2 Ch. 530). A power to invest in preference stock did not authorise investment in preference shares (*Re Willis, Spencer* v. *W.*, [1911] 2 Ch. 563).

Corporation stock.

(m) As to investments in stock issued by the corporation of a borough, the condition as to population was satisfied, having regard to an order of the Local Government Board (*Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446).

(o) By the Colonial Stock Act, 1900, s. 2, trustees may invest in any Colonial stock which is registered in the United Kingdom in accordance with the Colonial Stock Acts, 1877 and 1892, as amended by the Act of 1900, and with respect to which there have been observed such conditions (if any) as the Treasury may prescribe. By the same section the restrictions of sect. 2, sub-sect. 2 of the Trustee Act, 1893, are applied to Colonial stocks, and provision is made for a list to be kept by the Treasury of Colonial stocks in respect of which the provisions of the Act have been complied with. A power to invest in stocks of a "colony or dependency" did not authorise investment in stocks issued by Canadian provinces (*Re Maryon-Wilson*, [1912] 1 Ch. 55).

15 Geo. 5, c. 19, s. 1.

Colonial stocks.

The word "securities" in the above section includes (under sect. 68, *post*, p. 1106) stocks, funds and shares; and (in relation to payments into Court) includes "Government securities and any security of any foreign state, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom and all stock funds and effects" (35 & 36 Vict. c. 44, s. 3).

Securities.

In trust documents the word "securities" has a well-defined primary meaning of "money secured on property" (*Re Rayner, R.* v. *R.*, 89 L. T. 85, note). It has also a secondary meaning, as a synonym for "investments" (*S. C.*, [1904] 1 Ch. 189; see also *Re Hutchinson, Crispin* v. *Hadden*, 88 L. J. Ch. 352). And where it was used in such secondary meaning, a power to vary "securities" authorised trustees to re-sell purchased land (*Re Gent and Eason*, [1905] 1 Ch. 386); or purchased ground rents (*Re Tapp and London Dock Co.*, [1905] W. N. 85; see as to a power to invest on ground rents, *Re Mordan, Legg* v. *M.*, [1905] 1 Ch. 515).

(r) Cash under the control of or subject to the order of the Court may, under R. S. C. Ord. 22, r. 17, sub-sect. 1, and rule 17a, be invested in the following stocks, funds, or securities, namely:—

Two and Three-quarters per Cent. Consolidated Stock (to be called after April 5, 1903, Two and a Half per Cent. Consolidated Stock):
Consolidated Three Pounds per Cent. Annuities:
Reduced Three Pounds per Cent. Annuities:
Two Pounds Fifteen Shillings per Cent. Annuities:
Two Pounds Ten Shillings per Cent. Annuities:
Local Loans Stock under National Debt and Local Loans Act, 1887:
War Three and a Half per Cent. Stock:
War Four and a Half per Cent. Inscribed Stock and any other security issued under the authority of Parliament and charged on the Consolidated Fund:
India Two and a Half per Cent. Stock:
Exchequer Bills:
Bank Stock:
India Three and a Half per Cent. Stock:
India Three per Cent. Stock:
Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment:
Stocks of Colonial Governments guaranteed by the Imperial Government, or in respect of which the provisions of the Colonial Stock Act, 1900, and of sect. 2, sub-sect. 2 of the Trustee Act, 1893, (see now sect. 2, sub-sect. 1, *post*), are being complied with:

15 Geo. 5, c. 19, s. 1.

Mortgage of freehold and copyhold estates respectively in England and Wales:

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.:

Three per Cent. Metropolitan Consolidated Stock:

Two and a Half per Cent. Metropolitan Consolidated Stock:

Two and a Half per Cent. and Three per Cent. London County Consolidated Stock:

London County Council Three and a Half per Cent. Stock:

Registered London County Five and Three-quarters per Cent. Bonds:

Five per Cent. London County Consolidated Stock:

Three and a Half per Cent. Loan of the Corporation of London (Bridges):

Inscribed Two and a Half per Cent. Debenture Stock issued by the Corporation of London, and secured by a trust deed dated June 24, 1897:

Inscribed Three per Cent. Stock issued by the Corporation of London, and secured by a trust deed dated June 1, 1905:

Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Northern Ireland having for ten years next before the date of investment paid a dividend on ordinary stocks or shares:

Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Northern Ireland guaranteed by railway companies which own railways in Great Britain or Northern Ireland which have for ten years next before the date of investment paid a dividend on their ordinary stock or shares:

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, or under the Isle of Man Loans Act, 1880, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of the investment:

Guaranteed land stock issued under 54 & 55 Vict. c. 48:

Guaranteed Two and Three-quarters per Cent. Stock issued under 3 Edw. 7, c. 37:

Guaranteed Three per Cent. Stock issued under 9 Edw. 7, c. 42.

Power to vary investments.

As to the questions arising before the Trustee Act, 1893, with regard to varying investments, see *Hume* v. *Lopes*, [1892] A. C. 112.

Sub-sect. 2 (a).

See the Railways Act, 1921 (11 & 12 Geo. 5, c. 55), for the names of the railway companies "grouped" by that Act in the four companies named in this sub-section.

Purchase at a premium of redeemable stocks; change of character of investment.

2.—(1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

Provided that, in the case of any stock mentioned or referred to in paragraphs (g), (i), (k), (l), (m), (o), (p) and (q) of subsection (1) of section one of this Act, which is liable to be redeemed at par or at some other fixed rate, a trustee shall not be entitled to purchase the stock—

(a) at a price exceeding fifteen per centum above par or such other fixed rate; nor

(b) if the stock is liable to be so redeemed as aforesaid within fifteen years of the date of purchase, at a price exceeding its redemption value. 15 Geo. 5, c. 19, s. 2.

(2) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act, or any statute replaced by this Act.

Re-enacts Trustee Act, 1893, s. 2, which applied to the stocks named in paragraphs (g) (i) (k) (l) and (m).

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument, if any, creating the trust or by statute with respect to the investment of the trust funds. Discretion of trustees.

Re-enacts Trustee Act, 1893, s. 3, adding "or direction" and "or by statute." See as to the discretion of trustees, Lewin, 12th ed. 767 *et seq.*

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law. Power to retain investment which has ceased to be authorised.

Re-enacts Trustee Act, 1893, Amendment Act, 1894, s. 4.

That section was not retrospective so as to protect a trustee in the case of his having improperly retained an investment prior to the passing of the Act (*Re Chapman, Cocks* v. *Chapman*, [1896] 1 Ch. 323). As to the duties of trustees in regard to retaining securities, especially mortgage securities, see *S. C.*, [1896] 2 Ch. 763. It would seem that there is no duty on the part of trustees who continue to hold mortgages to make periodical inspections of the properties (*Shaw* v. *Cates*, [1909] 1 Ch. 409).

See also *Re Godwin, G.* v. *G.*, 87 L. J. Ch. 645 (retaining promissory note), and as to mortgages, sect. 8 and notes, *post.*

5.—(1) A trustee having power to invest in real securities may invest and shall be deemed always to have had power to invest— Enlargement of powers of investment.

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864. 27 & 28 Vict. c. 114.

(2) A trustee having power to invest in real securities may accept the security in the form of a charge by way of legal mortgage, and may, in exercise of the statutory power, convert an existing mortgage into a charge by way of legal mortgage.

15 Geo. 5, c. 19, s. 5.

(3) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may invest in the debenture stock of a railway company or such other company as aforesaid.

(4) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

38 & 39 Vict. c. 83.

(5) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

43 & 44 Vict. c. 8.

(6) A trustee having a general power to invest trust money in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

28 & 29 Vict. c. 78.

This section (except sub-sect. 2, as to which see L. P. Act, 1925, s. 87, *ante*), re-enacts T. A., 1893, s. 5, omitting words referring to express prohibition in the trust instrument (see sect. 69, sub-sect. 2, *post*, p. 1109). Sect. 5, sub-sect. 3 of T. A., 1893, represented by sub-sect. 4 of the present section, was held to be an enlargement of express powers, and not to enlarge the statutory power given by sect. 1, sub-sect. 1 (g) (*Re Tattersall, Topham* v. *Armitage*, [1906] 2 Ch. 399; see sect. 68, sub-sect. 5, *post*, providing that "instrument" includes Act of Parliament, which replaces sect. 50 of Trustee Act, 1893). Trustee Act, 1893, s. 5 (3), however, referred to prohibition "in the instrument authorising the investment." Sect. 69, sub-sect. 2, *post*, refers to "the instrument, if any, creating the trust."

Power to invest in land subject to drainage charges.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

10 & 11 Vict. c. 32.

Re-enacts Trustee Act, 1893, s. 6.

Investment in bearer securities.

7.—(1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to bearer which, if not so payable, would have been authorised investments:

Provided that securities to bearer retained or taken as an investment by a trustee (not being a trust corporation)

shall, until sold, be deposited by him for safe custody and collection of income with a banker or banking company. 15 Geo. 5, c. 19, s. 7.

A direction that investments shall be retained or made in the name of a trustee shall not, for the purposes of this subsection, be deemed to be such an express prohibition as aforesaid.

(2) A trustee shall not be responsible for any loss incurred by reason of such deposit, and any sum payable in respect of such deposit and collection shall be paid out of the income of the trust property.

Trustee Act, 1893, s. 7, forbade trustees, unless authorised by the terms of the trust, to apply for or hold certificates to bearer issued under the authority of (a) the India Stock Certificate Act, 1863; (b) the National Debt Act, 1870; (c) the Local Loans Act, 1875; (d) the Colonial Stock Act, 1877. As to "securities payable to bearer," see sect. 68, sub-sect. 13, *post*, and for "trust corporation," p. 794, *ante*. See also as to deposit of documents and securities, sects. 21, 30, *post*; and as to paying trust money into a bank, sect. 11, *post*.

Loans and investments by trustees not chargeable as breaches of trust.

8.—(1) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—

(a) that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and

(b) that the amount of the loan does not exceed two third parts of the value of the property as stated in the report; and

(c) that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security, of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted

15 Geo. 5, c. 19, s. 8.

be such as a person acting with prudence and caution would have accepted.

(4) This section applies to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Act.

Sects. 8 and 9 re-enact Trustee Act, 1893, ss. 8 and 9, which were re-enactments of Trustee Act, 1888, ss. 4 and 5. "Properly" is substituted for "lawfully" in sect. 8, sub-sect. 1.

Before the Trustee Act, 1888, rules had been laid down as to the minimum margins which a prudent lender would require for his protection, viz., that he should not advance more than two-thirds of the value on agricultural land, or more than one-half on house or trade property. The above section, which has modified these rules, involves the principle that, within the two-thirds rule, a prudent lender may, as to the amount of an advance, rely on expert advice. But if the property is liable to deteriorate a larger margin should be required (*Shaw* v. *Cates*, [1909] 1 Ch. 396—398). There is no rule that trustees must not advance more than half the valuation where part of the premises is used for business purposes (*Palmer* v. *Emerson*, [1911] 1 Ch. 758). The section is a relieving one, and does not oblige trustees to take a valuation for the purpose (*Palmer* v. *Emerson*, *supra*, where trustees were held justified in acting on a valuation made some two years previously).

The words "reasonably believed" do not apply to the instructing and employing (*Re Somerset*, *S.* v. *Poulett*, [1894] 1 Ch. 253; *Re Walker*, *W.* v. *W.*, 62 L. T. 452; 59 L. J. Ch. 386; see *Re Stuart*, *Smith* v. *Stuart*, [1897] 2 Ch. 583). A trustee cannot be said to have reasonably believed a man to be an able and practical surveyor when in fact the trustee knows nothing about it (*Re Walker*, *supra*) Reports of surveyors advising have been held insufficient (*ibid.*; *Shaw* v. *Cates*, *supra*). But see *Re Solomon*, *Nore* v. *Meyer*, [1912] 1 Ch. 261; [1913] 1 Ch. 200. The surveyor should not agree to take no fee if the transaction falls through (*Salisbury* v. *Keymer*, [1909] W. N. 31; *Re Dive*, *D.* v. *Roebuck*, [1909] 1 Ch. 328).

Liability for loss by reason of improper investment.

9.—(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This section applies to investments made before as well as after the commencement of this Act.

To get the benefit of this section the trustee must establish the propriety of the investment independently of its value (*Re Walker*, *supra*; see *Blyth* v. *Fladgate*, [1891] 1 Ch. 353). In applying the section the Court will be guided by the rule which obtained before the Trustee Act, 1888 (*Shaw* v. *Cates*, [1909] 1 Ch. 405). The Court ascertained the "smaller sum," and held trustees liable for the excess only (*ibid.*; *Re Somerset*, *S.* v. *Poulett*, [1894] 1 Ch. 253). See the order, Seton, 6th ed. 1144.

Powers supplementary to

10.—(1) Trustees lending money on the security of any property on which they can lawfully lend may contract that

15 Geo. 5, c. 19, s. 10.

powers of investment.

such money shall not be called in during any period not exceeding seven years from the time when the loan was made, provided interest be paid within a specified time not exceeding thirty days after every half-yearly or other day on which it becomes due, and provided there be no breach of any covenant by the mortgagor contained in the instrument of mortgage or charge for the maintenance and protection of the property.

(2) On a sale of land for an estate in fee simple or for a term having at least five hundred years to run by trustees or by a tenant for life or statutory owner, the trustees, or the tenant for life or statutory owner on behalf of the trustees of the settlement, may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by a charge by way of legal mortgage or a mortgage by demise or subdemise for a term of at least five hundred years (less a nominal reversion when by subdemise), of the land sold, with or without the security of any other property, such charge or mortgage, if any buildings are comprised in the mortgage, to contain a covenant by the mortgagor to keep them insured against loss or damage by fire to the full value thereof.

The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such charge or mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the charge or mortgage; and the trustees of the settlement shall be bound to give effect to such contract made by the tenant for life or statutory owner.

(3) Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement—

(a) for the reconstruction of the company;

(b) for the sale of all or any part of the property and undertaking of the company to another company;

(c) for the amalgamation of the company with another company;

(d) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them;

in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith, and may retain any securities

15 Geo. 5, c. 19, s. 10.

so accepted as aforesaid for any period for which they could have properly retained the original securities.

(4) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in such company, they may as to all or any of such securities, either exercise such right and apply capital money subject to the trust in payment of the consideration, or renounce such right, or assign for the best consideration that can be reasonably obtained the benefit of such right or the title thereto to any person, including any beneficiary under the trust, without being responsible for any loss occasioned by any act or thing so done by them in good faith:

Provided that the consideration for any such assignment shall be held as capital money of the trust.

(5) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument, if any, creating the trust.

(6) Where the loan referred to in subsection (1), or the sale referred to in subsection (2), of this section is made under the order of the court, the powers conferred by those subsections respectively shall apply only if and as far as the court may by order direct.

This section and sect. 11 are taken from L. P. Act, 1922.

Sub-sect. 1. See as to the law before this Act, *Vickery* v. *Evans*, 33 Beav. 376; Lewin, 12th ed. 386.

Sub-sect. 2. For "statutory owner," see S. L. Act, 1925, s. 117 (1) (xxvi), *ante*; and as to sales, see sect. 38 of that Act. For "charge by way of legal mortgage," see L. P. Act, 1925, s. 87, *ante*.

Sub-sect. 3. See as to reconstruction, Palmer's Company Precedents, 12th ed. 136 *et seq.* In *Re New*, [1901] 2 Ch. 541, trustees were, under the general powers of the Court, authorised to concur in a reconstruction scheme. See now sect. 57, *post*.

Power to deposit money at bank and to pay calls.

11.—(1) Trustees may, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account, and all interest, if any, payable in respect thereof shall be applied as income.

(2) Trustees may apply capital money subject to a trust in payment of the calls on any shares subject to the same trust.

Part II.

General Powers of Trustees and Personal Representatives.

General Powers.

Power of trustees for sale to sell

12.—(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with

15 Geo. 5, c. 19, s. 12.

by auction, &c.

any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.

(3) This section does not enable an express power to sell settled land to be exercised where the power is not vested in the tenant for life or statutory owner.

This section re-enacts, in sub-sect. 1, Trustee Act, 1893, s. 13, which itself replaced sect. 35 of the Conv. Act, 1881, but applied only to trusts or powers created after 1881. The rules which, apart from the statute, apply to trustees concurring with other persons in selling, are laid down by Jessel, M.R., in *Re Cooper and Allen* (4 Ch. D. 814). Trustees for sale of leaseholds held under one lease may, where the sale is in several lots, carry it into effect by under-leases (*Re Judd and Poland*, [1906] 1 Ch. 684). See also, *Alexander* v. *Clarke*, [1920] 1 I. R. 47. Sub-sects. 2 and 3 are new. Trustee Act, 1893, s. 44, empowered the Court to sanction the disposal by a trustee of land with an exception or reservation of minerals, or of minerals separately from the residue of the land; and sect. 3 of the T. A. Amendment Act, 1894, extended the provision to the case of other persons than trustees. See now L. P. Act, 1925, s. 92 and note, *ante*, p. 684. For "statutory owner," see S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.

Power to sell subject to depreciatory conditions.

13.—(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.

(4) This section applies to sales made before or after the commencement of this Act.

Re-enacts Trustee Act, 1893, s. 14, which replaced sect. 3 of the Trustee Act, 1888 (see *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. 586) and applied to sales made after the passing of the latter Act.

15 Geo. 5, c. 19, s. 14.

Power of trustees to give receipts.

14.—(1) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for—

(a) the proceeds of sale or other capital money arising under a [disposition on] trust for sale of land;

15 Geo. 5, c. 18.

(b) capital money arising under the Settled Land Act, 1925.

(3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

Sub-sect. 1 re-enacts Trustee Act, 1893, s. 20, which replaced Conv. Act, 1881, s. 36. Sect. 23 of the L. P. Amendment Act, 1859 (repealed by the present Act), contained similar provisions as to the payment of any purchase or mortgage money (see L. P. Act, 1925, s. 107, *ante*, and *Hockey* v. *Western*, [1898] 1 Ch. 350), unless the instrument creating the trust or security expressly declared the contrary. See also sect. 17, *post*; and as to the law before the Acts of 1859 and 1881, the second edition of this work, p. 421.

Sub-sects. 2 and 3 are new. The words "disposition on" in sub-sect. 2 (a) were repealed by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*). For "trust corporation," see p. 794, *ante*, and cf. S. L. Act, 1925, s. 94 (1), *ante*, p. 953. Funds in Court were, in the circumstances of the case, paid out to a sole trustee (*Leigh* v. *Pantin*, [1914] 2 Ch. 701).

Power to compound liabilities.

15. A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

(a) accept any property, real or personal, before the time at which it is made transferable or payable; or

(b) sever and apportion any blended trust funds or property; or

(c) pay or allow any debt or claim on any evidence that he or they think sufficient; or

(d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or

(e) allow any time of payment of any debt; or

(f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim,

or thing whatever relating to the testator's or intestate's estate or to the trust; 15 Geo. 5, c. 19, s. 15.

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

This section replaces as to the matters mentioned in paragraphs (c) (d) (e) and (f) the Trustee Act, 1893, s. 21. That section replaced sect. 37 of the Conv. Act, 1881, which itself replaced sect. 30 of 23 & 24 Vict. c. 145. The last-mentioned section (which was not confined to mere money claims, *Re Warren, Weadon* v. *Reading*, 51 L. T. 561; 53 L. J. Ch. 1016) justified a compromise by an executrix with the testator's surviving partner and his creditors as to the sale of partnership real estate (*West of England Bank* v. *Murch*, 23 Ch. D. 138; see also, *Re Owens, Jones* v. *O.*, 47 L. T. 64). An executor can under this section compromise a claim by his co-executor (*Re Houghton, Hawley* v. *Blake*, [1904] 1 Ch. 622). As to compromising threatened proceedings to set aside a will, see *Eaton* v. *Buchanan*, [1911] A. C. 253. As to the Court's power to compromise, see *Re New*, ([1901] 2 Ch. 541); and see sect. 57, *post*.

Paragraphs (a) and (b), and the extension of (c) to trustees, are new; and the provision as to a sole trustee is substituted for "a sole acting trustee where by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof." See preceding section and sect. 37, sub-sect. 2, *post*, and S. L. Act, 1925, ss. 30 (3) and 94 and Sched. 4 (12), *ante*.

"In good faith" involves the exercise of active discretion, and not merely leaving matters alone (*Re Greenwood, G.* v. *Firth*, 105 L. T. 509).

Power to raise money by sale, mortgage, &c.

16.—(1) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act, 1925, not being also the statutory owners.

This section and sect. 17 are new. See as to land held on charitable trusts, S. L. Act, 1925, s. 29, *ante*; and as to trustees for the purposes of that Act, *ibid.*, sect. 30; and for "statutory owner," *ibid.*, sect. 117, sub-sect. 1 (xxvi).

Protection to purchasers and mortgagees

17. No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned

15 Geo. 5, c. 19, s. 17.

to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

dealing with trustees.

Devolution of powers or trusts.

18.—(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

(4) In this section "personal representative" does not include an executor who has renounced or has not proved.

Sub-sect. 1. This sub-section replaces Trustee Act, 1893, s. 22, which replaced sect. 38 of the Conv. Act, 1881. As to the execution of a power where one donee disclaims, see L. P. Act, 1925, s. 156 (2), *ante*. A power given to trustees for dealing with the trust property is *prima facie* presumed to be annexed to the office; and the presumption is not excluded by the fact that its exercise requires discretion, or by the use of such words as "my said trustees" (*Re Smith, Eastick* v. *S.*, [1904] 1 Ch. 144; *Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475; *Re De Sommery*, [1912] 2 Ch. 622), or "my said executors" (*Re Robinson, Sproule* v. *S.*, [1912] 1 I. R. 410). A bare power given to two or more persons by name, and not annexed to an estate or office, does not survive (*Re Harding*, [1923] 1 Ch. 182).

Sub-sect. 2. This re-enacts Conv. Act, 1911, s. 8 (1), with the addition of the concluding words from "or other," which addition is retrospective (Sched. 1 (4), *post*).

As to the law before Conv. Act, 1911, see *Re Crunden and Meux*, [1909] 1 Ch. 690, where it was laid down that the person who is to execute a trust or power must be in some way pointed out by the creator thereof as a proper person to execute it. Accordingly where land was devised in trust to several named persons, their heirs and assigns, the executors of a surviving trustee (as being "his heirs and assigns" under Conv. Act, 1881, s. 30, repealed as to deaths after 1925 by L. P. Act, 1925) could execute a power of sale (*Re Pixton and Tong*, [1897] W. N. 178); and were held to be trustees of the will (*Re Waidanis, Rivers* v. *W.*, [1908] 1 Ch. 125). Their trusteeship however ceased on the appointment of new trustees (*Re Routledge, R.* v. *Saul*, [1909] 1 Ch. 280). On the other hand, where land was devised in trust to several named persons, the reference to heirs being omitted, the executors of the survivor could not execute a trust for sale (*Re Crunden and Meux, supra; Re Ingleby*, 13 L. R. Ir. 326).

Sub-sect. 3. See sect. 14, sub-sect. 2, *ante*.

Sub-sect. 4. See Administration of Estates Act, 1925, s. 5, *ante*.

15 Geo. 5, c. 19, s. 19.

Power to insure.

19.—(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

This section re-enacts Trustee Act, 1893, s. 18 (1) and (2), which replaced sect. 7 of the Trustee Act, 1888. It empowered trustees to insure against fire settled heirlooms, and to pay the premiums out of the income of capital moneys (*Re Egmont, Lefroy* v. *E.*, [1908] 1 Ch. 821; see *Re Quicke, Poltimore* v. *Q., ibid.* 887).

But see as to buildings, *Re McEacharn*, 103 L. T. 900. As to insurance in the case of the land of an infant, see S. L. Act, 1925, s. 102 (2), *ante*, p. 959.

As to the application of insurance moneys, see sect. 20, *post*.

Application of insurance money where policy kept up under any trust, power or obligation.

20.—(1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement within the meaning of the Settled Land Act, 1925, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement, as the case may be.

(2) If any such money is receivable by any person, other than the trustees of the trust or settlement, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge therefor, into court.

(3) Any such money—

(a) if it was receivable in respect of settled land within the meaning of the Settled Land Act, 1925, or any building or works thereon, shall be deemed to be capital money arising under that Act from the settled land, and shall be invested or applied by the trustees, or, if in court, under the direction of the court, accordingly;

(b) if it was receivable in respect of personal chattels settled as heirlooms within the meaning of the

15 Geo. 5, c. 19, s. 20.

Settled Land Act, 1925, shall be deemed to be capital money arising under that Act, and shall be applicable by the trustees, or, if in court, under the direction of the court, in like manner as provided by that Act with respect to money arising by a sale of chattels settled as heirlooms as aforesaid;

(c) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under such trust;

(d) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(4) Such money, or any part thereof, may also be applied by the trustees, or, if in court, under the direction of the court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustees shall be subject to the consent of any person whose consent is required by the instrument, if any, creating the trust to the investment of money subject to the trust, and, in the case of money which is deemed to be capital money arising under the Settled Land Act, 1925, be subject to the provisions of that Act with respect to the application of capital money by the trustees of the settlement.

(5) Nothing contained in this section prejudices or affects the right of any person to require any such money or any part thereof to be applied in rebuilding, reinstating, or repairing the property lost or damaged, or the rights of any mortgagee, lessor, or lessee, whether under any statute or otherwise.

(6) This section applies to policies effected either before or after the commencement of this Act, but only to money received after such commencement.

This and the two following sections are taken from L. P. Act, 1922. See as to settlements and settled land within the meaning of S. L. Act, 1925, ss. 1—3 of that Act, *ante*; as to personal chattels settled as heirlooms, sect. 67; and as to the application of capital money, sect. 73.

Deposit of documents for safe custody.

21. Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

See also sect. 7, *ante*.

15 Geo. 5, c. 19, s. 22.

Reversionary interests, valuations, and audit.

22.—(1) Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same falling into possession, or becoming payable or transferable may—

(a) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit;

(b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorised investments;

(c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable;

(d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release;

without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith.

(2) The trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—

(a) to place any distringas notice or apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as aforesaid is derived, payable or charged; or

(b) to take any proceedings on account of any act, default, or neglect on the part of the persons in whom such securities or other property or any of them or any part thereof are for the time being, or had at any time been, vested;

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken:

Provided that nothing in this subsection shall relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on the same falling into possession.

(3) Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper.

15 Geo. 5, c. 19, s. 22.

and any valuation so made in good faith shall be binding upon all persons interested under the trust.

(4) Trustees may, in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such vouchers and give such information to him as he may require; and the costs of such examination or audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

Cf. on sub-sect. 2, *Billing* v. *Brogden*, 38 Ch. D. 546.

Power to employ agents.

23.—(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or to do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immoveable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

(3) Without prejudice to such general power of appointing agents as aforesaid—

(a) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by

15 Geo. 5, c. 19, s. 23.

the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

(b) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

(c) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment:

Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

This subsection applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

Sub-sects 1 and 2 are from L. P. Act, 1922. "United Kingdom" means Great Britain and Northern Ireland (sect. 68, sub-sect. 20, *post*).

Sub-sect. 3 re-enacts T. A., 1893, s. 17, which replaced sect. 2 of the Trustee Act, 1888.

A trustee can execute a deed by a solicitor as attorney, and can empower that solicitor to receive trust money by producing a proper deed for the purpose. But the trustee must himself appoint the solicitor, and must himself permit the production of the deed. A deed executed by the attorney of a trustee acting under a general power is not sufficient within sub-sect. 3 (*Re Hetling and Merton*, [1893] 3 Ch. 280). See further sect. 69 of L. P. Act, 1925, and note, *ante*, p. 661.

The proviso is a statutory declaration of the law as to trustees allowing trust money to be received by a solicitor. Such receipt is

15 Geo. 5, c. 19, s. 23.

no part of the duty of a solicitor as such (*Wyman* v. *Paterson*, [1900] A. C. 280).

To render the trustee liable it must be shown that he knew, or ought to have known, that the solicitor had received the money (*Re Sheppard, De Brimont* v. *Harvey*, [1911] 1 Ch. 50). See further the note to sect. 30, *post*, p. 1050.

Power to concur with others.

24. Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

This section is from L. P. Act, 1922. The executors of the holder of an undivided share in real estate could concur in a partition under T. A., 1893, s. 21 (see now sect. 15, *ante*) (*Re Kemnal and Still*, [1923] 1 Ch. 293). See as to undivided shares in land, L. P. Act, 1925, s. 34; S. L. Act, 1925, s. 36, *ante*.

Power to delegate trusts during absence abroad.

25.—(1) A trustee intending to remain out of the United Kingdom for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from the United Kingdom of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons:

Provided that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this subsection.

(2) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

(3) The power of attorney shall not come into operation unless and until the donor is out of the United Kingdom, and shall be revoked by his return.

(4) The power of attorney shall be attested by at least one witness, and shall be filed at the Central Office within ten days after the execution thereof, or where not executed within the United Kingdom within ten days after its receipt in the United Kingdom with a statutory declaration by the donor that he intends to remain out of the

United Kingdom for a period exceeding one month from the date of such declaration, or from a date therein mentioned. 15 Geo. 5, c. 19, s. 25.

(5) The execution of any such instrument and statutory declaration shall be verified in such manner as is required by statute in the case of powers of attorney filed at the Central Office.

(6) If the power of attorney confers a power to dispose of or deal with land or a charge registered under the Land Registration Act, 1925, an office copy shall be filed at the land registry. 15 Geo. 5, c. 21.

(7) The statutory declaration aforesaid and a statutory declaration by the donee of the power of attorney that the power has come into operation and has not been revoked by the return of the donor shall be conclusive evidence of the facts stated in favour of any person dealing with the donee.

(8) In favour of any person dealing with the donee, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has become revoked by the act of the donor or by his death or otherwise, be as valid and effectual as if the donor were alive and of full capacity, and had himself done such act or executed such instrument, unless such person had actual notice that the power had never come into operation or of the revocation of the power before such act was done or instrument executed.

(9) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

(10) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

(11) In this section "trustee" includes a tenant for life and a statutory owner.

The words from "or where not executed" to "in the United Kingdom" in sub-sect. 4 were added by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*). The section is from the Act of 1924.

Cf. on this section the Execution of Trusts (War Facilities) Act, 1914 (5 Geo. 5, c. 13), the operation of which was limited to the

15 Geo. 5, c. 19, s. 25.

duration of the war. Apart from these enactments the rule *delegatus non potest delegare* has prevented the delegation of trusts, except by the employment of agents (see Lewin, 12th ed. 282 *et seq.*). See also L. P. Act, 1925, s. 29, *ante*. "United Kingdom" means Great Britain and Northern Ireland (sect. 68, sub-sect. 20), *post*. For "trust corporation" see p. 794, *ante*; and as to the verification of the execution of powers of attorney and statutory declarations, see Jud. Act, 1925, s. 219; and as to powers of attorney generally, L. P. Act, 1925, ss. 123 *et seq.*, *ante*. Under 5 Geo. 5, c. 13 (*supra*), it was held that the power must mention the settlement in which the property is comprised, and, to carry out a sale of real estate, must purport to deal with realty (*Re Donoughmore and Hackett*, [1918] 1 I. R. 359); and that a trust could not be delegated to a co-trustee (*Re Wells and Hopkinson*, [1916] 2 Ch. 289). See now sub-sect. 1 of the present section. For "statutory owner" see S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.

Indemnities.

Protection against liability in respect of rents and covenants.

26.—(1) Where a personal representative or trustee liable as such for—

(a) any rent, covenant, or agreement reserved by or contained in any lease; or

(b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or

(c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs;

satisfies all liabilities under the lease or grant which may have accrued, and been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof and thereafter—

(i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;

(ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

15 Geo. 5, c. 19, s. 26.

(2) This section operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

(3) In this section "lease" includes an underlease and an agreement for a lease or underlease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; "grant" applies to a grant whether the rent is created by limitation, grant, reservation, or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant; "lessee" and "grantee" include persons respectively deriving title under them.

"And" was substituted for "or" after "which may have accrued" in sub-sect. 1 by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

The present section replaces L. P. (Amdt.) Act, 1859, ss. 27 and 28. Their provisions are extended by it to trustees, and power is given to convey to a legatee, devisee, or other person, and not only, as under the former sections, to a purchaser.

Liability of representatives in respect of leases of deceased.

Where the representative of a lessee has not entered, he can only be sued as representative (*Rendall* v. *Andrae*, 61 L. J. Q. B. 630; *Whitehead* v. *Palmer*, [1908] 1 K. B. 157). Where the representative has entered, he may be sued either as representative or as assign of the lease (*Re Bowes, Strathmore* v. *Vane*, 37 Ch. D. 131). If the representative be sued as such, and he puts in a proper plea, he is only liable to the extent of the assets of the deceased (*ibid.*). If he be sued as assign, he is liable *de bonis propriis* (see Wms. Exors., 11th ed. 1373). His liability, however, as regards rent may be limited to the letting value of the holding (*Rendall* v. *Andrae*, 61 L. J. Q. B. 633; *Re Bowes, Strathmore* v. *Vane, supra; Whitehead* v. *Palmer, supra*); but as regards a covenant to repair cannot be so limited (*Rendall* v. *Andrae, supra*). See further, as to the liability of the representative of a lessee, the notes to *Jevens* v. *Harridge* and *Dean of Bristol* v. *Guyse*, 1 Wms. Saund. 1, 124.

Operation of section.

Administration out of Court

The section deals with the liability of the representative or trustee "as such" in respect of the leases of the deceased. Where the assets of the testator are administered out of Court, the representative acting in the manner pointed out in the above section does not remain liable in respect of subsequent claims under the leases. The lease had, under the Act of 1859, to be assigned to "a purchaser" (*Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 644; see *Re Sales*, 64 S. J. 308). Where it was assigned to a legatee the executor was not protected (*Dodson* v. *Sammell*, 1 Drew. & Sm. 579; compare *Smith* v. *S.*, *ibid.* 387; and see *Byrne* v. *Brown*, 22 Q. B. D. 657, where executors assigned a lease for a nominal consideration; and *Re Lawley, Jackson* v. *Leighton*, [1911] 2 Ch. 530, where assignees were paid to accept onerous leaseholds; see now sub-sect. 1 of the present section). Sect. 27 of the Act of 1859 applied in the case of leases granted or assigned to the deceased before the passing of the Act (*ibid.; Re Green*, 2 D. F. & J. 121); and also in the case of a fee farm grant (*Millar* v. *Sinclair*, [1903] 1 I. R. 150).

15 Geo. 5, c. 19, s. 26.

Right to follow assets.

Although the representative does not remain liable, the right of the lessor to follow assets is not prejudiced. As to the right to follow assets, see Wms. Exors., 11th ed. 1079 *et seq.*; and as to compelling a legatee to refund, see *ibid.* 1190. See also *Re Mouatt, Kingston Co.* v. *M.*, [1899] 1 Ch. 831. The right to follow where real assets had been aliened was dealt with in *Spackman* v. *Timbrell*, 8 Sim. 253 (*ante*, p. 460), and *Kinderley* v. *Jervis*, 22 Beav. 1 (*ante*, p. 555); see *Re Cary and Lott*, [1901] 2 Ch. 470. The same right where personal assets had been aliened was dealt with in *Dilkes* v. *Broadmead*, 2 D. F. & J. 566; in which case a purchaser for value without notice acquired a good title as against the creditors of the deceased to identified personal assets. The power of an executor, who is also residuary legatee, to alien personal assets to a purchaser for value without notice, is discussed in *Graham* v. *Drummond*, [1896] 1 Ch. 968; *Bombay Bank* v. *Suleman*, 24 Times L. R. 840. As to a purchaser with notice, see *Re Troughton, Rent Co.* v. *T.*, [1894] W. N. 154.

Administration in Court.

Apart from the above section, it is settled that where the assets are administered in Court, and the representative keeps back nothing which ought to be disclosed to the Court, an order directing the administration and application of the assets is of itself a complete and perfect indemnity to the representative (*Dodson* v. *Sammell*, 1 Drew. & Sm. 577); who will be protected from any future proceedings (*Bennett* v. *Lytton*, 2 J. & H. 157; *Waller* v. *Barrett*, 24 Beav. 419; *Dean* v. *Allen*, 20 Beav. 4; *Smith* v. *Smith*, 1 Drew. & Sm. 387).

Indemnity fund.

It was formerly the practice of the Court to order part of the assets to be retained as an indemnity fund in respect of the liability under the leases of the deceased (see the forms, Seton, 5th ed. 1281; omitted in 6th ed., see p. 1525). The retainer was only ordered where there was privity of estate between the executors and the lessors (*Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 64). Later it was decided that a landlord had no independent equity to require such a fund to be retained (*King* v. *Malcott*, 9 Ha. 692). And having regard to this decision, and to the rule that the order of the Court indemnifies the representative, it was said to be unnecessary to carry over a fund (*Dodson* v. *Sammell*, 1 Drew. & Sm. 579; see the decisions reviewed *Re King, Mellor* v. *South Australian Co.*, [1907] 1 Ch. 77). A fund will not be carried over where there is no privity of estate between the representative and the lessor (*Re Nixon, Gray* v. *Bell, supra*); at least in cases where there is no personal liability on the part of the representative to meet claims out of his own money ([1907] 1 Ch. 80). An indemnity fund formerly set apart in respect of leaseholds was paid out without the consent of the ground landlord (*ibid.; Sowdon* v. *Marriott*, 21 W. R. 808; *contra, Bunting* v. *Marriott*, 9 W. R. 264). So where all a testator's leases had been sold or surrendered (*Reilly* v. *Reilly*, 34 Beav. 406).

As to the liability of a representative in respect of the leases of the deceased, see generally, Wms. Exors., 11th ed. 1368 *et seq.* And as to his pleading the Stat. Lim. to a claim for improper distribution of assets, see *Lacons* v. *Warmoll*, quoted under sect. 27, *post*.

Liability of representatives in respect of rentcharges.

Where a rentcharge is secured by covenant, the representative is liable as such to its payment. Where there is no covenant there as regards arrears which have accrued during the life of the deceased, the representative may be liable (see *Leving's Case*, quoted in *Thomas* v. *Sylvester*, L. R. 8 Q. B. 370). But as regards instalments accruing after the death, the representative does not seem to be liable, except he becomes *terre tenant* for a freehold interest; in which case his liability would be for the full amount of the

rentcharge irrespective of his receipt of rents and profits (*Pertwee* v. *Townsend*, [1896] 2 Q. B. 129; see *ante*, p. 140).

15 Geo. 5, c. 19, s. 26.

Operation of section.

As regards the operation of sect. 28 of L. P. (Amdt.) Act, 1859, a fee farm grant was within it (*Millar* v. *Sinclair*, [1903] 1 I. R. 150). Further, it seems clear that, so far as the freeholds of a deceased person were concerned, an administrator could never before the Land Transfer Act, 1897 (*ante*), have sold them; and apparently could never have obtained the benefit of the section. An executor, where the will contained a charge of debts, might in some cases have sold under sect. 16 of the Act of 1859 (repealed by Administration of Estates Act, 1925, *ante*). But the proceeds of the sale did not become part of the residuary personal estate of the deceased. See now the Land Transfer Act, 1897, s. 2, and the Administration of Estates Act, 1925, s. 2 (*ante*).

Protection by means of advertisements.

27.—(1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the Gazette, and in a [daily London newspaper, and also, if the property includes land not situated in London in a daily or weekly] newspaper circulating in the district in which the land is situated, and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice, and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section—

(a) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or

(b) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an

15 Geo. 5, c. 19, s. 27.

intending purchaser would be advised to make or obtain.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

This section replaces, and extends to trustees, L. P. (Amdt.) Act, 1859, s. 29. Sub-sect. 2 (b) and sub-sect. 3 are new. Sect. 29 referred to "such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit," and did not specify the time to be named.

In sub-sect. 1 of the present section the bracketed words were repealed by L. P. (Amdt.) Act, 1926, s. 7 (see p. 595, *ante*).

Proceedings by an executor or administrator.

A prudent and reasonable executor or administrator ought to advertise for creditors as soon as possible after the death, and his conduct in this respect was had regard to on an application for relief under sect. 3 of the Judicial Trustee Act, 1896 (see now sect. 61, *post; Re Kay, Mosley* v. *K.*, [1897] 2 Ch. 522). If any difficulty arises, he can also apply by summons for an order determining the questions (R. S. C. Ord. 55, r. 3); or for an order for administration (r. 4); which, however, the Judge is not bound to order (r. 10).

Notices.

The practice as to notices given by the Chancery Division in administration actions is laid down in R. S. C. Ord. 55, rr. 45-47. In administration actions, it is unnecessary to repeat notices which have been already issued under this section (*Cuthbert* v. *Wharmby* (1869), W. N. 12). In an action seeking to make an executor liable who has issued notices, the Court of first instance was by sect. 29 of the L. P. (Amdt.) Act, 1859 (*supra*), clothed with the duty of forming its own opinion as to the sufficiency of the notices: and *qu.* whether an appeal lay (see *Re Bracken, Doughty* v. *Townson*, 43 Ch. D. 1). Where executors had issued notices, but had not inserted any notice in the Gazette or a London paper, they were insufficient (*Wood* v. *Weightman*, 13 Eq. 434). But there was no absolute rule as to the insertion in a London paper, or as to the length of the notice; the Court regarded the circumstances of each case (*Re Bracken, Doughty* v. *Townson, supra*). But see now sub-sect. 1 of the present section.

Protection afforded to an executor.

An executor who distributes assets, after taking the steps pointed out by the section is in the same position as if the estate had been administered under the Court; as to which see note to sect. 26, *ante*, p. 1046 (*Clegg* v. *Rowland*, 3 Eq. 368; *Re Frewen, F.* v. *F.*, 60 L. T. 953, which see as to notice to the executor; *Hunter* v. *Young*, 4 Ex. D. 256, in which last case the executor was held not a necessary party to an action by a creditor to compel a legatee to refund; and see *Re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 447). The section is not confined to claims by creditors, but protected an administratrix from a claim by next of kin (*Newton* v. *Sherry*, 1 C. P. D. 246).

As to the bearing of this section on the position of a personal representative conveying the real estate of a person dying after 1897, see *Re Cary and Lott*, [1901] 2 Ch. 463, quoted *ante*, p. 423.

The mere sending in a claim in answer to advertisements does not (for the purpose of the Stat. Limitations) keep the creditor's right alive (*Re Stephens, Warburton* v. *S.*, 43 Ch. D. 44).

Liability on shares.

Executors who have distributed assets under this section will be protected as regards those assets from liability on shares held by their testator (*Russell's Case*, 15 S. J. 790; see *Cole's Case*,

15 S. J. 711); but not where they had notice of the liquidator's claim (*Markwell's Case*, 21 W. R. 135; see *Re Troughton, Rent Co.* v. *T.*, [1894] W. N. 154). They may, however, be placed on the list of contributories, on the ground that further assets may come to their hands (*Russell's Case, supra*). As to the possible extent of a deceased shareholder's liability, see *Baird's Case*, 5 Ch. 725. An executor who paid a legacy without providing for a contingent liability on shares was made liable (*Taylor* v. *T.*, 10 Eq. 477); but was entitled to make legatees refund (*Jervis* v. *Wolferstan*, 18 Eq. 18; *Whittaker* v. *Kershaw*, 45 Ch. D. 320). In early cases a fund was set aside in an administration action to meet possible calls (*Re Muggeridge, M.* v. *Sharp*, 10 Eq. 443); but not in the case of shares in a chartered banking company (*Re Griffiths, Tate* v. *Rolls* (1880), W. N. 159). It was more recently laid down that a fund will not be retained in Court for the protection of a contingent future creditor, or for the protection of the executor. The executor is sufficiently protected by the order of the Court, which should, however, be one for administration (*Re King, Mellor* v. *South Australian Co.*, [1907] 1 Ch. 72).

Representative pleading the Statute of Limitations.

Where six years have elapsed since assets have been paid over to beneficiaries and the representative is subsequently sought to be made liable by a creditor, he may plead sect. 8 of the Trustee Act, 1888 (*ante*), whether in form the action be on devastavit, or for administration (*Lacons* v. *Warmoll*, [1907] 2 K. B. 364; *Re Blow*, [1914] 1 Ch. 233, quoted p. 285, *ante*).

Protection in regard to notice.

28. A trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

Taken from L. P. Amendment Act, 1924. See as to notice, L. P. Act, 1925, s. 199 and notes, *ante*, p. 785

Exoneration of trustees in respect of certain powers of attorney.

29. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying:

Provided that—

(a) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;

(b) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

Re-enacts T. A., 1893, s. 23, adding "was subject to any

15 Geo. 5, c. 19, s. 29.

disability or bankrupt or" before "dead"; "or suffered" after "done"; and "or thing" after "act."

Sect. 23 replaced sect. 26 of L. P. Amendment Act, 1859.

According to the common law, a power of attorney was instantly revoked by the death of the grantor, and acts afterwards done under it, even where it was given for value, were invalid (*Watson* v. *King*, 4 Camp. 272). In equity, however, where a power had been given for value, acts done under it after the death of the grantor, *bona fide* and without notice, were valid (*Bailey* v. *Collett*, 18 Beav. 179, and cases there quoted; *Hatch* v. *Searles*, 2 Sm. & Giff. 155; *Carter* v. *White*, 20 Ch. D. 228). Powers of attorney issued by the Bank of England for the transfer of stock contained a clause making a transfer valid, notwithstanding the previous death of the grantor; as to which, see *Kiddill* v. *Farnell* (3 Sm. & Giff. 428). Where a legacy was bequeathed to a married woman abroad with her husband, and the husband required the legacy to be paid under a power of attorney, the executor was justified in paying the money into Court, because until reduction into possession by the husband, the wife's right might have accrued by the death of the husband (*Re Jones*, 3 Drew, 680).

As to powers of attorney, see now L. P. Act, 1925, ss. 124 *et seq.*, *ante*, pp. 714-717.

Implied indemnity of trustees.

30.—(1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

Re-enacts Trustee Act, 1893, s. 24, which replaced sect. 31 of L. P. Amendment Act, 1859. Sect. 24 applied "without prejudice to the provisions" of the trust instrument (cf. sect. 69, sub-sect. 2, *post*).

The indemnity clause formerly expressly inserted in instruments and now implied therein by this section, did little more than what the Court would have done without the clause (*Dawson* v. *Clarke*, 18 Ves. 254). The right of a trustee to indemnity out of the trust estate is stated in *Re Beddoe, Downes* v. *Cottans*, [1893] 1 Ch. 558. And his right to be indemnified by the *cestui que trust* personally is explained in *Hardoon* v. *Belilios*, [1901] A. C. 118; *Dodson* v. *Downey*, [1901] 2 Ch. 620; *James* v. *May*, L. R. 5 H. L. 333; *Wise* v. *Perpetual Co.*, [1903] A. C. 139; *Matthews* v. *Ruggles Brise*, [1911] 1 Ch. 194.

Acts of co-trustees.

As regards the acts of co-trustees, a trustee may be liable (1) where he hands over trust money without securing its due application; (2) where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and (3) where he becomes aware of a breach of trust committed or meditated and does not proceed for restitution or redress (*Wilkins* v. *Hogg*, 8 Jur. (N.S.)

25). A trustee was made liable for permitting his co-trustee to retain sole possession of bonds to bearer (*Lewis* v. *Nobbs*, 8 Ch. D. 591). The usual indemnity clause would not protect a trustee in such cases (*Mucklow* v. *Fuller*, Jac. 198; *Dix* v. *Burford*, 19 Beav. 409; *Brumridge* v. *B.*, 27 Beav. 5). But where a will specially provided that any trustee who should pay over to his co-trustee or should occur in any act enabling him to receive moneys for the general purposes of the will should not be obliged to see to the application thereof, nor be rendered responsible by express notice of the misapplication thereof, trustees paying over money to a co-trustee were protected (*Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47; *Pass* v. *Dundas*, 43 L. T. 665). See in general as to the right of the passive trustee to indemnity from the acting trustee, *Bahin* v. *Hughes* (31 Ch. D. 390). **15 Geo. 5, c. 19, s. 30.**

As regards mercantile agents, such as bankers and brokers, a trustee cannot delegate the care of trust moneys to strangers where there is no "moral necessity from the usage of mankind" for the employment of such agency (*Speight* v. *Gaunt*, 9 App. Cas. 5). But it was held in equity that where, according to the usual and regular course of business, moneys ought to pass through the hands of mercantile agents, that course might properly be followed by trustees (*Ex p. Belchier*, Amb. 218; *Speight* v. *Gaunt*, *supra*). The above section gives the force of statute to this doctrine of equity; and when once the propriety of employing the agent has been established, it throws the *onus probandi* on those who seek to charge a trustee with loss arising from an agent's default (*Re Brier, B.* v. *Evison*, 26 Ch. D. 243). The doctrine applied to a case where a co-trustee was employed as a broker under a clause in the will (*Shepherd* v. *Harris*, [1905] 2 Ch. 310). The liability of the trustee is not increased by his receiving remuneration (*Jobson* v. *Palmer*, [1893] 1 Ch. 71; compare *National Trustees* v. *General Finance Co.*, [1905] A. C. 381). Acts of bankers, &c.

The trustee, however, must exercise a discretion in the choice of the agent (*Re Weall, Andrews* v. *W.*, 42 Ch. D. 678); and the agent must not be employed out of the ordinary scope of his business (*Fry* v. *Tapson*, 28 Ch. D. 268). It is no part of the duty of a solicitor as such to receive trust money. And trustees were liable for permitting him to retain it for an excessive period (*Wyman* v. *Paterson*, [1900] A. C. 280; see sect. 23, sub-sect. 3, of the present Act, *ante*, p. 1041; *Evans Williams* v. *Byron*, 18 T. L. R. 172). Trustees could not shelter themselves under the fraud of their solicitor (*Bostock* v. *Floyer*, 1 Eq. 26; *Sutton* v. *Wilders*, 12 Eq. 373; *Davis* v. *Hutchings*, [1907] 1 Ch. 356; compare *Re Smith, S.* v. *Thompson*, 18 Times L. R. 432), or his mistake (*National Trustees* v. *General Finance Co.*, [1905] A. C. 373). They were not protected by indemnity clauses (*Wyman* v. *Paterson, supra; Knox* v. *Mackinnon*, 13 App. Cas. 753; *Rae* v. *Meek*, 14 App. Cas. 558).

See, further, the cases quoted under s. 61, *post*.

Maintenance, Advancement and Protective Trusts.

31.—(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property— Power to apply income for maintenance and to accumulate surplus income during a minority.

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian,

15 Geo. 5, c. 19, s. 31.

if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows:—

(i) If any such person—

(a) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(b) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt

of such person after marriage, and though still an infant, shall be a good discharge; and

(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

This section, taken from L. P. Act, 1922, replaces in the cases of instruments coming into operation after December 31, 1925, sect. 42, sub-sects. 4 and 5, and sect. 43 of the Conv. Act, 1881, repealed by L. P. Act, 1925 (*ante*), except so far as they relate to instruments coming into operation before that date. Sub-sects. 4 and 5 of sect. 42 are also repealed by the present Act.

The remaining sub-sections of Conv. Act, 1881, s. 42 (relating to the management of an infant's land), are replaced by S. L. Act, 1925, s. 102 (*ante*), which Act repealed them. Sect. 42 applied where any person who would, but for the section, be beneficially entitled to the possession of any land was an infant, and being a woman was also unmarried (see S. L. Act, 1925, s. 102, *ante*, p. 960).

Sub-sects. 4 and 5 of sect. 42 are as follow:—

"(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay

15 Geo. 5, c. 19, s. 31.

thereout any money to the infant's parent or guardian, to be applied for the same purposes.

"(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but,

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year."

Sect. 43 of Conv. Act, 1881, is as follows:—

Application by trustees of income of property of infant for maintenance, &c.

"43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act."

(1) The law under the above sections of Conv. Act, 1881. (For definitions in sect. 2 of the Act (which section is not repealed by L. P. Act, 1925, *ante*), see p. 842, *ante*).

(2) The present section.

15 Geo. 5, c. 19, s. 31.

(1) Sect. 43 only authorises the application for maintenance of income to which, independently of the section, the infant is or will, on or before attaining twenty-one, become entitled (*Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331; *Re Judkin*, 25 Ch. D. 743). See, however, *Re Boulter* ([1918] 2 Ch. 40), where it was held that maintenance could be given out of the intermediate income of a fund to which an infant was contingently entitled for life, though that income, if accumulated, would be an accretion to corpus.

General rules as to when a gift carries income.

Independently of the section it is settled that in the case of immediate gifts an infant is entitled as from the testator's death to the income of realty, and also of personalty included in a specific or residuary bequest; and is also entitled (at least from the expiration of one year from the testator's death) to the income of a general legacy (see the cases collected, Theobald, 7th ed., pp. 180, 188). In the case of future or contingent gifts, a distinction must be drawn between real and personal estate. As regards personal estate, a future bequest carries the intermediate income where (1) the gift is residuary (*Re Taylor, Smart* v. *T.*, [1901] 2 Ch. 136); or where (2) the property is directed to be set apart from the rest of the estate (*Re Woodin, W.* v. *Glass*, [1895] 2 Ch. 309; *Re Clements, C.* v. *Pearsall*, [1894] 1 Ch. 665; *Re Medlock, Ruffle* v. *M.*, 54 L. T. 828); or where (3) the bequest being of a general legacy to an infant legatee the testator stands *in loco parentis* to the infant and the will provides no other maintenance (*Re George*, 5 Ch. D. 843; where other provision is made see *Re West, Westhead* v. *Aspland*, [1913] 2 Ch. 345). Where there is no other provision what the infant is entitled to is not interest but maintenance (*Re Bowlby, B.* v. *B.*, [1904] 2 Ch. 706—713). And as regards providing "other maintenance" it has been held that such provision is not found in the mere bequest to the infant of a share of residue out of the income of which he can be maintained (*Re Moody, Woodroffe* v. *M.*, [1895] 1 Ch. 109). On the other hand where the property was not directed to be set apart, the intermediate income was not carried by a future bequest of specific personalty (*Guthrie* v. *Walrond*, 22 Ch. D. 573), or by a contingent bequest of a general legacy, where the testator did not stand *in loco parentis* to the legatee (*Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331). In the case of a bequest to a class contingently on their attaining twenty-one, if the bequest carries the intermediate income, any beneficiary attaining twenty-one is entitled only to his share of income, having regard to the number of the class for the time being in existence (*Re Holford, H.* v. *H.*, [1894] 3 Ch. 30; *Re Jeffery, Arnold* v. *Burt*, [1895] 2 Ch. 577). But if the bequest does not carry the intermediate income, it seems that the first beneficiary attaining twenty-one takes as from that time the whole income until another share vests (*Furneaux* v. *Rucker* (1879), W. N. 135; *Re Adams, A.* v. *A.*, [1893] 1 Ch. 332; *Re Holford, H.* v. *H.*, [1894] 3 Ch. 40; as to *Furneaux* v. *Rucker*, however, see *Re Woodin, W.* v. *Glass*, [1895] 2 Ch. 309).

As regards real estate, a future devise does not carry intermediate income (*Re Eddel's Trusts*, 11 Eq. 559), even where the devise is residuary (*Wade Gery* v. *Handley*, 3 Ch. D. 374). But where realty and personalty are given together, the rules as to income in the case of bequests of personalty (*supra*) apply (*Re Townsend, T.* v. *T.*, 34 Ch. D. 357; *Re Burton, Banks* v. *Heaven*, [1892] 2 Ch. 38). Where real estate is devised to a class contingently on their attaining twenty-one, the first beneficiary attaining that age takes as from that time the whole income until another share vests (*Re Averill, Salisbury* v. *Buckle*, [1898] 1 Ch. 523).

Cases under sub-sect. 1.

Having regard to the above rules the powers of the section have been held available in the case of future or contingent gifts of

15 Geo. 5, c. 19, s. 31.

(1) residuary personalty (*Re Holford, H.* v. *H.* [1894] 3 Ch. 30); (2) personalty directed to be set apart, consisting of either a pecuniary legacy (*Re Medlock, Ruffle* v. *M.*, 54 L. T. 828), or a specific legacy (*Re Clements, C.* v. *Pearsall*, [1894] 1 Ch. 665), or leaseholds (*Re Woodin, W.* v. *Glass*, [1895] 2 Ch. 309); (3) a legacy given by a parent (*Re Moody, Woodroffe* v. *M.*, [1895] 1 Ch. 101); and (4) realty and personalty given together (*Re Burton, Banks* v. *Heaven*, [1892] 2 Ch. 38; *Re Jeffery, Arnold* v. *Burt*, [1895] 2 Ch. 577). But the powers of the section have been held not available in the case of a contingent pecuniary legacy not directed to be set apart (*Re Judkin*, 25 Ch. D. 743; *Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331).

Where there is a gift (carrying income) in favour of a class on attaining twenty-one, the income is divisible into as many shares as there are members in existence, one share being payable to each adult, the other shares being applicable under this section for the benefit of the infants (*Re Holford, H.* v. *H.*, [1894] 3 Ch. 30; *Re Jeffery, Arnold* v. *Burt*, [1895] 2 Ch. 577).

Where residue is bequeathed to an infant, the following have been held trustees within the section, viz., an executor on the residue being ascertained (*Re Smith, Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302), and an administrator with the will annexed (*Re Adams, Verrier* v. *Haskins*, [1906] W. N. 220).

It seems doubtful whether the section applies to an absolute gift subject to a gift over on not attaining twenty-one (*Re Buckley*, 22 Ch. D. 583, decided on 23 & 24 Vict. c. 145, s. 26). It did not apply where an infant was entitled contingently on (1) surviving his father, and (2) attaining twenty-one (*Tuthill* v. *T.*, [1902] 1 I. R. 429).

Accumulations.

Sub-sect. 2.

Where residue was bequeathed to the testator's daughters who should attain twenty-one, each daughter's share to be in trust for her life and after her death for her children, income accumulated during a daughter's minority formed an accretion to the capital (*Re Bowlby, B.* v. *B.*, [1904] 2 Ch. 685; overruling *Re Scott, S.* v. *S.*, [1902] 1 Ch. 918; see *Re Wells, W.* v. *W.*, 43 Ch. D. 281; *Re Humphreys, H.* v. *Levett*, [1893] 3 Ch. 1; *Re Mellor, Alvarez* v. *Dodgson*, [1922] 1 Ch. 312). It was said that sub-sect. 2 did not apply until a fund had been appropriated in satisfaction of the contingent legacy (*Re Bowlby*, [1904] 2 Ch. 714). Past accumulations may be applied for past maintenance (*Re Pitts, Collins* v. *P.* (1884), W. N. 225, 242; compare *Re Wise, Jackson* v. *Parrott*, [1896] 1 Ch. 281; see *Re Cooper, C.* v. *C.*, [1913] 1 Ch. 350). Income accruing during the minority of a life tenant may be applied for maintenance (*Re Long, Lovegrove* v. *L.*, [1901] W. N. 166), and may be paid to the guardians, who can give a good receipt (*ibid.*).

Contrary intention.

Sub-sect. 3.

A contrary intention, which excluded sub-sect. 1, was found in an express gift of residue (*Re Dickson, Hill* v. *Grant*, 29 Ch. D. 339). A contrary intention excluding sub-sect. 2 was not found in a direction to accumulate income and pay it to legatees when shares became payable (*Re Thatcher*, 26 Ch. D. 427; *Re Cooper, supra*), but was found in the creation of an immediate vested life interest (*Re Humphreys, H.* v. *Levett*, [1893] 3 Ch. 1; see also *Re Bass*, [1914] W. N. 368; *Re Greenslade, ibid.*, 435). See, in general, as to the cases in which the Court will direct payments for maintenance notwithstanding directions to accumulate, *Re Allen, Havelock* v. *H.* (17 Ch. D. 807); *Re Collins, C.* v. *C.* (32 Ch. D. 229); *Re Alford, Hunt* v. *Parry* (*ibid.* 383); *Re Walker, W.* v. *Duncombe*, [1901] 1 Ch. 879.

(2) The present section.

Sub-sect. 1.

The provisions of clause (ii) and the proviso are new. The Conv. Act, 1881, s. 43 (*supra*), did not contemplate any contingency beyond the attainment of majority.

The effect of the provisions as to accumulations of income appears to be that they belong absolutely to the infant at twenty-one or marriage if the interest in the income during minority is vested, or the interest in the property attained at twenty-one or marriage is absolute; subject to the provisions of any settlement made under the Infants Settlement Act, 1855. (See as to entailed interest, L. P. Act, 1925, s. 130, *ante*, and as to the power of married infants to give receipts cf. Admon. of Estates Act, 1925, s. 47 (1) (ii) and L. P. Act, 1925, s. 21, *ante*. Otherwise, including the case of the death before twenty-one or marriage of an infant having a vested interest in the income, the accumulations are to be added to capital, subject to a power in the trustees to apply them for maintenance, &c., as income.

15 Geo. 5, c. 19, s. 31.

Sub-sect. 2.

By L. P. Act, 1925, s. 175, *ante*, p. 768, contingent or future devises or bequests carry the intermediate income, unless otherwise expressly disposed of, in the case of wills or codicils coming into operation after December 31, 1925. As to the law apart from this enactment, see note to sect. 43 of the Conv. Act, 1881, *supra*.

Sub-sect. 3.

The provisions of this sub-section are new.

Sub-sect. 4.

See as to the powers of the Court in regard to maintenance, education, or benefit of an infant, sect. 53, p. 1093, *post*.

Annuities.

32.—(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Power of advancement.

Provided that—

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

15 Geo. 5, c. 19, s. 32.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

(3) This section does not apply to trusts constituted or created before the commencement of this Act.

This and the next section are from L. P. Acts, 1922 and 1924. See as to moneys and securities considered as land S. L. Act, 1925, s. 75 (5), and note, *ante*, p. 937, and as to conversion, p. 623, *ante*. As to capital money arising under the S. L. Act, see s. 117 (1) (ii) of that Act and note, *ante*. In *Klug* v. *K.*, [1918] 2 Ch. 67, the Court directed the raising of a sum for advancement under an express power where one trustee was willing to raise the sum while the other trustee declined to exercise her discretion.

Protective trusts.

33.—(1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—

(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

(ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

15 Geo. 5, c. 19, s. 33.

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

See as to trusts liable to be set aside on bankruptcy 2 Key & Elphinstone's Precedents, 11th ed., pp. 589-90. See also Elphinstone, Introduction to Conveyancing, 7th ed., p. 439.

Part III.

Appointment and Discharge of Trustees.

Limitation of the number of trustees.

34.—(1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.

(2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Act—

(a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

(b) the number of the trustees shall not be increased beyond four.

(3) This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply—

(a) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or

15 Geo. 5, c. 19, s. 34.

(b) where the net proceeds of the sale of the land are held for like purposes; or

(c) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land.

This section and sect. 35 are from L. P. Act, 1922. See also as to conveyances on trust for sale L. P. Act, 1925, s. 24, *ante;* as to land held on charitable, ecclesiastical, or public trusts S. L. Act, 1925, s. 29, *ante*; for "term of years absolute," sect. 117, sub-sect. 1 (xxix) of that Act, *ante*; and as to the statutory remedies relating to annual sums charged on land L. P. Act, 1925, s. 121, *ante*.

Appointments of trustees of settlements and dispositions on trust for sale of land.

35.—(1) Appointments of new trustees of conveyances on trust for sale on the one hand and of the settlement of the proceeds of sale on the other hand, shall, subject to any order of the court, be effected by separate instruments, but in such manner as to secure that the same persons shall become the trustees of the conveyance on trust for sale as become the trustees of the settlement of the proceeds of sale.

(2) Where new trustees of a settlement are appointed, a memorandum of the names and addresses of the persons who are for the time being the trustees thereof for the purposes of the Settled Land Act, 1925, shall be endorsed on or annexed to the last or only principal vesting instrument by or on behalf of the trustees of the settlement, and such vesting instrument shall, for that purpose, be produced by the person having the possession thereof to the trustees of the settlement when so required.

(3) Where new trustees of a conveyance on trust for sale relating to a legal estate are appointed, a memorandum of the persons who are for the time being the trustees for sale shall be endorsed on or annexed thereto by or on behalf of the trustees of the settlement of the proceeds of sale, and the conveyance shall, for that purpose, be produced by the person having the possession thereof to the last-mentioned trustees when so required.

(4) This section applies only to settlements and dispositions of land.

See as to trustees for the purposes of the S. L. Act, 1925, ss. 30 *et seq.* of that Act, *ante*, and for "principal vesting instrument," *ibid.*, s. 117 (1) (xxxi).

Power of appointing new or additional trustees.

36.—(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses

or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,— 15 Geo. 5, c. 19, s. 36.

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of any enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.

(4) The power of appointment given by subsection (1) of this section or any similar previous enactment to the personal representatives of a last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.

(5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.

15 Geo. 5, c. 19, s. 36.

(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

(7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(9) Where a lunatic or defective, being a trustee, is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by the continuing trustees or trustee, under this section, unless leave has been given by the Judge or Master in Lunacy to make the appointment.

This section replaces part of sect. 10 of the Trustee Act, 1893 (which itself replaced Conv. Act, 1881, s. 31, Conv. Act, 1882, s. 5, and Conv. Act, 1892, s. 6). Additions and changes are noted *infra*.

Sub-sect. 1. Infants.

"Or is an infant," "subject to the restrictions imposed by this Act on the number of trustees," and "whether or not being the persons exercising the power" are added. The appointment of an infant to be a trustee is void (L. P. Act, 1925, s. 20, *ante*). Under sect. 10 of T. A., 1893, a new trustee could not be appointed in place of an infant (*Re Tallatire* (1885), W. N. 191).

Number of trustees.

As to the restrictions imposed by the Act, see sect. 34, *ante*, and sub-sect. 6 of this section.

Donee of power appointing himself.

As to the donee appointing himself: Under the former law where the power expressly referred to the appointment of "other persons" (as in sect. 10 of T. A., 1893), the donee could not appoint himself (*Montefiore* v. *Guedalla*, [1903] 2 Ch. 725; *Re Sampson, S.* v. *S.*,

[1906] 1 Ch. 439). Where there was no such express reference, he could appoint himself (*ibid.*); but should not do so save in exceptional circumstances (*ibid.*; *Re Skeats*, 42 Ch. D. 522; *Re Newen, N.* v. *Barnes*, [1894] 2 Ch. 297). As to the donee appointing his own solicitor, see *Re Stamford, Payne* v. *S.*, [1896] 1 Ch. 288. **15 Geo. 5, c. 19, s. 36.**

"United Kingdom" means Great Britain and Northern Ireland (sect. 68, sub-sect. 20, *post*). Sub-sect. 1.

This section applies to trustees for the purposes of the S. L. Acts (sect. 64, *post*); and also to trustees of land held for religious or educational purposes (Trustees Appointment Act, 1890, s. 3; see *Re Coates to Parsons*, 34 Ch. 370). Where an appointment can be made under this section, application should not be made to the Court (*Re Gibbons*, 45 L. T. 756; 30 W. R. 287; *Re Higginbottom*, [1892] 3 Ch. 132. See *Re Soulby*, 21 W. R. 256; *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247).

An appointment made under this section will be free from any fetter to which a power in the trust instrument is subject (*Cecil* v. *Langdon*, 28 Ch. D. 1; *Re Lloyd*, 57 L. J. Ch. 246).

Where a trustee had resided for twelve months abroad, a new trustee was appointed (*Re Walker and Hughes*, 24 Ch. D. 698); but where in such a case the trustee had been in London for one week during the twelve months the appointment was held void (*Re Walker, Summers* v. *Barrow*, [1901] 1 Ch. 259; see *Re Stamford, Payne* v. *S.*, [1896] 1 Ch. 288; *Re Arbib and Class*, [1891] 1 Ch. 601). See as to evidence of absence, unfitness, &c., sect. 38, *post*. It seems that a trustee who disclaims, refuses to act within this section (*D'Adhemar* v. *Bertrand*, 35 Beav. 19), although he has no legal estate in him (*Re Birchall, B.* v. *Ashton*, 40 Ch. D. 436). When the trustees named in the will of a testator all die before him new trustees cannot be appointed under this section (*Nicholson* v. *Field*, [1893] 2 Ch. 511). As to a trustee becoming insane during the life of a testator, see *Newton* v. *N.*, noticed in L. T. Jour., vol. 55, p. 56. Upon the death of a surviving trustee his executors were held to have been displaced by a new appointment (*Re Routledge, R.* v. *Saul*, [1909] 1 Ch. 284). Vacancies.

Where a deed declared that certain persons should have "power to appoint new trustees," they were held to be "persons nominated for this purpose" (*Re Walker and Hughes*, 24 Ch. D. 698). Persons nominated to appoint trustees in certain events cannot under this section appoint in any other event (*Re Wheeler and De Rochow*, [1896] 1 Ch. 315; *Re Sichel*, [1916] 1 Ch. 358). As to the case of separate sets of trustees, see, [1896] 1 Ch. 321. Where the person nominated for the purpose of appointing is a lunatic so found, an appointment can be made under this section by the continuing trustees (*Re Blake* (1887), W. N. 173); in which case an appointment could also be made by the committee under an order in lunacy (see p. 1115, *post*). Where a power of appointment was vested in certain persons, the survivor and the heirs of the survivor, and the heir of the survivor could not be found, there was no person "nominated for the purpose and able and willing to act," and the surviving and continuing trustee could appoint under this section (*Cradock* v. *Witham*, [1895] W. N. 75). Where the persons nominated cannot agree, the personal representative of the last surviving trustee can appoint (*Re Sheppard* (1888), W. N. 234). A surviving trustee who is about to retire can under sub-sect. 8 appoint (see *Re Coates to Parsons*, 34 Ch. D. 370). But where the surviving trustee is abroad and will not appoint, application must be made to the Court (*Re Clift*, 27 S. J. 199). So where he is incapable (*Re Lemann*, 22 Ch. D. 633). A deceased sole trustee is a "last surviving or continuing trustee," and his executor can appoint (*Re Shafto*, 29 Ch. D. 247). The personal representative is not bound to appoint under this section (*Re Knight*, 26 Ch. D. 82). Who can appoint.

15 Geo. 5, c. 19, s. 36.

A surviving trustee cannot exercise the power given by this section by his will (*Re Parker*, [1894] 1 Ch. 707). Where a surviving trustee of a will appointed by his will general executors, and also special executors to execute the trusts of the original will, an appointment by the general executors under this section of new trustees of the original will was held valid (*ibid.*). And where the will of a surviving trustee named several executors, of whom A. alone proved, an appointment by A. was valid under sect. 27 of Lord Cranworth's Act (which section vested the power in the "acting executor" of the surviving trustee), and sect. 71 of the Conv. Act, 1881 (*Re Boucherett, Barne* v. *Erskine*, [1908] 1 Ch. 180). See now sub-section 4.

As to cases where the status of the donee of the power has been altered by an Act of Parliament see *Re Spencer, Duncan* v. *Royal Geological Society*, 33 Times L. R. 16; *Re Beresford Fund, ibid.*, 208.

Who can be appointed.

Where the donee of the power of appointing under this section desires to appoint, the Court will not interfere with him (*Re Higginbottom*, [1892] 3 Ch. 132). A judgment for the execution of the trusts will not prevent him from appointing (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134; *Re Hall, H.* v. *H.*, 59 L. T. 901; and see *Re Sales, S.* v. *S.*, 55 S. J. 838). But in that case his nominee must be approved by the Court (*ibid.; Re Norris, Allen* v. *N.*, 27 Ch. D. 333). Where there is no such judgment the donee might possibly appoint a person whom the Court would not have sanctioned (*Re Norris*, 27 Ch. D. 341; *Re Stamford, Payne* v. *S.*, [1896] 1 Ch. 288; *Re Cotter*, [1915] 1 Ch. 307; and see *Re Coode, C.* v. *Foster*, 108 L. T. 94).

Mode of appointment.

A corporation could be appointed a new trustee under sect. 10 of T. A., 1893, even jointly with the surviving trustee (*Re Thompson, T.* v. *Alexander*, [1905] 1 Ch. 229). See now sub-sects. 2 and 3. So can the Public Trustee (Public Trustee Act, 1906, s. 5; and see *Re Moxon*, quoted under sub-sect 6, *infra*).

The appointment may be made "by writing." But it cannot be made by will (*Re Parker*, [1894] 1 Ch. 707).

Sub-sect. 2.

This and sub-sects. 3, 4, 5 and 6 are new. Sub-sect. 2 seems to apply to the case of a vacancy arising on some ground other than those named in the section. For the restrictions imposed by the Act on the number of trustees see sect. 34, *ante*, and sub-sect. 6 of the present section.

Sub-sect. 3.

Cf. sect. 41, sub-sect. 1, and note, *post*, pp. 1069, 1072.

Sub-sect. 6.

In *Re Badger, B.* v. *Woolley*, 84 L. J. Ch. 567, it was held that where a sole trustee was originally appointed by a settlor or testator the beneficiaries had no absolute right to the appointment of a second trustee. For "trust corporation" see p. 794, *ante*. The Public Trustee could be appointed sole trustee though the will directed that the number of trustees should not be reduced below three (*Re Leslie's Estates*, [1911] 1 Ch. 611; *Re Moxon*, [1916] 2 Ch. 595). See also sects. 37 and 39, *post*.

Sub-sects. 7 and 8 re-enact T. Act, 1893, s. 10 (3) and (4).

Sub-sect. 9 is new. See as to "defective" S. L. Act, s. 117 (1) (xiii), *ante*, p. 979, and see also sect. 41, sub-sect. 1, and sect. 54, and notes, *post*.

Supplemental provisions as to appointment of trustees.

37.—(1) On the appointment of a trustee for the whole or any part of trust property—

(a) the number of trustees may, subject to the restrictions imposed by this Act on the number of trustees, be increased; and

(b) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property

held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed; and 15 Geo. 5, c. 19, s. 37.

(c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.

(2) Nothing in this Act shall authorise the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust.

Sub-sect. 1 re-enacts T. A., 1893, s. 10, sub-sect. 2. "Subject to the restrictions imposed by this Act on the number of trustees" (see sects. 34 and 36, sub-sect. 6, *ante*), is added in (a); "not exceeding four" in (b); and "save as hereinafter provided" in (b) and (c); and the reference to the inability of a sole trustee to give receipts (see sect. 14, sub-sect. 2, *ante*), and to a trust corporation are added in (c). For "trust corporation" see p. 794, *ante*.

Sub-sect. 2 is new. (See *supra*.)

Number of trustees.

The power in this section to increase the number of trustees only applies where a vacancy is being filled (*Re Gregson*, 34 Ch. D. 209); but even where there is no vacancy the Court can increase the number, either under sect. 41, *post* (*ibid.*), or under its general jurisdiction (*D'Adhemar* v. *Bertrand*, 35 Beav. 19). The appointment of a single trustee under sect. 27 of 23 & 24 Vict. c. 145 was held valid (*West of England Bank* v. *Murch*, 23 Ch. D. 138).

Separate sets of trustees.

T. A. 1893, s. 10 (2) (b) (reproduced in clause (b)) replaced Conv. Act, 1882, s. 5; Conv. Act, 1892, s. 6, as to which see *Savile* v. *Couper* (36 Ch. D. 520); *Re Moss' Trusts* (37 Ch. D. 513); *Re Paine* (28 Ch. D. 725); and the cases quoted under sect. 41, *post*, p. 1075. It would seem doubtful whether separate trustees can be appointed out of Court when the trusts may ultimately coalesce (*Re Hetherington*, 34 Ch. D. 211).

As to the original appointment of a sole trustee, see *Re Badger*, cited on sect. 36, sub-s. 6, *supra*.

15 Geo. 5, c. 19, s. 38.

Evidence as to a vacancy in a trust.

38.—(1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.

(2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

This section is new. See sect. 36, sub-sect. 1, *ante*. "United Kingdom" means Great Britain and Northern Ireland (sect. 68, sub-sect. 20 *post*).

Retirement of trustee without a new appointment.

39.—(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

Replaces Trustee Act, 1893, s. 11, which replaced sect. 32 of the Conv. Act, 1881. The Court has jurisdiction to discharge a trustee without appointing a new trustee in his place (*Re Chetwynd, Scarisbrick* v. *Nevinson*, [1902] 1 Ch. 692). Where the Public Trustee has been appointed a co-trustee may retire (Public Trustee Act, 1906, s. 5 (2)).

The reference to a trust corporation (p. 794, *ante*), is added.

Vesting of trust property in new or continuing trustees.

40.—(1) Where by a deed a new trustee is appointed to perform any trust, then—

(a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the

trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and

(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates interests and rights with respect to which a declaration could have been made.

(2) Where by a deed a retiring trustee is discharged under the statutory power without a new trustee being appointed, then—

(a) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates; and

(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by such persons as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.

(3) An express vesting declaration, whether made before or after the commencement of this Act, shall, notwithstanding that the estate, interest or right to be vested is not expressly referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary contained in the deed of appointment or discharge) to vest in the persons respectively referred to in subsections (1) and (2) of this section, as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons.

(4) This section does not extend—

(a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;

15 Geo. 5, c. 19, s. 40.

(b) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;

(c) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under an Act of Parliament.

In this subsection "lease" includes an underlease and an agreement for a lease or underlease.

(5) For purposes of registration of the deed in any registry, the person or persons making the declaration expressly or impliedly, shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(6) This section applies to deeds of appointment or discharge executed on or after the first day of January, eighteen hundred and eighty-two.

Replaces T. Act, 1893, s. 12, which replaced sect. 34 of the Conv. Act, 1881. Sub-sects. 1 (b), 2 (b) and 3, the words from "except" to "stock" in sub-sect. 4 (a), and sub-sect. 4 (b) are added; and a provision excluding legal estates or interests in copyhold or customary land omitted, those tenures being abolished as from January 1, 1926, by L. P. Act, 1922, Part V. For retrospective amendments of sect. 12 of T. A., 1893, and sect. 34 of Conv. Act, 1881, as to customary land and land securing debentures, see Sched. 1 (2), *post*, p. 1110.

This section applies in the case of a bare trustee (*London and County Banking Co.* v. *Goddard*, [1897] 1 Ch. 642). Where an equitable mortgage contained a declaration of trust by the mortgagor of the legal estate and a power to the mortgagees to appoint new trustees, and the mortgagees exercised that power and made a vesting declaration under this section, the legal estate was held to pass (*ibid.*). See also as to sub-sect. 4, *S. C.*, p. 649. Compare with this section the effect of an undertaking under seal by the Public Trustee to administer a small estate (Public Trustee Act, 1906, s. 3 (2)).

For the statutory power referred to in sub-sect 2, see sect. 39, *ante*.

Part IV.

Powers of the Court.

Appointment of new Trustees.

Power of Court to appoint new trustees.

41.—(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without

the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. 15 Geo. 5, c. 19, s. 41.

In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a lunatic or a defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

(2) The power conferred by this section may, in the case of a deed of arrangement within the meaning of the Deeds of Arrangement Act, 1914, be exercised either by the High Court or by the court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed. 4 & 5 Geo. 5, c. 47.

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section gives power to appoint an executor or administrator.

This section re-enacts Trustee Act, 1893, s. 25. Sub-sect. 2 is added (see sect. 1 of the Deeds of Arrangement Act, 1914), as are in sub-sect. 1 "or is a lunatic or defective" and the words from "or is a corporation" to "dissolved."

In connection with this section see also the power of the Court to appoint a judicial trustee under the Judicial Trustees Act, 1896, *post*.

The first half of sub-sect. 1 corresponds with and replaces sect. 32 of the Trustee Act, 1850, and sect. 9 of the Trustee Act, 1852. The second half replaces, as regards felony, part of sect. 8 of the Trustee Act, 1852, and, as regards bankruptcy, sect. 147 of the Bankruptcy Act, 1883. Sub-sect. 3 corresponds with sect. 36 of the Trustee Act, 1850.

General note.

Of the cases referred to in the following note many were decided under the law as it existed prior to the passing of the T. Act, 1893. Such decisions, however, appear to be still applicable.

When persons are only constituted trustees by an order in a suit, new trustees cannot be appointed in their place by the same order (*Lees* v. *Coulton*, 20 Eq. 20).

The Court, upon an application under sect. 32 of the Trustee Act, 1850, refused to enter into the question of the validity of the instrument creating the trust (*Re Matthews*, 26 Beav. 463). Except under special circumstances, as where a vesting order was required, the Court refused to appoint a new trustee where there was a valid power in the instrument of trust (*Re Davies*, 3 Mac. & G. 278; see *Re Cooper*, 4 W. R. 729; *Re Sutton* (1885), W. N. 122); even where the donee of the power intended to exercise it corruptly (*Re Hodson*, 9 Hare, 118). Nor as a rule would the Court appoint where an appointment could be made under a statutory power (*Re Soulby*, 21 W. R. 256; *Re Gibbons*, 45 L. T. 756; see *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247; *Re Higginbottom*, [1892] 3 Ch. 132).

15 Geo. 5, c. 19, s. 41.

And, there being an existing power, it was held that a judgment for the execution of the trusts did not give jurisdiction to the Court to appoint; but it was said that in such a case the person appointed by the donee of the power required to be approved by the Court; and that repeated appointments of improper persons might be held to amount to a refusal to exercise the power (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134; *Re Hall, H.* v. *H.*, 51 L. T. 901; see *Re Sales, S.* v. *S.*, 55 S. J. 838). Proper persons appointed by the donee were approved by the Court, although all the beneficiaries objected (*Cecil* v. *Langdon*, 28 Ch. D. 1).

Lunatic donees of power.

Where the donee of the power was a lunatic so found, it would seem that the Court of Lunacy could not appoint (see *Re Garrod*, 31 Ch. D. 164); but the power might be exercised by the committee under an order in lunacy (Lun. Act, 1890, ss. 128, 129, *post*, p. 1114; see *Re Bowmer*, 3 De G. & J. 658; *Re Garrod, supra; Re Shortridge*, [1895] 1 Ch. 278); or the trustees might appoint under sect. 10 of T. Act, 1893 (sect. 36, *ante*) (see *Re Blake* (1887), W. N. 173). The Chancery Division had also jurisdiction to make an appointment (*Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662) (see now sect. 54, *post*). The Court refused in such a case to appoint a new trustee, until a committee had been appointed and served with the petition (*Re Parker's Trusts*, 32 Beav. 580).

Circumstances causing application to the Court.

(1) Connected with the power.

The Court has appointed new trustees in the following cases. Where the donees of the power were unwilling to appoint (*Re Knight*, 26 Ch. D. 82), or could not agree (*Re Tempest*, 1 Ch. 485), or were in India (*Re Humphrey*, 1 Jur. (N.S.) 921); where under a settlement by a husband for the sole benefit of the wife, the husband and wife had a joint power but were judicially separated and the husband had long resided abroad (*Re Somerset* (1887), W. N. 122); where the power was vested in the surviving trustee, "his heirs or assigns," and the heir of the last surviving trustee could not be found (*Re Freeman*, 37 Ch. D. 148; compare *Cradock* v. *Witham*, [1895] W. N. 75); where it was doubtful whether the power applied to the case which had occurred (*Re Woodgate*, 5 W. R. 448; *Re Armstrong's Settlement*, 5 W. R. 448; *Cooper* v. *Macdonald*, 14 W. R. 755). Where a continuing trustee had power, but declined, to appoint the Public Trustee the Court appointed him (*Re Kensit*, [1908] W. N. 235). See the provisions as to powers of appointing new trustees, sect. 36, *ante*, p. 1060.

(2) Circumstances connected with the trustee.

Mental incapacity.

Before the Lunacy Act, 1890, orders were made under the Trustee Act, 1850, by the Court of Chancery alone, appointing a new trustee in the place of a person of unsound mind not so found, the incapacity arising from mental infirmity (*Re Martin*, 34 Ch. D. 618; *Re Davies*, 3 Mac. & G. 278; *Re Vickers*, 3 Ch. D. 112; *contra*, *Re Ormerod*, 3 De G. & J. 249; *Re Good Intent Society*, 2 W. R. 671). Where a vesting order was also asked, the order was in some cases made in Chancery and Lunacy (*Re Mason*, 10 Ch. 273; *Re Stewart*, 8 W. R. 297; *Re Davidson*, 20 L. J. Ch. 644; *Re Druce*, 46 L. T. 669; *Re Smyth*, 55 L. T. 37); but could not be made in Chancery alone (*Re Martin*, 34 Ch. D. 618); except where the person of unsound mind was also an infant (*Re Arrowsmith*, 6 W. R. 642; see Lunacy Act, 1890, s. 143, *post*, p. 1122), or out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29), or where an order for sale had been made (*Herring* v. *Clark*, 4 Ch. 167). Since the Lunacy Act, 1890, a new trustee has, under the Trustee Act, 1893, s. 25, been appointed in Chancery alone in the place of a person of unsound mind not so found; but a vesting order was refused (*Re M.*, [1899] 1 Ch. 79). Such a vesting order had, it seems, to be applied for in lunacy (see *Re Martin*, 34 Ch. D. 618). As to the power of appointing new trustees possessed by the Court of Lunacy, see Lunacy Act,

1890, s. 141, *post*, p. 1121; *Re Owen*, 4 Ch. 782; *Re Green*, 10 Ch. 272; *Re Hodgson, Kenlis* v. *H.*, 11 Ch. D. 889; *Re Rolls Hoare* (1888), W. N. 94; *Re Chauncey*, 14 W. R. 849. As already noted, the present section gives the Court express power to appoint a new trustee in place of a lunatic or defective one. **15 Geo. 5, c. 19, s. 41.**

By the Lunacy Act, 1911, s. 1, the powers of the Judge in Lunacy under sects. 135-143 of the Lunacy Act, 1890, to make vesting and other orders, including the power to appoint a new trustee or trustees under sect. 141, in the case of lunatic trustees or mortgagees, were transferred to the High Court, except so far as they related to lunatic mortgagees not being also trustees, the exception including the case of the mortgage debt being paid off and the lunatic mortgagee becoming trustee for the mortgagor (*Re James's Mortgage Trusts*, [1919] 1 Ch. 61).

The present Act repeals sect. 1 of the Lunacy Act, 1911; but sect. 54, *post*, p. 1093 (replacing Lunacy Act, 1922, s. 2 (3) to (5)), provides that, where the High Court has power under this Part of the Act to make orders in relation to lunatic and defective trustees, the Judge or Master in Lunacy shall have no power to make such an order, except in the case dealt with in *Re James's Mortgage Trusts* (*supra*) and three other cases (see the section and the Trustee Act (Jurisdiction in Lunacy) Rules, 1925, *post*, p. 1112). For "defective," see S. L. Act, 1925, s. 117 (1) (xiii), *ante*.

Physical incapacity.

In the case of a person who is incapable, the incapacity arising from physical infirmity or old age (*Re Lemann*, 22 Ch. D. 633; *Re Phelps*, 31 Ch. D. 351; *Re Barber*, 39 Ch. D. 187; *Re Campbell* (1888), W. N. 176), or ill-health (*Re Chauncey*, 14 W. R. 849; *Re Weston*, [1898] W. N. 151; see *Re Dawson*, 3 N. R. 397), the Chancery Division has appointed a new trustee.

Infancy.

The Court appointed a new trustee in the place of an infant trustee nominated by a testator (*Re Gartside*, 1 W. R. 196; *Re Porter*, 25 L. J. Ch. 482); without prejudice, however, to any application by the infant to be restored to the trusteeship when he comes of age (*Re Shelmerdine*, 33 L. J. Ch. 474; *Re Brunt* (1883), W. N. 220; *Re Tallatire* (1885), W. N. 191). By L. P. Act, 1925, s. 20, *ante*, the appointment of an infant to be a trustee in relation to any settlement or trust is void.

Residence abroad.

The Court has power under this section to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 247). Where a trustee was resident in Jamaica, but there was no evidence that he did not intend to return to this country, Kindersley, V.-C., refused to appoint a new trustee (*Re Mais*, 16 Jur. 608; 21 L. J. Ch. 875; see *Re Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288; *Re Walker, Summers* v. *Barrow*, [1901] 1 Ch. 259, cases of powers). A bookseller domiciled in New York for several years was held "incapable of acting" within the words of a power (*Mennard* v. *Welford*, 1 Sm. & Giff. 426; but see *Re Bignold, supra*). See, further, *Re Moravian Society*, 26 Beav. 101; *Re Arbib and Class*, [1891] 1 Ch. 601; *Re Watts*, 9 Hare, 106; *Re Harrison*, 22 L. J. Ch. 69; *Re Stewart*, 8 W. R. 297. As to appointing a trustee in place of an ex-enemy sovereign, see *Re Ex-Czar of Bulgaria*, 122 L. T. 115.

Absconding.

A new trustee will be appointed where a trustee absconds (*Hyde* v. *Benbow* (1884), W. N. 117), or is an absconding bankrupt (*Re Renshaw*, 4 Ch. 783; *Re Druce*, 46 L. T. 669; *Re Lamb*, 28 Ch. D. 77; *Davies* v. *Hodgson*, 32 Ch. D. 225; *Re Gardiner*, 33 Ch. D. 590; *Re Mace* (1887), W. N. 232).

Bankruptcy.

A new trustee can under this section be appointed in place of a bankrupt, even if unwilling to retire (*Re Dawson*, [1899] W. N. 134). Where the bankruptcy was recent, and it was not shown that the man

15 Geo. 5, c. 19, s. 41.

was of good character and had the command of means, it was held that he ought to be removed (*Re Adams' Trust*, 12 Ch. D. 637; *Re Foster*, 55 L. T. 479; see *Re Bridgman*, 1 Dr. & Sm. 170); except, possibly, in a case where he has no money to receive (*Re Barker's Trusts*, 1 Ch. D. 43). A new trustee was appointed in place of a bankrupt (*Re Tweedy*, 28 Ch. D. 529). See also above cases as to absconding. Trust property does not pass to the bankruptcy trustee (Bankruptcy Act, 1914, s. 38 (1)).

Felony.

A new trustee can, under this section, be appointed in place of a felon, although the latter is unwilling to retire (*Re Dawson*, [1899] W. N. 134).

Surviving trustee dead intestate and no administrator.

Where a surviving trustee is dead intestate and no administration has been taken out, a new trustee may be appointed under this section (*Davis* v. *Chanter*, 6 W. R. 416). As to vesting orders in such a case, see the note to sect. 44, *post*, p. 1080. A person absolutely entitled to stock was in such a case appointed trustee for his own benefit, and the stock was ordered to be transferred to him (*Re Dickson* (1872), W. N. 223).

No existing trustees.

Where trustees appointed by will had died in the testator's life, an appointment was made (*Re Smirthwaite*, 11 Eq. 251; *Re Orde*, 24 Ch. D. 271; *Re Williams*, 36 Ch. D. 231). Where the appointment of the acting trustees was void, and the donee of the power of appointment could not be found, the Court appointed (*Re Freeman*, 37 Ch. D. 148). In the case of stock standing in the name of an incorporate body which had ceased to exist, the Court appointed trustees and directed them to transfer (*Hanover* v. *Bank of England*, 8 Eq. 350). Where a limited company sold its leaseholds and became dissolved before assigning them, the Court appointed a new trustee under this section, pointing out that the words "although there is no existing trustee" do not limit the previous words (*Re Bomore Road* (No. 9), [1906] 1 Ch. 364; *Re Queenstown Co.*, [1918] 1 I. R. 356; see *Re Taylor*, [1904] 2 Ch. 741). In another case the Court appointed a trustee in the place of an industrial or provident society which had been dissolved (*Re Ruddington*, [1909] 1 Ch. 701). See now the concluding words of sub-sect. 1.

No trustees originally appointed.

Where no trustees were originally appointed by a testator, it was doubtful whether the Court could appoint under the Trustee Acts, 1850 and 1852, but it could clearly appoint under its inherent jurisdiction (*Bodkin* v. *Brunt*, 6 Eq. 580; *Re Moore*, *McAlpine* v. *Moore*, 21 Ch. D. 778; *Re Gillett* (1876), W. N. 251; 25 W. R. 23). Where persons were declared constructive trustees of stock, trustees were appointed in their place, although no trustees had been originally named by the testatrix (*Re Davis*, 12 Eq. 214).

Trustees refusing to act.

Where a trustee who had executed the deed creating the trust declined to act, the Court refused, under this section, to appoint a new trustee in his place without his consent (*Re Garty*, 10 L. T. 331); but new trustees have been appointed in the place of disclaiming trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Martinez*, 22 L. T. 405; *Re Pratt*, 55 L. T. 315); and it is sufficient that a disclaiming trustee should disclaim at the bar (*Foster* v. *Dawber*, 1 Dr. & Sm. 172; *Re Tyler*, 5 De G. & Sm. 56).

Trustee not removed against his will.

The Court refused, under the Trustee Act, 1850, to remove a trustee who desired to continue in the trust (*Re Hodson*, 9 Hare, 121), even where he was a solicitor who misconducted himself (*Re Blanchard*, 3 D. F. & J. 131). Nor would the Court remove on the ground of lunacy where the lunacy was disputed (*Re Combs*, 51 L. T. 45). To remove a trustee resident within the jurisdiction from the trust against his wish, an action was necessary (*Re Blanchard*, 3 D. F. & J. 131; *Re Bignold*, 7 Ch. 223); and the mere fact of there being a dissension between one of several *cestuis que trust* and the trustee

was held not a sufficient ground for removal (*Forster* v. *Davies*, 4 D. G. F. & Jo. 133). See further, *Letterstedt* v. *Broers* (9 App. Cas. 371); *Assets Co.* v. *Trustees Corporation* (65 L. J. Ch. 74); Lewin, 1087, 12th ed. But where new trustees can be appointed on petition, an action should not be brought (*Thomas* v. *Walker*, 18 Beav. 521; *Legg* v. *Mackrell*, 2 D. F. & J. 551). As to removing felon or bankrupt trustees against their will, see *Re Dawson, supra.*

Existing trustees were not re-appointed.

It was finally settled, after some difference of opinion (*Re Driver*, 19 Eq. 352; *Re Dalgleish*, 4 Ch. D. 143; *Re Pearson*, 5 Ch. D. 982), that the Court would not re-appoint existing trustees with a view to a vesting order being made under sect. 34 of the Trustee Act, 1850 (now replaced by sect. 44 (i) of the present Act). See *Re Vicat* (33 Ch. D. 103); *Re Dewhirst* (*ibid.* 416); *Re Stocken* ([1893] W. N. 203). But see now the added words in sub-sect. (i) of sect. 44.

Receiver.

Trustees were appointed although there was a receiver of the trust property (*Reeves* v. *Neville*, 10 W. R. 335).

Principles on which new trustees are selected.

In selecting a new trustee, it was said that the Court would have regard to the wishes of the author of the trust expressed in or clearly collected from the instrument creating the trust. A person would not be appointed with a view to the interest of some of the *cestuis que trust* in opposition to the interests of others. The Court would have regard to the question whether the appointment would promote or impede the execution of the trust; but the mere fact of the continuing trustee refusing to act with the proposed trustee was not sufficient to prevent the appointment (*Re Tempest*, 1 Ch. 485).

Who will be appointed.

The Court would not in general appoint a *cestui que trust* to be a trustee (*Foster* v. *Abraham*, 17 Eq. 356; *Re Roskell*, Seton, 1188, 7th ed.; *Re Conybeare*, 1 W. R. 458; *Ex p. Clutton*, 17 Jur. 988); but where the *cestui que trust* was absolutely entitled, and it was decided to vest the trust funds in him, he might be appointed (*Re Currie*, 10 Ch. 93; *Re Dickson* (1872), W. N. 223; *Re Price* (1883), W. N. 202). A *cestui que trust* was appointed under special circumstances, *e.g.*, where there were indications in the will (*Tempest* v. *Camoys*, 58 L. T. 221); or where a stranger could not be found (*Re Clissold*, 10 L. T. 642); but in such cases an undertaking has been required that if the person appointed became the sole trustee, he would immediately take steps to appoint a co-trustee (*Re Burgess* (1877), W. N. 87; *Re Lightbody*, 52 L. T. 40). The husband of a *cestui que trust* was appointed on a similar undertaking (*Re Parrott* (1881), W. N. 158; *Re Hattatt*, 21 L. T. 781; 18 W. R. 416; see *Wilding* v. *Bolder*, 21 Beav. 224).

Cestui que trust.

Woman.

Unmarried women were formerly only appointed under special circumstances (*Re Campbell*, 31 Beav. 176; *Berkley* v. *Berkley*, 9 Ch. 720; *Re Peake*, [1894] 3 Ch. 520; see *Brook* v. *B.*, 1 Beav. 531), but more recently have been frequently appointed (*Re Dickinson*, [1902] W. N. 104). As to married women, see now M. W. P. Act, 1882, ss. 18, 24, *ante*, pp. 389, 393; L. P. Act, 1925, s. 170, *ante*, p. 762.

Person resident abroad.

Persons resident out of the jurisdiction were only appointed under special circumstances (*Re Freeman*, 37 Ch. D. 151; *Re Guibert*, 16 Jur. 852; *Re Curtis*, I. R. 5 Eq. 429). In the case of personalty, where all the *cestuis que trust* were permanently resident abroad, such persons were appointed (*Re Liddiard*, 14 Ch. D. 310; *Re Austen*, 38 L. T. 601; *Re Drewe* (1876), W. N. 168); and where one *cestui que trust* resided in Canada, a Canadian was appointed trustee of her share jointly with the other trustee (*Re Cunard*, 48 L. J. Ch. 129; 27 W. R. 52). In the case of realty, where all the *cestuis que trust* were resident abroad, two Canadian and one English trustee were appointed, upon an undertaking by the Canadian trustees that they would not appoint any new foreign trustee without the consent of the Court (*Re Freeman*, 37 Ch. D. 148; compare *Re Simpson*, [1897] 1 Ch. 256). Where

15 Geo. 5, c. 19, s. 41.

English and Irish lands were settled on the same trusts, and the English Court had appointed English trustees of the English land, the Irish Court appointed the same persons to be trustees of the Irish land (*Re Maberley*, 19 L. R. Ir. 341). Where the *cestuis que trust* were resident abroad, the Court appointed an alien to be trustee where no English person could be found (*Re Hill* (1874), W. N. 228).

Agent. Solicitor.

The agent of the property was appointed and allowed to receive a commission (*Re Freeman*, 37 Ch. D. 148). The Court refused to appoint the solicitor acting for the petitioner (*Re Orde*, 24 Ch. D. 271; see *Re Stamford*, [1896] 1 Ch. 288); but this was done where there was a difficulty in finding anyone else (*Re Brentnall* (1872), W. N. 77).

A corporation.

A corporation can be appointed trustee, even jointly with a continuing trustee (*Re Thompson, T.* v. *Alexander*, [1905] 1 Ch. 229; and see sect. 42, *post*). As to the practice where a corporation is appointed executor, see *Re Hunt*, [1896] P. 288.

Number of trustees appointed.

The Court would not appoint a sole trustee (*Re Ellison*, 2 Jur. (N.S.) 62; *Re Porter*, *ibid.* 349; *Re Dickinson*, 1 Jur. (N.S.) 724; see *D'Adhemar* v. *Bertrand*, 35 Beav. 20; *West of England Bank* v. *Murch*, 23 Ch. D. 146), except under special circumstances (*Re Reynault*, 16 Jur. 233; see *Leigh* v. *Pantin*, [1914] 2 Ch. 701). Two trustees of real estate were appointed by the Court in the place of one (*Ex p. Tunstall*, 4 De G. & S. 421; see *Re Welsh*, 3 My. & Cr. 292; *Birch* v. *Cropper*, 2 De G. & S. 255; *Plenty* v. *West*, 16 Beav. 356); and new trustees were added to the original trustees (*Re Boycott*, 5 W. R. 15; *Grant* v. *G.*, 34 L. J. Ch. 641; *Re Brackenbury*, 10 Eq. 45; *Re Gregson*, 34 Ch. D. 209). Where the number had dropped to one, a second was appointed (*Finlay* v. *Howard*, 2 Dr. & W. 490). The Court would not in general diminish the number of the trustees, but, under special circumstances, two were appointed in place of three (*Re Marriott*, 18 L. T. 749; *Bulkeley* v. *Earl of Eglinton*, 1 Jur. (N.S.) 994; *Re Fowler* (1886), W. N. 183).

Prior to the Trustee Act, 1893, in a case where there was a continuing trust, and one of the trustees became an absconding bankrupt, the Court would not reduce the number by appointing the other trustees to be trustees in the place of themselves and the bankrupt, and vesting the property in them alone; but held that a new trustee must be appointed (*Re Lamb*, 28 Ch. D. 77; *Re Gardiner*, 33 Ch. D. 591), following the decisions in lunacy (*Re Nash*, 16 Ch. D. 503; *Re Aston*, 23 Ch. D. 217). Appointments and vesting orders of this nature were, however, made under special circumstances (*Re Martyn*, 26 Ch. D. 745; *Re Watson*, 19 Ch. D. 384; *Davies* v. *Hodgson*, 32 Ch. D. 225). Since the Trustee Act, 1893, and having regard to sects. 26 and 35 of that Act (sects. 44 and 51, *post*), the Court, in a similar case, without making any fresh appointment, has vested property in three out of four trustees (*Re Lees*, [1896] 2 Ch. 508; *Dugmore* v. *Suffield*, [1896] W. N. 50), and in two out of three (*Re Price*, [1894] W. N. 169; *Re Fitzherbert*, [1898] W. N. 58). A similar order has been made under the Lunacy Act, 1890, ss. 135, 136 (*Re Leon*, [1892] 1 Ch. 348). In the case of a trustee desiring to retire, the Court refused to discharge him under this section without appointing another in his place, but discharged him under the general jurisdiction (*Re Chetwynd, Scarisbrick* v. *Nevinson*, [1902] 1 Ch. 692). Cf. as to reducing the number of trustees, sect. 34, *ante*.

Where the Public Trustee is appointed to be custodian trustee, he is not to be reckoned in determining the number of trustees for the purposes of this Act (Public Trustee Act, 1906, s. 4 (2) (g)). The Public Trustee may be appointed new, or additional, or sole

trustee (sect. 5). Cf. *Re Moxon*, [1916] 2 Ch. 595, quoted in note to sect. 36, sub-sect. 6, *ante*. **15 Geo. 5, c. 19, s. 41.**

Severance of trusts.

Where by the same instrument different parts of the property are vested in the same trustees on different trusts, the Court can (independently of sect. 37, *ante*, p. 1064) appoint separate new trustees of the different parts (*Re Paine*, 28 Ch. D. 725; *Re Hetherington*, 34 Ch. D. 211; *Re Grange, Cooper* v. *Todd*, 44 L. T. 469), or of one part only, without requiring new trustees to be appointed of the remaining part (*Re Moss*, 37 Ch. D. 513, where the existing trustees retired from part of the trusts; *Re Dennis*, 12 W. R. 575; *Re Cotterill* (1869), W. N. 183; *Re Aston*, 25 L. R. Ir. 96; see *Re Cunard*, 48 L. J. Ch. 129). An order was refused in *Re Nesbitt* (19 L. R. Ir. 509).

Sub-sect. 2. Trustee of creditor's deed.

The Court, before the present Act, appointed new trustees of a trust deed for benefit of creditors (*Re Raphael*, 9 Eq. 233; *Re Price*, 6 Eq. 460; *Re Bache* (1868), W. N. 223; *Re Donisthorpe*, 10 Ch. 55).

Evidence on application of appointment of new trustees.

The evidence should show that the person proposed to be appointed is a fit person. One affidavit is sufficient; the costs of a second will not be allowed (*Re Arden* (1887), W. N. 166). The deponent's position in life must be stated. "Gentleman" is not sufficient (*Re Horwood*, 55 L. T. 373; *Re Orde*, 24 Ch. D. 271). The deponent should not be the solicitor (*Grundy* v. *Buckridge*, 17 Jur. 731; 22 L. J. Ch. 1007; *Re Hartley* (1879), W. N. 169). Something should be shown as to the pecuniary means of the proposed trustee (*Re Castle Sterry* (1888), W. N. 179). "Of independent means" is sufficient, but not "gentleman" alone (*Re Horwood, supra*; see *Re Smith's Policy*, [1894] W. N. 68). In general the proposed trustee shall not appear by counsel to consent (*Re Draper*, 2 W. R. 440; *Re Parker*, 21 L. T. 218). His consent to act, however, should, in proceedings in Chancery and in Chancery and lunacy, be evidenced by a written consent signed by him, and verified by the signature of his solicitor (R. S. C. Ord. 38, r. 19A; *Re Hume*, 35 Ch. D. 457). As to a consent in the case of proceedings in lunacy, see Rules in Lunacy, 1892, r. 92, and form of consent, *post*, pp. 1124, 1125. As to evidence on application for vesting order, see note to sect. 44, *post*, p. 1082.

Form of application.

All applications under the Act may be made by petition except as otherwise provided under Ord. 55 (R. S. C. Ord. 54B, r. 2). An application for the appointment of a new trustee may be made by summons (R. S. C. Ord. 55, r. 13A (a)), but the appointment must be made by the Judge in person (R. S. C. Ord. 55, r. 15A). The application, if not made in any pending matter, should be entitled in the matter of the trust and of the Act (R. S. C. Ord. 54B, r. 4A). If a vesting order is asked for, the application should state the sections of the Act under which it is proposed that the order should be made (*ibid*).

For forms of petitions and summons for the appointment of new trustees and for vesting orders, see Dan. Ch. Forms.

Service.

On an application to appoint new trustees in the place of two who were desirous of retiring, both the old trustees and all the *cestuis que trust* were required to appear (*Re Sloper*, 18 Beav. 596); but service on the old trustee was not required, where he was physically incapable by reason of physical infirmity (*Re Weston*, [1898] W. N. 151), or mental infirmity (*Re Green*, 10 Ch. 272; *Re Stewart*, 8 W. R. 297; see *Re East*, 8 Ch. 735), or was permanently resident abroad (*Re Bignold*, 7 Ch. 233; *Re Martin Pye*, 42 L. T. 247; *Re Stewart, supra*), or had absconded (*Re Nicholson's Trusts* (1884), W. N. 76; *Hyde* v. *Benbow, ibid.* 117). Where the last trustee was dead, intestate, and a vesting order was asked, service on the heir was required (*Re Oxenham* (1875), W. N. 6; *Re Smirthwaite*, 11 Eq. 251; see now Admon. of Estates Act, 1925, ss. 1 and 3 (1), *ante*;

15 Geo. 5, c. 19, s. 41.

and as to deaths before 1926, Conv. Act, 1881, s. 30; and *Re Pilling*, 26 Ch. D. 432). Service on the heir was not required in *Purvis* v. *Abraham* (1866), W. N. 126; *Re Stanley*, [1893] W. N. 30. Where an order had been made on petition, and two persons had been made petitioners without their consent, their names were struck out, and they were treated as not served (*Re Savage*, 15 Ch. D. 557). Where a new trustee was appointed of a term of years, service on the reversioner was required (*Re Farrant*, 20 L. J. Ch. 532; see *Re Matthew*, 2 W. R. 85). The general rule formerly was that all the *cestuis que trust* must be served or join in the application (*Re Richards*, 5 De G. & Sm. 636; *Re Fellows*, 2 Jur. (N.S.) 62). But where parties were numerous, service was dispensed with on some who were represented by trustees (*Re Smyth*, 2 De G. & Sm. 781; see *Re Blanchard*, 3 D. F. & J. 137), and on one who was abroad (*Re Wilson*, 31 Ch. D. 522; *Re Lightbody*, 52 L. T. 40; see *Re Parrott* (1881), W. N. 158). According to the present practice an express order dispensing with service is not necessary, the Judge exercising his discretion according to the circumstances of each case (Practice Note, [1901] W. N. 85).

Forms of orders.

For forms of orders, see Seton, 7th ed. 1172 *et seq.*

Sub-sect. 4.

Compare the definition of trust contained in sect. 68, sub-sect. 17, *post*, p. 1106. The Court has refused to appoint a person to perform the duties of executor (*Eaton* v. *Daines*, [1894] W. N. 32; *Re Willey*, [1890] W. N. 1; see *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778; and see now Judicial Trustees Act, 1896, s. 1, *post*).

A new trustee was appointed to act with an administrator who had cleared the estate (*Re Ponder*, [1921] 2 Ch. 59).

Power to authorise remuneration.

42. Where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit.

This sect. is from L. P. Act, 1922. Compare Judicial Trustees Act, 1896, s. 1 (5), *post*.

Powers of new trustee appointed by the Court.

43. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Re-enacts T. Act, 1893, s. 37, which section replaced sect. 33 of the Trustee Act, 1850, and sect. 33 of the Conv. Act, 1881. Before these sections trustees appointed by the Court could not appoint others in their place (*Holder* v. *Durbin*, 11 Beav. 594), or exercise discretionary powers (*Newman* v. *Warner*, 1 Sim. (N.S.) 457). See further the note to sect. 18, *ante*, p. 1036.

Vesting Orders.

Vesting orders of land.

44. In any of the following cases, namely:—

(i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed

out of court under any statutory or express power; 15 Geo. 5, c. 19, s. 44.

(ii) Where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person—

(a) is under disability; or

(b) is out of the jurisdiction of the High Court; or

(c) cannot be found, or, being a corporation, has been dissolved;

(iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any interest in land;

(iv) Where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead;

(v) Where there is no personal representative of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land;

(vi) Where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey the land or interest or to release the right, and has wilfully refused or neglected to convey the land or interest or release the right for twenty-eight days after the date of the requirement;

(vii) Where land or any interest therein is vested in a trustee whether by way of mortgage or otherwise, and it appears to the court to be expedient;

the court may make an order (in this Act called a vesting order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that—

(a) Where the order is consequential on the appointment of a trustee the land or interest therein shall be vested for such estate as the court

15 Geo. 5, c. 19, s. 44.

may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled or formerly entitled jointly with another person, and such trustee is under disability or out of the jurisdiction of the High Court or cannot be found, or being a corporation has been dissolved, the land interest or right shall be vested in such other person who remains entitled, either alone or with any other person the court may appoint.

This section replaces T. Act, 1893, s. 26, which itself replaced sects. 7-15 and 34 of the T. Act, 1850, and sect. 2 of the T. Act, 1852. As compared with sect. 26 of the Act of 1893, there are added the words from "or" to "power" in sub-sect. (i); from "or interest" to "otherwise" and from "or" to "dissolved" in sub-sect. (ii); "interest in" before "land"; the whole of sub-sect. (vii); and in proviso (b) "or formerly entitled," "under disability or," and "or being" to "dissolved." "Is under disability" is substituted for "is an infant" in sub-sect. (ii) (a), and the concluding words of the section for "some other person." "Heir or," is omitted in sub-sect. (v).

Sub-sect. (i). Infirmity.

Where the Court appointed a new trustee in place of a person incapable from physical infirmity, a vesting order was made under this sub-section (*Re Weston*, [1898] W. N. 151). But where the incapacity arose from mental infirmity the Chancery Division refused to make a vesting order; which it seems had, in such a case, to be applied for in Lunacy (*Re M.*, [1899] 1 Ch. 79; *Re Martin*, 34 Ch. D. 618). But see now the words "is under disability" in sub-sect. (ii), and the note to sect. 41 (*ante*, p. 1070), and sect. 54 (*post*), as to the Lunacy jurisdiction.

Sub-sect. (ii).

Land held by a company which is dissolved.

In cases where the Court appointed a new trustee in the place of a dissolved company or society, it has made orders vesting in the new trustee real estate and choses in action previously vested in the company or society (*Re Bomore Road* (*No.* 9), [1906] 1 Ch. 359; *Re Ruddington*, [1909] 1 Ch. 707; *Re Queenstown Co.*, [1918] 1 Ir. R. 356). If in such a case a new trustee was not appointed, there was a conflict of authority as to whether a vesting order could be made on the ground that the trustee "cannot be found." See, on the one hand, *Re General Accident Corporation*, [1904] 1 Ch. 147; *Re Richard Mills*, [1905] W. N. 36, in which cases legal interests in leaseholds and freeholds were in question. And see, on the other hand, *Re Taylor*, [1904] 2 Ch. 741, where letters patent were in question; *Re Ruddington*, [1909] 1 Ch. 707. See now clause (c).

Infants.

As above noted "is under disability" is substituted for the words "is an infant" in sect. 26 of T. Act, 1893. The appointment of an infant as trustee is void (L. P. Act, 1925, s. 20, *ante*).

Before the Conv. Act, 1881, infants often became by devolution or devise seised of lands as trustees, and in particular where a vendor of land had died (see *Re Lowry*, 15 Eq. 78). Under the Conv. Act, 1881, ss. 4 and 30, the legal estate devolved on the personal representative, both where there was a contract to sell freeholds binding on the heir or devisee of a deceased vendor, and in the case of trust estates; except in the latter case, where they were copyhold (Copyhold Act, 1887, s. 45; see *Re Mills*, 37 Ch. D. 312; *Re Beaufort*, [1898] W. N. 148). See now Administration of

Estates Act, 1925, ss. 1 and 3, *ante*. Copyhold tenure was abolished after 1925 by L. P. Act, 1922. **15 Geo. 5, c. 19, s. 44.**

The Chancery Division had jurisdiction where the infant was also a lunatic (*Re Arrowsmith*, 4 Jur. (N.S.) 1123; 6 W. R. 642; Lunacy Act, 1890, s. 143, *post*, p. 1122); see note to sect. 41, *ante*, and sect. 54, *post*. A vesting order was refused as to an equitable estate vested in an infant, and which was bound by an order for sale (*Re Williams*, 5 D. G. & Sm. 515). A vesting order was made as to the estate of an infant heir in *Dewar* v. *Maitland*, 2 Eq. 834.

Infant tenant in tail.

In the case of an infant tenant in tail, a vesting order will, if the protector consents to it, bar all estates in remainder (*Powell* v. *Matthews*, 1 Jur. (N.S.) 973; *Re Montagu, Faber* v. *M.*, [1896] 1 Ch. 549; and see *Hargreaves* v. *Wright*, 1 W. R. 408; *Singleton* v. *Hopkins*, 4 W. R. 107; *Re Breary* (1873), W. N. 487; *Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620). For form of order appointing a person to convey property for an infant tenant in tail, see *Re Montagu, supra*.

Where a testator had agreed to grant easements, and infants were entitled to the land, a person was appointed under sect. 7 of the Trustee Act, 1850, to convey to a releasee to uses for the purpose of granting the easements and subject thereto to the uses of the will (*Re Taylor* (1866), W. N. 5).

Service.

The infant should be served (*Re Jones*, 22 W. R. 837; *Re Adams* (1887), W. N. 175; *Re Russell* (1866), W. N. 125; *Re Cooper*, 9 W. R. 531; *contra, Re Little*, 7 Eq. 323; *Re Tweedy*, 9 W. R. 398; *Re Willan, ibid.* 689; *Re Davies' Trust* (1889), W. N. 215).

Forms.

For forms of orders vesting land, see Seton, 7th ed. 1191-1193.

Sub-sect. (ii) (b), (c).

Trustees out of jurisdiction or who cannot be found.

If a lunatic trustee was out of the jurisdiction, it would seem that the Chancery Division could make a vesting order (*Re Gardner*, 10 Ch. D. 29; see now sect. 54, *post*). A trustee will be treated as out of the jurisdiction, even where he appears by counsel (*Stillwell* v. *Ashley*, Seton, 7th ed. 1206). An heir who was out of the jurisdiction was declared to be a trustee, and his interest vested in the executor (*Hooper* v. *Strutton*, 12 W. R. 367; see *Re Badcock*, 2 W. R. 386; *Re Skitter*, 4 W. R. 791).

Where a mortgagee who was a trustee absconded, the land was vested in the *cestui que trust* (*Re Barber*, 58 L. T. 303). Where one out of four trustees absconded, the land was vested in the other three, no new trustee being required (*Re Lees*, [1896] 2 Ch. 508; see the note *ante*, p. 1074). Where a trustee of a will disclaimed and the heir could not be found, a person was appointed to convey the land which had been sold in an administration action (*Wilkes* v. *Groom*, 8 D. M. & G. 205).

Mortgagor absconding.

Where a mortgagor under an equitable mortgage, the defendant in a foreclosure suit, had absconded, an order was made declaring him a trustee and vesting the estate in the mortgagee (*Lechmere* v. *Clamp*, 30 Beav. 218; 31 Beav. 578). But the order will not be made on motion to make the foreclosure absolute; a separate application must be made (*Smith* v. *Boucher*, 1 Sm. & G. 72). Where a mortgagor was abroad, a vesting order was refused as to the last day of the term which he had covenanted to assign to a purchaser from the mortgagee (*Re Propert*, 22 L. J. Ch. 948).

Trustee solely entitled.

As regards the meaning of "solely seised" in sect. 9 of the Trustee Act, 1850, in a case where the legal interest in land was vested in A. and B., and A. was beneficially entitled to the whole, it was said that B. was solely seised of one moiety in trust for A. (*McMurray* v. *Spicer*, 5 Eq. 539).

Sub-sect. (iii) Trustee jointly entitled.

For forms of orders, see Seton, 7th ed., pp. 1191 *et seq.*

Under sect. 10 of the Trustee Act, 1850, it was held that the words "seised jointly" were not to be construed strictly as referring

15 Geo. 5, c. 19, s. 44.

to a joint tenancy at law only (*Re Greenwood*, 27 Ch. D. 359), and included co-parceners (*ibid.*). A mortgagee having died intestate, the estate descended upon two co-parceners, one of whom was out of the jurisdiction, the estate was vested in the other alone (*Re Templer*, 4 N. R. 494). Where one of a bankrupt's assignees had gone abroad, the Court made an order declaring him a trustee, and vesting the estate in the other assignees (*Re Joyce*, 2 Eq. 576). An order was made under sect. 10 of the Trustee Act, 1850, as to one of several trustees who was a convict (*Re Hulme*, 57 L. T. 13). Where one of several mortgagees who were trustees was abroad, his interest was vested in a transferee (*Re Walker*, 3 Ch. D. 209). But where realty was mortgaged to A. and B., and A. went abroad, it was held, upon payment off of the mortgage, that the Court had no jurisdiction under the Trustee Act, 1850, to vest in the purchaser the estate of A. (*Re Osborn*, 12 Eq. 392).

Service and forms.

In the case of a sole trustee's heir who was abroad, service was dispensed with (*Re Stanley*, 62 L. J. Ch. 469; 68 L. T. 197). In the case of persons jointly entitled, service was dispensed with on the person abroad (*Re Greenwood*, 27 Ch. D. 359). For form of orders, see Seton, 7th ed. 1193.

Sub-sect. (iv)

For form of orders, see Seton, 7th ed. 1194.

Sub-sect. (v).

No representative.

"Or heir" was added in T. Act, 1893 (see Administration of Estates Act, 1925, s. 45). Under the corresponding section (sect. 15) of the Trustee Act, 1850, the Court vested copyholds, the sole trustee of which had died intestate without an heir, in the *c. q. t.* who was absolutely entitled (*Re Godfrey*, 23 Ch. D. 205). Where as a security for a loan land was conveyed on trust for sale and payment of the loan, and of the balance to the borrower, "his executors, administrators, and assigns," and the lender died intestate and without an heir, a vesting order was made under the same section, the deed which operated as a conversion being more than a mere mortgage (*Re Underwood*, 3 K. & J. 745; see *Re Keeler*, 11 W. R. 62). A bastard sold a reversionary interest in realty under a will, the trustees of which subsequently conveyed the legal estate to the bastard who died without children: an order was made vesting the legal estate in the purchaser (*Re Wilkinson*, 12 W. R. 522). As to evidence on applications by married women, see *Re Graves*, [1925] W. N. 205.

For form of order, see Seton, 7th ed. 1194.

Sub-sect. (vi)

Refusal or neglect to convey.

A refusal was held not "wilful" within sect. 2 of T. Act, 1852, where the trustee entertained *bona fide* doubt as to the title of the applicant to call for a conveyance (*Re Mills*, 40 Ch. D. 14). An order was made under that section to defeat an attempt at extortion on the part of a trustee (*Re O'Donnell*, 19 W. R. 522). Where one of two trustees of mortgagees absconded, and refused to transfer to the continuing and a new trustee, a vesting order was made, but the Court required the new trustee to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487; see *Re Grayson*, 27 W. R. 534).

A. having been declared a trustee of leaseholds for the plaintiff, and ordered to execute an assignment, refused to execute. Notice of motion for an order directing A. to execute the deed within four days, or for a vesting order, was served on A., who did not appear. The motion having stood over for twenty-eight days, a vesting order was made on an *ex parte* application (*Knight* v. *K.* (1866), W. N. 114). And where the defendant had been declared a trustee for the purpose of executing a lease to the plaintiff and neglected to do so within twenty-eight days after formal demand, an order was made that, on the consideration money being brought into Court, the chief clerk should execute the lease (*Derham* v. *Kiernan*, Ir. R. 5 Eq. 217). See also *Warrender* v. *Foster*, Seton, 7th ed. 2218;

and the power given by Jud. Act., 1884, s. 14 (now Jud. Act, 1925, s. 47), for the Court to nominate a person to execute an instrument in place of a person who does not comply with an order to do so. The last-mentioned power was exercised in *Howarth* v. *H.*, 11 P. D. 68, 95; *Re Cathcart*, [1893] 1 Ch. 466; *Re Lumley*, [1893] W. N. 13; see *Savage* v. *Norton*, [1908] 1 Ch. 290. 15 Geo. 5, c. 19, s. 44.

Where a mortgagor covenanted to surrender copyholds to his mortgagee, and neglected to surrender for twenty-eight days after demand and tender of engrossment, a vesting order was made on the petition of the mortgagee (*Re Crowe*, 13 Eq. 26). As to the instrument to be tendered in the case of copyholds, see before this Act *Rowley* v. *Adams*, 14 Beav. 130. Separate orders may be made as to different parts of the property if convenient (*Brader* v. *Kirby* (1872), W. N. 174).

Service and forms.

Service was not required on the recusant (*Re Crowe*, 13 Eq. 26; see *Ex p. Armstrong*, 16 Sim. 296; *Re Baxter*, 2 Sm. & Giff. App. 5). An order vesting lands, which were subject to an annuity, was made without requiring service on the annuitant (*Re Winteringham*, 3 W. R. 578). For form of order, see Seton, 7th ed. 1194; see also sect. 51, sub-sect. 1 (ii), *post*, and note.

General note as to vesting orders of land.

The Court has authority to make a vesting order of land, though there may exist a person capable of conveying it to the trustees appointed by the Court (*Re Manning*, Kay, App. 28).

Crown.

Where the legal estate in land had vested in the Crown as a trustee, the Court had no jurisdiction under the earlier Trustee Acts to make a vesting order (*Re Taylor*, [1904] 2 Ch. 741; *Re Pratt*, 55 L. T. 313; *Pryce Jones* v. *Williams*, [1902] 2 Ch. 522; compare *Hastings* v. *Letton*, [1908] 1 K. B. 386). See further *Re Martinez*, 22 L. T. 403, where the Crown consented; *Re Minchin*, 2 W. R. 179; *Re Giraud*, 32 Beav. 385; and compare the decisions as to the Crown quoted *ante*, p. 143. But sect. 5 of the Intestates Estates Act, 1884, provided that, where under that Act an order for sale was made of the Crown's interest in land, sect. 1 of the Trustee Act, 1852, should apply (see now sect. 38, sub-sect. 2, and sect. 57 of the Admon. of Estates Act, *ante*, which Act repeals the Intestates Estates Act, 1884). Sect. 30 of the T. Act, 1893 (see now sect. 47, *post*), would seem to have applied to such a case (see sect. 38 of the Interpretation Act, 1889). The present Act binds the Crown (sect. 71, sub-sect. 4, *post*).

Where new facts arise or are discovered after the making of a vesting order, see, as to the practice, *Re Havelock*, 14 W. R. 26, 174; *Re Clinton, Jackson* v. *Slaney* (1882), W. N. 176.

Form of application for vesting order of land.

The application for a vesting order consequential on the appointment of a new trustee, whether the appointment is made by the Court or a Judge or out of Court, may be made by summons (R. S. C. Ord. 55, r. 13A (b)); see, as to allowing the costs of a petition in a complicated case, *Re Morris*, 60 L. T. 96. In other cases under this section the application must be by petition (R. S. C. Ord. 54B, r. 2; see *Frodsham* v. *F.*, 15 Ch. D. 317; *Smith* v. *Gill*, 53 L. T. 623); but may afterwards be referred to chambers (*Re Tweedy*, 28 Ch. D. 529; *Re Pratt*, 55 L. T. 313). The application, if not made in a pending matter, should be entitled in the matter of the trust and of the Act (R. S. C. Ord. 54B, r. 4A). The application should state the section or sections of the Act under which it is proposed that the order shall be made (*ibid.*).

Service.

On an application for a vesting order of leaseholds, where the lease contained no covenant against assignment, service on the reversioner was not required (*Re Matthews*, 2 W. R. 85; see *Re Farrant*, 20 L. J. Ch. 532). And where a tenant for life applied for an order vesting property in a new trustee appointed under a

15 Geo. 5, c. 19, s. 44.

power, service on the remainderman was required (*Re Maynard*, 16 Jur. 1084). See, further, the cases as to service quoted above in the note to the present section, and in the note to sect. 41, *supra*.

Evidence.

In the case of a vesting order the beneficial title to the property may be proved by the affidavit of a person acquainted with the facts (*Re Hoskins*, 4 De G. & J. 436); but the legal title must be strictly proved (Dan. Ch. P. 7th ed. 1792).

Form of orders.

With regard in general to the form of orders vesting real estate, the order should describe the property (*Re Ord*, 3 W. R. 386). Land may be vested to uses to bar dower (*Davey* v. *Miller*, 1 Sm. & Giff. App. 19); but a declaration against dower will not be inserted (*Ex p. Grieve*, 5 De G. & Sm. 436). Land has been vested to the use of such persons as an executor and an executrix (who was a married woman) should by deed appoint, and in default in the executor and executrix (*Re Powell*, 4 K. & J. 338); and has been vested subject to a legacy (*Re Ellerthorpe*, 18 Jur. 669). See, further, Seton, 7th ed. 1208 *et seq*. For form of order in case of an infant heir of a vendor of copyholds, see *Re Beaufort*, [1898] W. N. 148; and in case of an infant tenant in tail, see *Re Montagu*, [1896] 1 Ch. 549.

Proviso (b).

Where one of several trustees is out of the jurisdiction and a new trustee is appointed in his place, the vesting order should in form vest in the new and continuing trustees such estate as was vested in the continuing and absent trustees (*Smith* v. *S.*, 3 Drew. 72; see *Re Fisher*, 1 W. R. 505; *Re Bute*, Johns. 15; see *contra*, *Re Watts*, 9 Hare, 106; *Re Plyer*, *ibid.* 220). In the case of a last surviving trustee who had died without a personal representative, the vesting order should in form vest the property in the new trustees, "for all such estate as was vested in the last surviving trustee at the time of his death" (*Re Williams*, 36 Ch. D. 231; *Re Rackstraw*, 52 L. T. 612; *Re Rathbone*, 2 Ch. D. 483; see *Re Sarum*, 55 L. T. 313; (1886), W. N. 140; *Re Pilling*, 26 Ch. D. 432).

Vesting orders in the case of absolute beneficial interests.

Under the Trustee Act, 1850, the Court of Lunacy refused to vest trust property directly in a person having an absolute beneficial interest (*Re Holland*, 16 Ch. D. 672); but did so after appointing as new trustee the person so entitled (*Re Currie*, 10 Ch. D. 93). Trust property, however, was vested in persons having absolute beneficial interests where a sole trustee of copyholds died intestate and without an heir (*Re Godfrey*, 23 Ch. D. 205). See also *Re Adams* (1887), W. N. 175; *Re Barber*, 58 L. T. 303; see further the decision as to vesting stock in beneficiaries quoted under sect. 51, *post*, p. 1092.

Scope of Trustee Act, 1850.

The scope of the Trustee Act, 1850, was to embrace every case of inconvenience (*Bristow* v. *Booth*, L. R. 5 C. P. 91). But under it the Court had no jurisdiction to decide a dispute as to title (*Re Draper*, 9 W. R. 805). It was said that the Court, in acting under the Trustee Acts, never administered trusts (*Re Holland*, 16 Ch. D. 672); certainly not in lunacy (*Re Currie*, 10 Ch. D. 93).

Public trustee.

As regards the Public Trustee where he acts as custodian, vesting orders may be made (Public Trustee Act, 1906, s. 4 (2) (a)). And where he undertakes to administer small estates the undertaking may operate under this section (sect. 3, sub-sect. 2).

Vesting property in winding up.

Compare with the above section the power of the Court to vest in the liquidator the real property of an unregistered company being wound up (Comp. (Consol.) Act, 1908, s. 272).

Orders as to contingent rights of unborn persons.

45.—Where any interest in land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof,

become entitled to or possessed of that interest on any trust, the court may make an order releasing the land or interest therein from the contingent right, or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

15 Geo. 5, c. 19, s. 45.

Re-enacts Trustee Act, 1893, s. 27. That section replaced sect. 16 of the Trustee Act, 1850, under which section orders were made discharging in favour of purchasers the rights of unborn persons (*Hargreaves* v. *Wright*, 1 W. R. 408), and vesting in purchasers the interests of unborn children (*Wake* v. *W.*, 1 W. R. 283).

For form of order, see Seton, 7th ed. 1195.

For definition of "contingent right," see sect. 68, sub-sect. 2, *post*.

46.—Where any person entitled to or possessed of any interest in land, or entitled to a contingent right in land, by way of security for money, is an infant, the court may make an order vesting or releasing or disposing of the interest in the land or the right in like manner as in the case of a trustee under disability.

Vesting order in place of conveyance by infant mortgagee.

Re-enacts T. Act, 1893, s. 28. This section replaces portions of sects. 7 and 8 of the Trustee Act, 1850; under which sections the legal estate in copyholds outstanding in the infant heir of a mortgagee was vested (*Re Franklyn* (1888), W. N. 217). In the present section "trustee under disability" is substituted for "an infant trustee" (see note to sect. 44, *ante*, p. 1078).

As to service, see note to sub-sect. (ii) (a) of sect. 44, *ante*, p. 1079.

For form of order, see Seton, 7th ed. 1191.

47.—Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee for the purposes of this Act, and the court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate or interest as that court thinks fit in the purchaser or mortgagee or in any other person:

Provided that, in the case of a legal mortgage, the estate to be vested in the mortgagee shall be a term of years absolute.

Vesting order consequential on order for sale or mortgage of land.

Re-enacts T. Act, 1893, s. 30 (as altered by the amending Act of 1894). The proviso is new. For "term of years absolute," see S. L. Act, 1925, s. 117 (1) (xxix), *ante*; and as to mortgages, L. P. Act, 1925, ss. 85 *et seq.*, *ante*.

Sect. 30 of T. Act, 1893, replaced sect. 29 of the Trustee Act, 1850, and sect. 1 of the Trustee Act, 1852. The section corresponds

15 Geo 5, c. 19, s. 47.

in effect with those sections, but extends the power of the Court to the case of an order directing a mortgage. Under the former of such sections, where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the testator's debts, the purchaser could require an order discharging the contingent rights of the unborn issue of the infant (*Wood* v. *Beetlestone*, 1 K. & J. 213). The latter of such sections was held to apply to orders for sale under the Partition Acts, 1868 and 1876 (*Beckett* v. *Sutton*, 19 Ch. D. 646); and where an order had been made for sale of a lunatic's estate (*Herring* v. *Clark*, 4 Ch. 167; *Re Stamper, S.* v. *S.*, 46 L. T. 372). By the Intestates' Estates Act, 1884, s. 5, sect. 1 of the Trustee Act, 1852, was applied to sales of the interest of the Crown in escheated estates. Sect. 30 of T. Act, 1893, seems to have applied to such a case (see sect. 38 of the Interpretation Act, 1889). The Administration of Estates Act, 1925, *ante*, abolishes escheat in the case of deaths after 1925 (sect. 45, sub-sect. 1 (d)), and repeals the Intestates' Estates Act, 1884 (cf. note to sect. 44, p. 1081, *ante*). To carry out a sale ordered by the Court, a person was appointed to convey in lieu of a person refusing (*Beale* v. *Bragg*, [1902] 1 Ir. R. 99).

Where an order purporting to direct a mortgage (for purposes of maintenance) of an infant tenant in tail in remainder was made without jurisdiction, it had no effect and was not supported by the present section (*Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620).

Form of application.

Applications under this section should be made in chambers (R. S. C. Ord. 55, r. 13A (c)).

Vesting order consequential on judgment for specific performance, &c.

48.—Where a judgment is given for the specific performance of a contract concerning any interest in land, or for sale or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest in land either in cases arising out of the doctrine of election or otherwise, the court may declare—

(a) that any of the parties to the action are trustees of any interest in the land or any part thereof within the meaning of this Act; or

(b) that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was during his lifetime a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act;

and thereupon the court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

Re-enacts, omitting reference to judgments for partition or sale in lieu of partition (see *infra*), Trustee Act, 1893, s. 31, which replaced Trustee Act, 1850, s. 30. "Interest in" land is added.

Under this section the judgment is made a condition precedent (*Re Colling*, 32 Ch. D. 336).

Specific performance.

A donee of a power of jointuring was ordered, in a suit by his wife for specific performance, to execute the power by a deed. On his refusal, he was declared a trustee, and the Court appointed a

person to execute the requisite deeds in his place (*Wellesley* v. *W.*, 4 D. M. & G. 537). Where there had been a decree for specific performance of an agreement to grant a lease, and the defendant had refused to execute the lease, a person was appointed to execute in his place (*Hall* v. *Hale*, 51 L. T. 226; see, however, *Grace* v. *Baynton* (1877), W. N. 79). So where infants were entitled to land subject to an agreement for a lease (*Hodgson* v. *Bower*; *Howell* v. *Palmer*, Seton, 7th ed. 1227, 1228). A person entitled to land in Ireland agreed to convey it, and was ordered by a Scotch Court to execute a conveyance, but refused. He was declared a trustee by an Irish Court and a vesting order was made under sect. 26 of Trustee Act, 1893 (see now sect. 44, *ante*) (*Re Ruthven*, [1906] 1 I. R. 236). **15 Geo. 5, c. 19, s. 48.**

Partition.

In a partition suit, instead of giving an infant a day to show cause, the Court might declare him to be a trustee of the shares allotted to other parties (*Bowra* v. *Wright*, 4 De G. & Sm. 265). Where the shares of the parties to a partition suit were complicated, the Court declared each of the parties trustees as to the shares allotted to the other of them, and by the same order appointed a new trustee in their place vesting the whole property in such new trustee and directing him to convey (*Shepherd* v. *Churchill*, 25 Beav. 21; see form of order, *ibid.* p. 23; and *Orger* v. *Sparke*, 9 W. R. 180). Where, however, upon an order for sale in a partition action the parties and their unborn issue were declared trustees, the Court refused to appoint a new trustee in their place till after the order had been drawn up (*Lees* v. *Coulton*, 20 Eq. 20). Where an order for sale in a partition action was made contingent on the answers to certain inquiries, the Court by the same order declared that on such a sale infant parties would be trustees and ordered their next friend to convey their shares (*Davies* v. *Ingram*, [1897] 1 Ch. 477).

In partition suits where there was no order for sale, and part of the land the subject-matter of the action was vested in a lunatic, vesting orders were made in lunacy (*Re Molyneux*, 10 W. R. 512; *Re Sherard*, 1 D. J. & S. 421; *Re Watson*, 58 L. T. 509). Whether, since the Trustee Act, 1893, these orders could be made in Chancery alone seems doubtful (see the remarks of Stirling, J., in *Re M.*, [1899] 1 Ch. 85). In any case, however, after a sale had been directed, an order could, it would appear, be made in Chancery (see *Herring* v. *Clark*, 4 Ch. 167; *Re Watson*, 58 L. T. 509; *Casswell* v. *Sheen*, 69 L. T. 854). The Partition Acts, 1868 and 1876, were repealed by L. P. Act, 1925, without prejudice to proceedings commenced thereunder before January 1, 1926. See as to undivided shares in land, sect. 34 of that Act, *ante*, p. 622.

Other cases.

Sect. 30 of the Trustee Act, 1850, was said to apply to all cases where there was a judgment against an infant for an immediate conveyance (*Mellor* v. *Porter*, 25 Ch. D. 161). Whether this included a judgment against an infant for foreclosure of an equitable mortgagee, see *S.C.* For orders in foreclosure suits declaring the mortgagor a trustee for the mortgagee, see *Lechmere* v. *Clamp* and *Smith* v. *Boucher*, quoted, *ante*, p. 1079, and for a similar order as to the mortgagor's infant heir, see *Foster* v. *Parker* (8 Ch. D. 147). Where a sale was ordered in a foreclosure suit instituted against a mortgagor of unsound mind, an order was made vesting the property in the plaintiff as trustee for the purchaser (*Harrison* v. *Smith*, 17 W. R. 646).

The words "unborn persons" in a similar position in sect. 30 of the Trustee Act, 1850, were held to include living persons who might subsequently have a right to claim under a party, *e.g.*, as his heir (*Bassett* v. *Moxon*, 20 Eq. 182).

In the case of sales of realty, where there is only an unexecuted contract for sale, a suit is necessary to declare the vendor a trustee;

15 Geo. 5, c. 19, s. 48.

but in the case of an executed contract a suit is not necessary (*Re Cuming*, 5 Ch. 72; see note, *post*, p. 1108).

As to the case where a person, declared to be a trustee in a suit, refuses to convey land, see *Knight* v. *K.* and *Derham* v. *Kiernan*, quoted in note to sub-sect. (vi) of sect. 44, *ante*, p. 1080.

Applications under this section must be in Chambers (R. S. C. Ord. 55, r. 13A (c)). For forms of orders under this, the preceding and the two following sections, see Seton 7th ed. 1221—32 and 1196; *Lees* v. *Coulton* (20 Eq. 21).

See in connection with this section the power given by the Jud. Act, 1884, s. 14 (now Jud. Act, 1925, s. 47), to appoint a person to execute documents on behalf of a recusant; and *Howarth* v. *H.*, 11 P. D. 68, 95; *Re Cathcart*, [1893] 1 Ch. 466; *Re Lumley*, [1893] W. N. 13; *Savage* v. *Norton*, [1908] 1 Ch. 290.

Effect of vesting order.

49.—A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a trustee, have the same effect—

(a) as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate or interest as the court directs; or

(b) if there is no such person, or no such person of full capacity, as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate or interest as the court directs;

and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Re-enacts, adding "or interest" after "estate," Trustee Act, 1893, s. 32.

Provisions to the same effect were contained in sects. 34 and 7—15 of the Trustee Act, 1850, and sects. 12 and 8 of the Trustee Act, 1852. In the case of an order vesting the estate of an infant tenant in tail the effect is to bar the estate tail and remainders over (*Re Montagu, Faber* v. *M.*, [1896] 1 Ch. 549; see *Re Hambrough, H.* v. *H.*, [1909] 2 Ch. 620). See Seton, 7th ed. 1171, 1191 *et seq.*

Power to appoint person to convey.

50.—In all cases where a vesting order can be made under any of the foregoing provisions, the court may, if it is more convenient, appoint a person to convey the land or any interest therein or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Re-enacts Trustee Act, 1893, s. 33, which replaced the first half of sect. 20 of the Trustee Act, 1850.

The Jud. Act, 1884, s. 14 (now Jud. Act, 1925, s. 47), gives power to order an officer of the Court to execute documents.

15 Geo. 5, c. 19, s. 50.

Under sect. 20 of the Trustee Act persons were appointed to execute a lease (*Hall* v. *Hale*, 51 L. T. 226; *Cowper* v. *Harmer*, 57 L. T. 714; *Derham* v. *Kiernan*, I. R. 5 Eq. 217; see *contra*, *Grace* v. *Baynton* (1877), W. N. 79); and a jointure deed (*Wellesley* v. *W.*, 4 D. M. & G. 537). It was doubtful whether under that section a person could be appointed in place of an infant to convey in execution of a power given by statute, *e.g.*, a conveyance by an infant heir or devisee under sect. 11 of the Debts Recovery Act, 1830 (*Wood* v. *Beetlestone*, 1 K. & J. 213).

Who may be appointed.

In a foreclosure action against the infant heir of a mortgagee, his mother was appointed to convey (*Foster* v. *Parker*, 8 Ch. D. 147). Where the legal estate was vested in a tenant for life with remainder to an infant in tail, the agent of the vendor was appointed to convey for the infant on payment of the purchase-money into Court (*Hargreaves* v. *Wright*, 1 W. R. 408). Where real estate devised to married women and infants was sold under a decree in lots the Court appointed the plaintiffs' solicitor to convey their shares to the several purchasers (*Hancox* v. *Spittle*, 3 Sm. & Giff. 478; and see *Wilks* v. *Groom*, 6 D. M. & G. 205). A person was appointed to convey lands, the property of a lunatic, sold in a partition action (*Keating* v. *K.*, [1918] 1 I. R. 453).

For form of orders, see Seton, 7th ed. 1196. As to the conveyance, see *Ex p. Foley*, 8 Sim. 395; *Caswell* v. *Sheen*, 69 L. T. 854.

Vesting orders as to stock and things in action.

51.—(1) In any of the following cases, namely:—

(i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;

(ii) Where a trustee entitled, whether by way of mortgage or otherwise, alone or jointly with another person to stock or to a thing in action—

(a) is under disability; or

(b) is out of the jurisdiction of the High Court; or

(c) cannot be found, or, being a corporation, has been dissolved; or

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled; or

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action for twenty-eight days next after an order of the court for that purpose has been served on him;

(iii) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a thing in action is alive or dead;

(iv) Where stock is standing in the name of a

15 Geo. 5, c. 19, s. 51.

deceased person whose personal representative is under disability;

(v) Where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient;

the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint:

Provided that—

(a) Where the order is consequential on the appointment of a trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer:

Provided that the person appointed to make or join in making a transfer of stock shall be some proper officer of the bank, or the company or society whose stock is to be transferred.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act, may transfer the stock to himself or any other person, according to the order, and the Bank of England and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

This section re-enacts Trustee Act, 1893, s. 35, with the following differences: There are added the latter part of sub-sect. 1 (i), "whether" to "otherwise" in sub-sect. 1 (ii), "or" to "dissolved" in sub-sect. 1 (ii) (c) (cf. as to these, sect. 44, *ante*), sub-sect. 1 (iv) and (v) (cf. as to (v) sect. 44), and the proviso to

sub-sect. 2. "Is under disability" is substituted for "is an infant" in sub-sect. 1 (ii) (a) (cf. sect. 44, *ante*). Reference to the Bank of Ireland is omitted in sub-sects. 3 and 4. Sect. 35 of Trustee Act, 1893, replaced provisions of the Trustee Acts, 1850 and 1852. For definitions of "stock" and "transfer" see sect. 68, sub-sects. 14 and 16, *post*. **15 Geo. 5, c. 19, s. 51.**

Under sect. 35 of Trustee Act, 1850, orders were made vesting the right to transfer stock standing in the name of a testator who had no personal representative (*Re Herbert*, 8 W. R. 272), and stock standing in the name of two original trustees, the survivor having died without personal representative (*Re Crowe*, 14 Ch. D. 610). The Court has refused to vest in new trustees unauthorised investments (*Re Harrison*, 22 L. J. Ch. 69); but in such a case the Court vested the right to call for a transfer to the trustees themselves "or to any purchaser" from them (*Re Peacock*, 14 Ch. D. 212; see *Re New Zealand Trust Co.*, [1893] 1 Ch. 403; and compare *Re De Quetteville*, 19 T. L. R. 383). For form of order where one of two new trustees died before the stock was transferred to him, see *Re Glanville* ((1877), W. N. 248; (1878), W. N. 21); and see generally as to forms of orders, proviso (a), and p. 1091, *infra; Re Tweedy* (28 Ch. D. 529); *Re Hopper* (54 L. T. 267). Sub-sect. 1 (i).

In a case since the Trustee Act, 1893, the Court, on an application made in Chancery alone for appointment of new trustees and a vesting order, refused to make an order vesting stock standing in the name of a lunatic trustee (*Re M.*, [1899] 1 Ch. 79). But see now sect. 54, *post*, and note to sect. 41, *ante*, p. 1070.

As above noted, "is under disability" is substituted for "is an infant"; and the appointment of an infant as trustee is void (L. P. Act, 1925, s. 20, *ante*). Sub-sect. 1 (ii) (a).

Where consols were standing in the name of an infant, who was the sole beneficial owner, but subject to an express power of maintenance, which was vested in an executor, the infant was declared a trustee, and the right to transfer the consols was vested in the executor (*Gardner* v. *Cowles*, 3 Ch. D. 304; see *Sanders* v. *Homer*, 25 Beav. 467; *Rives* v. *Rives* (1866), W. N. 144). So also, where there was no express power, but only an order by a Scotch Court empowering a *curator bonis* to advance part of the capital (*Re Findlay*, 32 Ch. D. 221). In the last-mentioned case, the Bank of England objecting on the ground that there was no jurisdiction to declare the infant a trustee or make a vesting order, the order was abandoned by the parties, and the income was ordered to be paid to the guardian of the infant pursuant to 11 Geo. 4 & 1 Will. 4, c. 65, s. 32 (32 Ch. D. 641; see *Re Westwood*, 6 N. R. 61, 316). In *Gardner* v. *Cowles* and *Sanders* v. *Homer*, *supra*, the stock was ordered to be transferred into Court. Infant solely entitled.

Where consols are standing in the name of an infant, powers of accumulation at the request of the guardian are given by sect. 3 of the National Debt (Stockholders Relief) Act, 1892.

Where stock to which an infant was beneficially entitled was standing in the joint names of himself and another person, it was vested by an order in that other person (*Re Harwood*, 20 Ch. D. 536; *Re Barnett* (1889), W. N. 216). In a similar case the right to transfer was vested in the guardian (who according to the law of the infant's domicile was entitled to receive the infant's stocks), such guardian undertaking to transfer the stock into Court (*Re Dehaynin*, [1910] 1 Ch. 223). Where a father under a mistake transferred stock into the joint names of himself, his wife, and an infant child, the Court declared the infant a trustee for the father (*Devoy* v. *D.*, 3 Sm. & Giff. 403; followed in *Stone* v. *Stone*, 3 Jur. (N.S.) 708). Where stock was standing in the names of three trustees Infant jointly entitled with other person.

15 Geo. 5, c. 19. s. 51.

and an infant, and two trustees were dead, and the third was out of the jurisdiction, the Court appointed a guardian and allowed maintenance, and vested the right to receive the dividends in the guardian during the minority (*Re Morgan*, Seton, 6th ed. 1219).

For forms of orders under the section, see Seton, 7th ed. 1198—1204.

Sub-sect. 1 (ii) (b) (c).

Out of the jurisdiction, &c.

Under sect. 22 of Trustee Act, 1850, it was held that where a lunatic trustee was also out of the jurisdiction, the Chancery Division might alone make a vesting order (*Re Gardner*, 10 Ch. D. 29; see *Re M.*, [1899] 1 Ch. 79. See, however, *Cramer* v. *C.*, 5 D. & Sm. 312; and see *Re Smith*, I. R. 4 Eq. 180). See now as to the lunacy jurisdiction note to sect. 41, *ante*, and sect. 54, *post*; and on the added words respecting dissolved corporations, see note to sect. 44, *ante*.

Where a trustee of stock was absent from England in command of a vessel on a voyage to India, he was not out of the jurisdiction within 11 Geo. 4 & 1 Will. 4, c. 60 (*Hutchison* v. *Stephens*, 5 Sim. 498). A debtor in India mortgaged shares in an English company to a creditor in England; upon sale by the mortgagee the debtor was a trustee of the shares for the purchaser (*Re Angelo*, 5 De G. & Sm. 278).

Bank stock was standing in the names of four trustees, of whom one was abroad, but the parties were unwilling to remove him. Under the circumstances, and notwithstanding an objection by the bank that the title to the dividends and the corpus of the stock would be severed, the Court vested the right to receive past and future dividends in the three other trustees during their joint lives (*Re Peyton*, 25 Beav. 317; 2 De G. & J. 290).

Where one out of four trustees absconded, the trust choses in action were vested in the other three, no new trustee being required (*Re Lees*, [1896] 2 Ch. 508; see the note *ante*, p. 1074). Where one of two trustees was abroad, and a new trustee had been appointed in his place, the right to transfer was vested in the continuing and new trustees (*Re Blaine* (1886), W. N. 203; *Re Keeley*, 53 L. T. 487). The new trustee should be co-petitioner (*Re Keeley*, *supra*). It should appear on the face of the order that the trustee is out of the jurisdiction (*Re Mainwaring*, 26 Beav. 172). The case of a "personal representative" being out of the jurisdiction or impossible to find was specifically dealt with by sect. 25 of the Trustee Act, 1850, under which orders applicable to such a case were made in *Re Dickson* ((1872), W. N. 223); *Re Crowe* (14 Ch. D. 304, 610); *Re Price* ((1883), W. N. 202); *Re Trubee* ([1892] 3 Ch. 55).

Who cannot be found.

See the cases quoted under sect. 44, sub-sect. (ii) (c), *ante*, p. 1079.

Under the present sub-section in T. A. 1893, a vesting order was made in *Re Price* ([1894], W. N. 169).

Sub-sect. 1 (ii) (d).

Neglect to transfer after request.

The case of neglect to transfer after request by beneficiary was dealt with by sects. 23, 24, and 25 of the Trustee Act, 1850; under which it was held that new trustees properly appointed were persons "absolutely entitled" (*Ex p. Russell*, 1 Sim. (N.S.) 404; *Re Ellis*, 24 Beav. 426; *Re Baxter*, 2 Sm. & Giff. App. 5; see *Re Stroud* (1874), W. N. 180); but not one of such trustees, nor a tenant for life (*Mackenzie* v. *M.*, 5 De G. & Sm. 338). Where two executors of a surviving trustee refused to transfer to persons absolutely entitled, and the third executor was lunatic, a vesting order was made in Lunacy and Chancery (*Re White*, 5 Ch. 698; *Re Wacher*, 22 Ch. D. 535). The right to dividends accrued before his request was vested in the beneficiary; but it was held that the Court had no authority to make an order as to dividends accrued subsequent to the request (*Re Hartnall*, 5 De G. & Sm. 111).

The case of a "personal representative" refusing to transfer,

&c., was specifically dealt with by sect. 25 of the Trustee Act, 1850, under which orders applicable to such a case were made in *Re Ellis* (24 Beav. 426); *Re Stroud* ((1874), W. N. 180); *Re Trubee* ([1892] 3 Ch. 55). 15 Geo. 5, c. 19, s. 51.

Under the present sub-section in T. A. 1893, it has been held that the jurisdiction to make a vesting order does not arise before the twenty-eight days have expired (*Re Knox*, [1895] 1 Ch. 538; 2 Ch. 483). Under sects. 23 and 24 of the Trustee Act, 1850, service on the recusant trustee was not required (*Re Baxter*, 2 Sm. & Giff. App. v.; *Ex p. Armstrong*, 16 Sim. 296; see *Re Mount*, 24 L. T. 290). In a case under T. A. 1893, where the recusant trustee was served, he was ordered to pay costs (*Re Knox*, [1895] 2 Ch. 483; see sect. 60, *post*). An order will be made where the trustee does not appear on an affidavit stating that the petition has been served on him, and that the request, duly addressed and sent to him, has not been returned by the Post Office (*Re Struve's Trusts*, [1912] W. N. 149).

Sub-sect. 1 (ii) (e).

Neglect to transfer after service of an order.

Before T. A. 1893 the case of neglect to transfer after service of an order was dealt with by sects. 4 and 5 of the Trustee Act, 1852; under which it was held that the vesting order must not deal with a larger subject-matter than the previous order which it proposes to enforce (*Skynner* v. *Pelichet*, 9 W. R. 191). As to whether service of such previous order on the trustee personally is necessary, see *Coles* v. *Benbow* ((1873), W. N. 60). An order was made upon motion (*Re Holbrook*, 8 W. R. 3). Applications under this sub-section should be in chambers (R. S. C. Ord. 55, r. 13A (c)).

In connection with this sub-section, see the power given by Jud. Act, 1884, s. 14 (now Jud. Act, 1925, s. 47), to appoint a person to execute documents on behalf of a recusant; *Savage* v. *Norton*, [1908] 1 Ch. 290.

Sub-sect. 1 (iii).

Uncertainty as to death of trustee.

Before the T. Act, 1893, uncertainty as to whether a trustee was alive or dead was dealt with by sect. 22 of the Trustee Act, 1850. Where stock was standing in the names of A. and B. as trustees, and it was believed that A. had died previously, but strict proof could not be furnished, an order was made upon B.'s subsequent death appointing the bank's officer to concur with B.'s executor in transferring the stock into Court (*Re Bourke*, 2 De G. J. & Sm. 426).

Sub-sects. 2—5.

General note as to orders vesting stock, &c.

Form of order.

The effect of a vesting order is to transfer to the new trustees of a will the rights and powers of the old trustees, so that administration with the will annexed will be granted to them (*Woodfall* v. *Arbuthnot*, L. R. 3 P. & M. 108).

Where a vesting order is made by the Chancery Division in relation to trust stock or shares fully paid up, the order should vest in the person named the right to transfer the stock or shares. As a rule, the order should go on to direct those persons to transfer the stock into their own names (*Re Gregson*, [1893] 3 Ch. 233; *Re Joliffe*, [1893] W. N. 84; *Re Price*, [1894] W. N. 169; Seton, 7th ed., 1213; compare the order made by the Court of Lunacy, *Re C. M. G.*, [1898] 2 Ch. 324). But under special circumstances (as in the case of shares not fully paid) this direction may be omitted (*Re New Zealand Trust Co.*, [1893] 1 Ch. 403; *Re Gregson, supra*). The order may, under special circumstances, vest in the trustees a right to transfer the stock or shares to themselves "or any purchaser" (*Re Peacock*, 14 Ch. D. 212; *Re New Zealand Trust Co.*, [1893] 1 Ch. 411). With the added proviso to sub-sect. 2 compare Lunacy Act, 1890, s. 137.

Sub-sect. 5 replaces sect. 31 of the Trustee Act, 1850, under which it was held that the Court might order the person, in whom the right to transfer stock was vested, to transfer it into Court (*Re Pitt*, 1 Jur. (N.S.) 1155; *Re Dawson*, 3 N. R. 397), *e.g.*, under the Trustee

15 Geo. 5, c. 19, s. 51.

Relief Act (*Re Draper*, 9 W. R. 805; *Re Thornton*, 9 W. R. 475; see *Re Mais*, 21 L. J. Ch. 875).

Practice.

As to form of application and service, see further the notes to sects. 41 and 44, *supra*.

Bank of England.

The Bank of England are bound to comply with a vesting order in proper form, but are entitled to require that the order shall show that the statutory requirements have been satisfied (*Re Tweedy*, 28 Ch. D. 529; see *Re Ellis*, 24 Beav. 426; *Re Greyson*, [1893] 3 Ch. 233; *Re C. M. G.*, [1898] 2 Ch. 324; *Re Mainwaring*, 26 Beav. 172). Sect. 49 (*post*) provides an express indemnity for the bank and others acting under an order. There is also an implied indemnity to the bank acting on an order made by the Court under sect. 14 of the Jud. Act, 1884 (now Jud. Act, 1925, s. 47) (*Savage* v. *Norton*, [1908] 1 Ch. 290). Where a vesting order was made in chambers, the Bank of England refused to act on it (*Re Griffith* (1889), W. N. 171); and a vesting order was subsequently made on motion (*ibid.*; see *Re Jones* (1889), W. N. 196; 61 L. T. 554). Where the bank's officer is appointed to join in making a transfer, he can only transfer for the person divested by the order. Any person jointly entitled must join (*Wade* v. *Hopkinson*, Seton, 7th ed., 1214).

Vesting stock in beneficiaries absolutely entitled.

As regards vesting the right to transfer stock in *cestuis que trust* absolutely entitled, orders of this nature were made under sect. 22 of the Trustee Act, 1850 (*Ex p. Bradshaw*, 2 D. M. & G. 900; *Re Ryan*, 9 W. R. 137; see *Re White*, 5 Ch. 698; *Re Barber*, 58 L. T. 303; see *contra*, *Re Brass*, 4 W. R. 764). Similar orders were made where the persons absolutely entitled were appointed new trustees (*Re Dickson*, 21 W. R. 220; *Re Price* (1883), W. N. 202). The right to transfer stock was vested in a trustee who was beneficially interested, but only for the purpose of a transfer into Court (*Frodsham* v. *F.*, 15 Ch. D. 317). As to registered shares in ships before the T. Act, 1893, see Merchant Shipping Act, 1854, s. 10.

Sub-sect. 6.

Where the Public Trustee acts as custodian, vesting orders may be made (Public Trustee Act, 1906, s. 4 (2)). And where he undertakes to administer small estates, the undertaking may operate as a vesting order (sect. 3, sub-sect. 2).

Vesting property in winding up.

Compare with the above section the power of the Court to vest in the liquidator the personal property of an unregistered company being wound up (Comp. (Consol.) Act, 1908, s. 272).

Vesting orders of charity property.

52. The powers conferred by this Act as to vesting orders may be exercised for vesting any interest in land, stock, or thing in action in any trustee of a charity or society over which the court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the court under its general or statutory jurisdiction.

This section re-enacts, adding "interest in" before land, T. A., 1893, s. 39, which replaced sect. 45 of the Trustee Act, 1850. Under the latter section an order was made in *Re Davenport* (4 D. M. & G. 839); see *Re Lincoln Chapel* (1 Jur. (N.S.) 1011). New trustees of charities can be appointed (1) by the parties either under an express power, or under sect. 36 of the present Act (*Re Coates to Parsons*, 34 Ch. D. 370; Trustees Appointment Act, 1890, s. 3); or (2) by a Judge in chambers under the Char. Trusts Act, 1853, s. 28 (see R. S. C. Ord. 55, r. 13); or (3) by the Char. Commrs. under the Charitable Trusts Act, 1860, s. 2. Enactments providing that upon the appointment of new trustees of charities the land shall vest in

the new trustees without conveyance, are contained in the Trustees Appointment Acts, 1850, 1869 and 1890. 15 Geo. 5, c. 19, s. 52.

As to vesting orders where a charity trustee is a lunatic, see note to sect. 54, *post*.

Vesting orders in relation to infant's beneficial interests.

53. Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—

(a) appointing a person to convey such property; or

(b) in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit.

This section is from L. P. Act, 1922. See also as to maintenance, sect. 31, *ante*, p. 1051, and Conv. Act, 1881, ss. 42 (4) and (5) and 43, printed with notes under sect. 31. The present section appears to apply whether the instrument under which the infant takes came into operation before or on or after January 1, 1926.

Jurisdiction of the High Court in regard to lunatics.

54. Where the High Court has power under this Part of this Act to make orders in relation to lunatics and defectives who are trustees, the Judge or Master in Lunacy shall, save as provided in this section, have no power to make such an order:

Provided that where—

(a) a lunatic or defective has become a trustee of mortgaged property merely by reason of the mortgage having been paid off;

(b) an order in lunacy is made authorising the exercise of a power to appoint a trustee;

(c) an order in lunacy is made for giving effect to a contract made before the lunatic or defective was under disability;

(d) a lunatic or defective is beneficially entitled to some interest in the property but holds the property or some interest therein under an express, implied or constructive trust;

the High Court and the Judge or Master in Lunacy shall, in accordance with rules to be made by the Lord Chancellor, have concurrent jurisdiction.

This section replaces the Lunacy Act, 1922, s. 2 (3) to (5). Under sects. 135—143 of the Lunacy Act, 1890, the Judge in Lunacy had power to make vesting orders in relation to lunatic trustees or mortgagees, and to appoint new trustees; but by sect. 1 of the Lunacy Act, 1911, these powers were transferred to the High Court except so far as they related to lunatic mortgagees, not being also trustees (see *Re James' Mortgage Trusts*, quoted in note to sect. 41, *ante*, p. 1071). In the case dealt with by that decision (clause (a) of

15 Geo. 5, c. 19, s. 54.

the present section) and the three other cases named, the High Court and the Judge or Master in Lunacy have concurrent jurisdiction, except that no order may be made in lunacy in relation to a trust which is subject to an administration order made in the Chancery Division (Trustee Act (Jurisdiction in Lunacy) Rules, 1925, r. 1, p. 1112, *post*). For "defective" see S. L. Act, 1925, s. 117 (1) (xiii), *ante*, p. 979. Under this part of the present Act the High Court has power to appoint new trustees in place of lunatic or defective trustees (sect. 41), and to make vesting orders where a trustee has been appointed, and in the case of trustees under disability (sects. 44 and 51); and the powers conferred as to vesting orders may be exercised for vesting property in trustees of charities (sect. 52). The last-mentioned power was given by sect. 138 of the Lunacy Act, 1890, to the Judge in Lunacy also, but see now *supra*.

Orders made upon certain allegations to be conclusive evidence.

53 & 54 Vict. c. 5.

55. Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, as amended by any subsequent enactment, or under any Act relating to lunacy in Northern Ireland, founded on an allegation of any of the following matters namely—

(a) the personal incapacity of a trustee or mortgagee; or

(b) that a trustee or mortgagee or the personal representative of or other person deriving title under a trustee or mortgagee is out of the jurisdiction of the High Court or cannot be found, or being a corporation has been dissolved; or

(c) that it is uncertain which of two or more trustees, or which of two or more persons interested in a mortgage, was the survivor; or

(d) that it is uncertain whether the last trustee or the personal representative of or other person deriving title under a trustee or mortgagee, or the last surviving person interested in a mortgage is living or dead; or

(e) that any trustee or mortgagee has died intestate without leaving a person beneficially interested under the intestacy or has died and it is not known who is his personal representative or the person interested;

the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section does not prevent the court from directing a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained.

This section replaces T. Act, 1893, s. 40, which itself replaced T. Act, 1850, s. 44. "Northern Ireland" is substituted for "Ireland," references to heirship are omitted, and the provision as to a dissolved corporation (cf. sects. 41, 44 and 51, *ante*), is added.

Application of vesting order to property out of England.

56. The powers of the court to make vesting orders under this Act shall extend to all property in any part of His Majesty's dominions except Scotland.

15 Geo. 5, c. 19, s. 56.

This section replaces T. Act, 1893, s. 41, which replaced sect. 54 of the Trustee Act, 1850. Under that section vesting orders were made by the English Court of Chancery as to lands in Ireland (*Re Hewitt*, 6 W. R. 537; *Re Taitt* (1870), W. N. 25), and in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. 336). As to the jurisdiction in lunacy over lands and personal estate in Scotland and Ireland, see now Lunacy Act, 1890, s. 110 (*post*, p. 1113). Before the repeal by the last-mentioned Act of sect. 56 of Trustee Act, 1850, it was held that there was no jurisdiction in lunacy over Irish lands (*Re Davies*, 3 Mac. & G. 278) or Irish railway stock (*Re Hodgson, Kenlis* v. *H.*, 11 Ch. D. 888); but that the L.JJ. as additional Judges of the Chancery Division for the purposes of lunacy applications had such jurisdiction (*Re Lamotte*, 4 Ch. D. 325; *Re Smyth*, 55 L. T. 37); and that the petition should be entitled in lunacy and in Chancery (*ibid.*).

The provisions of the former Trustee Acts were extended to the private property of the sovereign in England and Ireland (25 & 26 Vict. c. 37, s. 10). See now sect. 38 of the Interpretation Act, 1889.

The Acts relating to land within the jurisdiction of the Palatine Courts are stated, Shelford R. P. S., 9th ed., 570.

By the Trustee, &c. Act, 1894, s. 2, the powers conferred by sect. 41 of T. Act, 1893 (replaced by the present section) were also given to the High Court in Ireland.

Jurisdiction to make other Orders.

Power of Court to authorise dealings with trust property.

57.—(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925.

This section, taken from L. P. Act, 1922, confers on the Court a new, and in terms apparently unlimited, jurisdiction in regard to questions arising in the administration of trusts. As to the power of the Court before this Act to sanction Acts which trustees had no power to do, see *Re New*, [1901] 2 Ch. 541. The Court would not

15 Geo. 5, c. 19, s. 57.

sanction an unauthorised change of investment merely on the ground of advantage (*Re Tollemache*, [1903] 1 Ch. 955). Liberty was given to trustees to retain unauthorised investments for the duration of the war and for six months afterwards (*Re Hazeldine, Public Trustee* v. *H.*, [1918] 1 Ch. 433). For provisions somewhat similar to those of this section as to settled land, see S. L. Act, 1925, s. 64, *ante*, under which the Court may sanction the effecting by a tenant for life of any transaction if it is one which could have been validly effected by an absolute owner.

Persons entitled to apply for orders.

58.—(1) An order under this Act for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any interest in land, stock, or thing in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

This section re-enacts (adding "interest in" before "land") T. A. 1893, s. 36, which replaced sect. 37 of the Trustee Act, 1850. Under that Act the following cases were decided:—

Where executors and trustees of a naturalized British subject renounced probate and declined to act, the Court, on the petition of the administrator and the persons who would (if not aliens) have been co-heirs, appointed new trustees and vested the real estate in them (*Re Martinez*, 22 L. T. 403). A person who has a contingent interest in real estate may apply for the appointment of new trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Harden Chapel*, 1 W. R. 212).

Infants.

Where there are infants *cestuis que trust*, it is not sufficient that the adult *cestuis que trust* should be petitioners; the infants (by their next friend) should join (*Re Fellows*, 2 Jur. (N.S.) 62).

Lunatics.

A lunatic *cestui que trust* should apply by his next friend; an order will not be made on the application of the committee alone (*Re Bourke*, 2 D. J. & S. 426). In the case of a lunatic mortgagee, the application should be made by the committee (*Re Wheeler*, 1 D. M. & G. 434; see, however, *Re Sparkes*, 6 Ch. D. 361).

Married women.

A woman married since 1882 can apply without her husband (*Re Outwin*, 48 L. T. 410).

New trustee.

In a petition for a vesting order a new trustee recently appointed by deed was required to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487).

Creditors who have obtained decree.

Creditors who have obtained a decree for the administration of the estate of their debtor, under which a contract for sale of his real estate has been entered into, may apply for a vesting order (*Re Wragg*, 1 D. J. & S. 356). And where a decree for sale had been made, it was held that a petition was properly presented by a purchaser whose money was in Court (*Ayles* v. *Cox*, 17 Beav. 584; *Gough* v. *Bage*, 25 L. T. 738). Three purchasers of different lots were allowed to join in one petition (*Rowley* v. *Adams*, 14 Beav. 130).

Purchasers under decree.

In general, proceedings under the Act are regulated by Rules of

Court. See R. S. C. Ord. 54 b, Ord. 55, r. 13A, which will be found in the Annual Practice. 15 Geo. 5, c. 19, s. 58.

59.—Where in any action the court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the court, and that he cannot be found, the court may hear and determine the action and give judgment therein against that person in his character of a trustee as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character. Power to give judgment in absence of a trustee.

This section re-enacts T. A. 1893, s. 43, which replaced sect. 49 of the Trustee Act, 1850.

Under the old practice a cause might be certified as fit to be set down, where a defendant trustee who had not entered an appearance could not be found (*Westhead* v. *Sale*, 6 W. R. 52; *Burrell* v. *Maxwell*, 25 L. T. 655). For the present practice, where a defendant does not appear, see R. S. C. Ord. 13, r. 12; and as to the cases in which one trustee can be sued in the absence of his co-trustee, see notes to R. S. C. Ord. 16, rr. 6 and 8 in the Annual Practice.

60.—The court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just. Power to charge costs on trust estate.

This section re-enacts (substituting "property"—see sect. 68, sub-sect. 11, *post*—for "land or personal estate"), T. A. 1893, s. 38, which replaced sect. 51 of the Trustee Act, 1850. Mode of raising costs.

Costs may be charged on the inheritance (*Ex p. Davies*, 16 Jur. 882; Seton, 7th ed. 1218), or may be ordered to be raised by mortgage (*Re Crabtree*, 14 W. R. 497), or to be paid out of the corpus of the fund (Seton, 7th ed. 1218). In the case of two trust funds the costs may be apportioned (*Re Grant*, 2 J. & H. 754; see *Re Allen* (1889), W. N. 132). The amount of the trust fund was not alone a sufficient reason for directing costs on the higher scale (*Re Spettigue*, 32 W. R. 385).

The costs of appointing new trustees will in general be paid out of corpus (*Carter* v. *Sebright*, 26 Beav. 376). As to what these costs properly include, see *Harvey* v. *Olliver* (57 L. T. 239). But where the application is solely for the benefit of a life tenant (Seton, 7th ed. 1218), or of a reversioner (*Re Brackenbury*, 10 Eq. 45), the costs will be paid by the applicant. Costs, by whom payable.

As to the costs of two petitions presented on the same day, see *Re Pring* (28 L. T. 467). Where a bill was filed instead of a petition under the Trustee Act, 1850, the plaintiff paid all costs (*Thomas* v. *Walker*, 18 Beav. 521).

15 Geo. 5, c. 19, s. 60.

Respondents.

On petitions under the Trustee Act, 1850, there was no jurisdiction to order respondents to pay costs (*Re Primrose*, 23 Beav. 590; see *Re Knight*, 26 Ch. D. 82, 91; *Re Mills*, 34 Ch. D. 33). The present section, however, gives such jurisdiction (*Re Knox*, [1895] 1 Ch. 538; 2 Ch. 483). A respondent had to pay the costs of unnecessary charges in his affidavit (*Re Willis*, 12 W. R. 97); and a trustee improperly opposing a petition paid his own costs of opposition, and from his remaining costs were deducted the costs of other parties in respect of the opposition (*Re Wiseman*, 18 W. R. 574). A trustee may lose his right to costs by misconduct (*Re Knight*, 26 Ch. D. 82).

A lord of the manor appearing to consent paid his own costs (*Ayles* v. *Cox*, 17 Beav. 584). A tenant for life in remainder appearing in his own interest pays his own costs (*Re Thornton*, 9 W. R. 475). If a respondent is improperly served, no costs will be allowed (R. S. C. Ord. 65, r. 27 (23); *Day* v. *Croft*, 19 Beav. 518). As to whether if he is properly served he loses his costs by having notice not to appear, see *Turner* v. *Mullineux* (9 W. R. 252). As to tender of costs on service, see R. S. C. Ord. 65, r. 27 (19).

Between vendor and purchaser.

As between vendor and purchaser, the costs of proceedings under this Act should be paid by the vendor (*Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584); but a railway company purchasing paid such costs (*Re Nash*, 4 W. R. 111).

As to the costs of orders in lunacy, see the note to sect. 142 of the Lunacy Act, 1890, *post*, p. 1121.

Power to relieve trustee from personal liability.

61.—If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

This section re-enacts sect. 3 of the Judicial Trustees Act, 1896, under which the following cases were decided:—

Practice under section.

It is not necessary to plead the Act, but *semble* it is better to do so (*Singlehurst* v. *Tapscott Co.*, [1899] W. N. 133; *Re Pawson's Settlement*, [1917] 1 Ch. 541). Where inquiries are ordered in an administration action, the trustee should see that such directions are inserted as will insure that proper evidence on any question intended to be raised under the Act shall be before the Court (*Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 588). In the last case the question of relieving the trustee was considered, though only raised for the first time on further consideration.

"May be liable."

The words "or may be liable" appear to point to doubtful questions of construction (*Re Grindey, Clews* v. *G.*, [1898] 2 Ch. 593).

Cases on section generally.

As regards the section generally, a narrow construction ought not to be adopted (*Re Grindey, Clews* v. *G.*, [1898] 2 Ch. 601; *Re Kay, Mosley* v. *K.*, [1897] 2 Ch. 524); and it should be carefully but not grudgingly construed in favour of trustees (*Re Roberts, Knight* v. *R.*, 76 L. T. 485). In view of the fact that a trustee cannot now as of course procure a trust to be executed by the Court, the section was passed to enable the Court in a proper case to remedy the hardship of the previous law (*Perrins* v. *Bellamy*, [1899]

1 Ch. 800, 802; *Re Roberts, Knight* v. *R.*, 76 L. T. 484). The fact that the trustee does not apply to the Court for directions is important (*Re Kay, Mosley* v. *K.*, [1897] 2 Ch. 523). But in a proper case he may be excused for omitting to apply (*Re Grindey, Clews* v. *G.*, [1898] 2 Ch. 593; see *Perrins* v. *Bellamy*, [1899] 1 Ch. 802; *Re Tollemache*, [1903] 1 Ch. 466). The section did not enlarge the extraordinary jurisdiction of the Court to sanction irregular dealings with trust property (*Re Tollemache, supra*). Such extraordinary jurisdiction was confined to cases of emergency (*S. C.*, [1903] 1 Ch. 955). See now sect. 57, *ante*. **15 Geo. 5, c. 19, s. 61.**

To obtain relief the trustee must have acted "honestly and reasonably." It was said by Kekewich, J., in one case, that a trustee who does nothing and accepts without explanation what is said by his co-trustee, is dishonest (*2nd Dulwich, &c. Society*, 68 L. J. Ch. 198; see *Re Smith, Hands* v. *Andrews*, [1893] 2 Ch. 11). But this seems inconsistent with the ruling of the C. A. in the last-mentioned case ([1893] 2 Ch. 18). "Honestly."

"Reasonably" means reasonably as trustee (*Re Grindey, Clews* v. *G.*, [1898] 2 Ch. 601). In some cases a test, apparently applied to ascertain whether a trustee has acted reasonably, has been to see whether he would have so dealt with his own money (*Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 590; *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 542; see *Shaw* v. *Cates*, [1909] 1 Ch. 405). It has been said, however, that it is not enough to show this, though it would be a point in his favour (*Re Barker, Ravenshaw* v. *B.*, 77 L. T. 714). It was said in another case that this would not be material except as to *bona fides* (*Re De Clifford, De C.* v. *Quilter*, [1900] 2 Ch. 716; compare *Rae* v. *Meek*, 14 App. Cas. 569, 570; *Learoyd* v. *Whiteley*, 12 A. C. 733). In the case of investments on mortgage, the requirements of sect. 8 (*ante*) constitute a standard by which reasonable conduct is to be judged; though non-compliance with them is not necessarily fatal to an application for relief (*Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 591, 592; see *Waite* v. *Parkinson*, 85 L. T. 456). Trustees who did not obtain the reports required by the section were held not to have acted reasonably (*Re Dive, D.* v. *Roebuck*, [1909] 1 Ch. 328; *Shaw* v. *Cates*, [1909] 1 Ch. 389). The conduct of a trustee investing on mortgage was held not reasonable (*Chapman* v. *Browne*, [1902] 1 Ch. 805). But see *Palmer* v. *Emerson*, [1911] 1 Ch. 758). "Reasonably."

Proof that a trustee has acted honestly and reasonably does not alone entitle him to relief; he must show that under all the circumstances he ought fairly to be excused (*National Trustees* v. *General Finance Co.*, [1905] A. C. 373). Where trustees had improperly paid over money, the Court refused to excuse them on the ground that their solicitors had committed a mistake (*National Trustees Co.* v. *General Finance Co., supra*) or a fraud (*Davis* v. *Hutchings*, [1907] 1 Ch. 356; compare *Re Smith, S.* v. *Thompson*, 18 Times L. R. 432). But see *Re Allsop, Whittaker* v. *Bamford*, [1914] 1 Ch. 1. The position of a company performing the duties of a trustee for reward is in these matters different from that of a gratuitous trustee ([1905] A. C. 381). Ought to be excused.

Relief has been granted under the section in the following cases:— Where an executor had paid legatees, and the assets subsequently proved insufficient for the debts, the relief being given as to some only of the payments (*Re Kay, Mosley* v. *K.*, [1897] 2 Ch. 518); where a testator directed his trustees to maintain his estate in the investments existing at his death, and they did not call in a promissory note (*Re Grindey, Clews* v. *G.*, [1898] 2 Ch. 593); where an executor abstained on reasonable grounds from attempting to recover a debt due to the estate (*Re Roberts, Knight* v. *R.*, 76 L. T. 479; Instances in which relief has been granted.

15 Geo. 5, c. 19, s. 61.

but see *Re Greenwood, G.* v. *Firth,* 105 L. T. 509); where an executor compromised the claim of a co-executor (*Re Houghton, Hawley* v. *Blake,* [1904] 1 Ch. 626); where trustees having no power of sale sold leaseholds on the advice of their solicitor that they had such a power (*Perrins* v. *Bellamy,* [1899] 1 Ch. 797); where on such advice a trustee distributed income instead of accumulating it, on a mistaken construction of a will (*Re Allsop, Whittaker* v. *Bamford,* [1914] 1 Ch. 1); where executors paid money to their solicitors in reliance on their statements that it was required for the purposes of administration (*Re De Clifford, De C.* v. *Quilter,* [1900] 2 Ch. 707); or paid money to a solicitor for payment of duties (in view of the terms of the will) (*Re Mackay, Griesseman* v. *Carr,* [1911] 1 Ch. 300); where a trustee lived in the country and money was lost by the fraud of her London solicitor's clerk (*Re Smith, S.* v. *Thompson,* 18 Times L. R. 432); where trustees lent money on mortgage without a fresh valuation (*Palmer* v. *Emerson,* [1911] 1 Ch. 758).

Relief refused.

Relief has been refused where, after a writ has been issued against him, a trustee continued to make payments to a tenant for life without applying to the Court for directions (*Re Kay, Mosley* v. *K.,* [1897] 2 Ch. 518); also in the case of a trustee who was party to an investment on mortgage held to be improper from the nature and value of the property, though he acted in reliance on his co-trustee who was solicitor to the trust (*Re Turner, Barker* v. *Ivimey,* [1897] 1 Ch. 536; see *Re Stuart, Smith* v. *Stuart,* [1897] 2 Ch. 583; and also *Waite* v. *Parkinson,* 85 L. T. 456, where no costs were given against the trustee; *Chapman* v. *Browne,* [1902] 1 Ch. 785); where a trustee allowed his co-trustee, a member of the firm of solicitors acting for the trust, to receive trust funds which were paid into the account of the firm (*Wynne* v. *Tempest,* [1897] W. N. 43, in which case the trustee was not charged with interest); where trustees for the purpose of investment allowed trust money to be under the control of their solicitor who misappropriated it (*Evans Williams* v. *Byron,* 18 T. L. R. 172; see *Wyman* v. *Paterson,* [1900] A. S. 280); where a sole executrix postponed for fourteen years the sale of investments which ought to have been sold within a year from the death, the executrix not being allowed to set off against the loss suffered on some investments the gain on others (*Re Barker, Ravenshaw* v. *B.,* 77 L. T. 712); where a trustee appropriated property to a settled share without inquiry as to its sufficiency (*Re Brookes, B.* v. *Taylor,* [1914] 1 Ch. 558). And see cases quoted above as to "reasonably."

Power to make beneficiary indemnify for breach of trust.

62.—(1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.

(2) This section applies to breaches of trust committed as well before as after the commencement of this Act.

This section (omitting "entitled for her separate use and" before "restrained") re-enacts Trustee Act, 1893, s. 45. That section replaced sect. 6 of the Trustee Act, 1888, the language of which is supposed to have been taken from *Raby* v. *Ridehalgh* (7 D. M. & G.

104); see *Re Somerset, S.* v. *Poulett* ([1894] 1 Ch. 262). The power of impounding is not a new power but had been exercised by the Court before 1888 (see *Raby* v. *Ridehalgh, supra; Sawyer* v. *S.*, 28 Ch. D. 595; *Re Somerset,* [1894] 1 Ch. 275). The earlier cases are collected in Lewin, 12th ed. 1179 *et seq.* The section has invested the Court with a judicial discretion which it seems will be exercised on the same principles as were adopted before the statute (*Bolton* v. *Curre,* [1895] 1 Ch. 549; see *Re Somerset,* [1894] 1 Ch. 275). 15 Geo. 5, c. 19, s. 62.

It has been said that the section does not operate to curtail the previously existing rights and remedies of trustees or to alter the law except by giving greater power to the Court (*Bolton* v. *Curre,* [1895] 1 Ch. 549; *Fletcher* v. *Collis,* [1905] 2 Ch. 34). According to the law independent of the section it seems that where a *c. q. t.* merely consented to a breach, obtaining no benefit, his interest was not impoundable to indemnify the trustee (*Fletcher* v. *Collis,* [1905] 2 Ch. 32; *Sawyer* v. *S.*, 28 Ch. D. 598). But even a mere consent (whether in writing or not) prevented the party giving it from obtaining relief against the trustee in respect of the breach (*Walker* v. *Symonds,* 3 Swan. 64; *Fletcher* v. *Collis, supra*). Accordingly where with the consent of the tenant for life a trustee improperly dealt with and lost the trust fund, and was compelled by the remainderman to replace it, the tenant for life could not as against the trustee claim the income of the replaced fund (*Fletcher* v. *Collis,* [1905] 2 Ch. 24).

"Consent in writing."

The words "in writing" govern only the word "consent," not the words "instigation or request" (*Griffith* v. *Hughes,* [1892] 3 Ch. 105; *Re Somerset, S.* v. *Poulett,* [1894] 1 Ch. 265).

What amounts to instigation, &c.

"In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to, some act or omission which is itself a breach of trust, and not some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees" (*Re Somerset,* [1894] 1 Ch. 265). The beneficiary must know the facts which rendered what he was instigating, requesting, or consenting to in writing, a breach of trust (*ibid.,* 270, 274; see *Mara* v. *Browne,* [1895] 2 Ch. 69). Constructive notice of such facts is not sufficient (*Re Somerset,* [1894] 1 Ch. 267).

The liability of the interest of the beneficiary in the trust estate to be impounded is not limited by the amount of the benefit, if any, which he may have derived from the breach of trust, but extends to the whole interest. It may exist even where the beneficiary derives no such benefit (*Chillingworth* v. *Chambers,* [1896] 1 Ch. 699, 700). The liability is not affected by the fact that the beneficiary is one of several trustees who has participated in the breach, and as such trustee would otherwise be entitled to contribution from the co-trustees. Thus where two trustees were equally to blame for a breach and after the breach one acquired a beneficial interest greater than the loss resulting from the breach, the whole loss was made good out of such interest, and a claim to make the co-trustee contribute was refused (*Chillingworth* v. *Chambers,* [1896] 1 Ch. 685).

In the case of a married woman restrained from anticipation, trustees have a duty to protect her, and the Court will be slow to impound her interest to recoup them when they knowingly commit a breach of trust (*Bolton* v. *Curre,* [1895] 1 Ch. 544; see *Sawyer* v. *S.,* 28 Ch. D. 595; *Ricketts* v. *R.,* 64 L. T. 263; *Mara* v. *Browne,* [1895] 2 Ch. 69; in all of which cases impounding was refused). Such an interest was impounded in *Griffith* v. *Hughes* ([1892] 3 Ch. 105).

The equity of a trustee to have the interest of a *cestui que trust* impounded will affect that interest in the hands of an assignee who

15 Geo. 5, c. 19, s. 62.

purchased subsequently to the breach of trust (*Bolton* v. *Curre*, [1895] 1 Ch. 544). The refusal by the trustee at the time of the breach of trust of an express charge on the interest of the *c. q. t.* is not a waiver of this equity (*ibid.*).

In an action by beneficiaries against the tenant for life and the trustees for a breach of trust, the trustees claimed to impound the interest of the tenant for life, but gave no notice under Ord. 16, r. 55. At the trial leave was given to the trustees to apply in chambers with reference to enforcing their right to impound (*Re Holt, H.* v. *H.*, [1897] 2 Ch. 525; see *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 656).

Payment into Court.

Payment into Court by trustees.

63.—(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the court may order the payment into court to be made by the majority without the concurrence of the other or others.

(4) Where any such money or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.

(5) Every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered.

This section re-enacts T. Act, 1893, s. 42, which replaced the Trustee Relief Acts, 1847 and 1849. Under those Acts it was held that where a difficulty affecting trust funds in the hands of trustees could be dealt with by means of a summons under R. S. C. Ord. 55, r. 3, the funds should not be paid into Court, but a summons should be issued (*Re Giles*, 55 L. T. 51; 55 L. J. Ch. 695; see *Re Birkett*, 9 Ch. D. 576; *Re Parker*, 39 Ch. D. 303). It was said that an infant's legacy might be paid into Court and would thereupon cease to carry interest (*Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46); and payment into Court was necessary to enable the executor to escape liability and distribute the residue (*Re Salomons*, [1920] 1 Ch. 290). But see now Admon. of Estates Act, 1925, s. 42, *ante*, p. 468. Payment into Court was held to deprive trustees of their discretion as to application of the fund (*Re Murphy*, [1900] 1 Ir. R. 145). An order was made in Chancery for the maintenance of a lunatic not so found out of the income of trust

funds paid into Court (*Re Carr, C.* v. *C.*, [1904] 1 Ch. 792; see *Re Barker*, [1904] W. N. 13). Where the money is paid into Court, the course pointed out in R. S. C. Ord. 54B, r. 4, and S. C. Funds Rules, 1894, r. 41 (see Annual Practice), should be followed. The general practice under the Acts is stated, Seton, 7th ed. 1152 *et seq.*

15 Geo. 5, c. 19, s. 63.

As to deposit of bearer securities with a bank, see sect. 7, *ante*.

Part V.

General Provisions.

Application of Act to Settled Land Act Trustees.

64.—(1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the Settled Land Act, 1925, and trustees for the purpose of the management of land during a minority, whether such trustees are appointed by the court or by the settlement, or under provisions contained in any instrument.

(2) Where, either before or after the commencement of this Act, trustees of a settlement have been appointed by the court for the purposes of the Settled Land Acts, 1882 to 1890, or of the Settled Land Act, 1925, then, after the commencement of this Act—

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the settlement, though no trustees for the purposes of the said Acts were thereby appointed; or

(b) if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being for the purposes of the said Acts, or the personal representatives of the last surviving or continuing trustee for those purposes,

shall have the powers conferred by this Act to appoint new or additional trustees of the settlement for the purposes of the said Acts.

(3) Appointments of new trustees for the purposes of the said Acts made or expressed to be made before the commencement of this Act by the trustees or trustee or personal representatives referred to in paragraph (b) of the last preceding subsection or by the persons referred to in paragraph (a) of that subsection are, without prejudice to any order of the court made before such commencement, hereby confirmed.

Sub-sect. 1 re-enacts, adding the words from "and" to "minority," T. A. 1893, s. 47 (1), which section replaced S. L. Act, 1890, s. 17. By Sched. I (3) of the present Act, *post*, p. 1110, sect. 47 of T. A. 1893, is to be deemed always to have applied to the

15 Geo. 5, c. 19, s. 64.

appointment of trustees for the purposes of sect. 42 of the Conv. Act, 1881 (see S. L. Act, 1925, s. 102, *ante*, p. 958). Sub-sects. 2 and 3 of the present section are new.

Trust estates not affected by trustee becoming a convict.

33 & 34 Vict. c. 23.

65. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or pass to his co-trustee in right of survivorship or devolve on his personal representative as if he had not become a convict:

Provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

Re-enacts Trustee Act, 1893, s. 48.

By the Forfeiture Act, 1870, s. 1, it is enacted that from and after July 4, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat, but nothing in the Act is to affect the law of forfeiture consequent on outlawry. The Crown is empowered to appoint an administrator, in whom the convict's property vests (sects. 9, 10), and provision is made as to the mode in which the property is to be applied (sects. 12-18). See as to the right of the Crown before the Act *Talbot* v. *Jevers*, [1917] 2 Ch. 363.

Power is given by sect. 41, sub-sect. 1 (*ante*, p. 1068) to the Court to appoint new trustees in lieu of any trustee who has been convicted of felony.

Indemnity to banks, &c.

66. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Bank of England, and to all persons for any acts done pursuant thereto, and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the court by which the order was made had jurisdiction to make it.

Re-enacts T. Act, 1893, s. 49, omitting reference to the Bank of Ireland.

There is also an implied indemnity to the Bank acting on an order made by the Court under sect. 14 of the Jud. Act, 1884 (now Jud. Act, 1925, s. 47) (*Savage* v. *Norton*, [1908] 1 Ch. 290). Compare the indemnity in the case of lunacy orders, *Re Spurling*, [1909] 1 Ch. 199.

Jurisdiction of the "Court."

67.—(1) In this Act "the court" means the High Court, and also the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham, or the county court, where those courts respectively have jurisdiction.

(2) The procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

Replaces T. Act, 1893, s. 46. See as to the Lancaster Court the Chancery of Lancaster Acts, 1850 to 1890; and as to Durham the Palatine Court of Durham Act, 1889. **15 Geo. 5, c. 19, s. 67.**

68. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:— Definitions.

(1) "Authorised investments" mean investments authorised by the instrument, if any, creating the trust for the investment of money subject to the trust, or by law;

(2) "Contingent right" as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent (*a*);

(3) "Convey" and "conveyance" as applied to any person include the execution by that person of every necessary or suitable assurance (including an assent) for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance (*b*); "sale" includes an exchange;

(4) "Gazette" means the London Gazette;

(5) "Instrument" includes Act of Parliament;

(6) "Land" includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way, and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land; and in this definition "mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same, but not an undivided share thereof; and "hereditaments" mean real property which under an intestacy occurring before the commencement of this Act might have devolved on an heir (*c*);

(7) "Mortgage" and "mortgagee" include a charge or chargee by way of legal mortgage, and relate to every estate and interest regarded in equity as

15 Geo. 5, c. 19, s. 68.

merely a security for money, and every person deriving title under the original mortgagee (*d*);

(8) "Pay" and "payment" as applied in relation to stocks and securities and in connexion with the expression "into court" include the deposit or transfer of the same in or into court;

(9) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person;

(10) "Possession" includes receipt of rents and profits or the right to receive the same, if any; "income" includes rents and profits; and "possessed" applies to receipt of income of and to any vested estate less than a life interest in possession or in expectancy in any land (*e*);

(11) "Property" includes real and personal property, and any estate share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not (*f*);

(12) "Rights" include estates and interests;

(13) "Securities" include stocks, funds, and shares; and so far as relates to payments into court has the same meaning as in the enactments relating to funds in the Supreme Court and "securities payable to bearer" include securities transferable by delivery or by delivery and endorsement (*g*);

(14) "Stock" includes fully paid up shares, and so far as relates to vesting orders made by the court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein (*h*);

(15) "Tenant for life," "statutory owner," "settled land," "settlement," "trust instrument," "trustees of the settlement," "lunatic," "defective," "term of years absolute" and "vesting instrument" have the same meanings as in the Settled Land Act, 1925, and "entailed interest" has the same meaning as in the Law of Property Act, 1925 (*i*);

15 Geo. 5, c. 20.

(16) "Transfer" in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

(17) "Trust" does not include the duties incident to an estate conveyed by way of mortgage (*k*), but with this exception the expressions "trust" and

"trustee" extend to implied and constructive trusts, (*l*) and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative (*m*), and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee (*n*); 15 Geo. 5, c. 19, s. 68.

(18) "Trust corporation" (*o*);

(19) "Trust for sale" in relation to land means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale (*p*); "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale;

(20) "United Kingdom" means Great Britain and Northern Ireland.

This section replaces T. Act, 1893, s. 50. Definitions (2) (5) (8) (12) (14) and (16) (adding "or securities") repeat definitions in that section. Differences are noted *infra*.

(*a*) See as to rights of entry L. P. Act, 1925, ss. 1 (2) and 4, *ante*.

(*b*) The definition in sect. 50 of T. Act, 1893, added reference to the Acts to be performed by married women and tenants in tail, in accordance with the Fines and Recoveries Act, 1833 (see that Act, *ante*, and sect. 167 of the L. P. Act, 1925, *ante*), and to surrenders, &c., of copyholds. The provisions as to assents and as to "sale" are new.

(*c*) The definition in T. Act, 1893, included manors and lordships and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land (see L. P. Act, 1925, s. 34, *ante*). Rentcharges were held to be included in the somewhat similar definition of "lands" in the Trustee Act, 1850 (*Re Harrison*, Seton, 7th ed. 1180). Cf. on the present definition sect. 12, *ante*; and as to the definition of "hereditaments," see Administration of Estates Act, 1925, s. 45, *ante*.

(*d*) The reference to charges by way of legal mortgage (L. P. Act, 1925, s. 87, *ante*) is added. As to the meaning of "mortgage," see *Re Underwood*, 3 K. & J. 475; *Lawrence* v. *Galsworthy*, 3 Jur. (N.S.) 1049. Cf. *Foster* v. *Barnard*, [1916] 2 A. C. 154.

(*e*) The definition of "possession" and "income" are added, and reference to legal life estates in land is omitted.

(*f*) "Share" is added.

(*g*) The definition of "securities payable to bearer" is added (see sect. 7, *ante*).

(*h*) "Stock" in the Trustee Act, 1850, was held to include shares in a limited company, whether fully paid-up or not (*Re New Zealand Trust and Loan Co.*, [1893] 1 Ch. 403; see *Re Angelo*, 5 De G. & S. 278), and annuities from a life office (*Re Tweedy*, 28 Ch. D. 529).

As to registered shares in ships, see sect. 51, sub-sect. 6, *ante*, p. 1088.

(*i*) See S. L. Act, 1925, s. 117, *ante*, and L. P. Act, 1925, s. 130, *ante*.

15 Geo. 5, c. 19, s. 68.

(*k*) A declaration of trust in an equitable mortgage by the mortgagor of the legal estate is a trust within the Act (*London and County Bank* v. *Goddard*, [1897] 1 Ch. 642; cf. sect. 54 (a), *ante*).

It was held under the Trustee Act, 1850, that the Court had no authority to convey the estate of a mortgagee who had been paid off (*Re Osborn*, 12 Eq. 392); but had authority to transfer the mortgage where the mortgagees were trustees, and one was out of the jurisdiction (*Re Walker*, 3 Ch. D. 209; see *Re Nicholson*, 34 Ch. D. 663; *Re Underwood*, 3 K. & J. 745).

Constructive trustees.

(*l*) As to constructive trustees in the case of a sale of stock, see *Re Angelo*, 5 De G. & Sm. 278; *Re Davis*, 12 Eq. 214.

In the case of a sale of land, the general doctrine of equity is that after contract the vendor is a constructive trustee of the land for the purchaser (*Shaw* v. *Foster*, L. R. 5 H. L. 333; see *Lysaght* v. *Edwards*, 2 Ch. D. 506, 510). For the purposes of the Trustee Act, 1850, however, the following distinctions were taken. Where the contract was executed by payment of the purchase-money, the vendor was a trustee (*Re Cuming*, 5 Ch. 72; *Re Colling*, 32 Ch. D. 336; *Re Wilkinson*, 12 W. R. 522); but not where the contract was unexecuted (*Re Carpenter*, Kay, 418; *Re Faulder* (1866), W. N. 83; see, however, *Re Badcock*, 2 W. R. 386; *Re Taylor* (1866), W. N. 5), except in the case of a compulsory sale (*Re Russell*, 35 L. J. Ch. 461; *Re Lowry*, 15 Eq. 78; doubted *Re Colling*, 32 Ch. D. 336). Where only part of the purchase-money had been paid, but possession had been given and the vendor was found lunatic, a vesting order was made, which was not, however, to be dated until after the payment of the balance (*Re Pagani*, [1892] 1 Ch. 236; *Re Beaufort*, [1898] W. N. 143). Where there is a doubt as to the trusteeship by reason of the title being complicated, an action should be brought (*Re Martin*, 34 Ch. D. 619).

The following persons amongst others were also held to be constructive trustees for the purpose of the Trustee Act, 1850. An assignee of a bankrupt's estate (*Re Joyce*, 2 Eq. 576). An infant beneficially entitled to stock standing in his own name subject to trusts for maintenance (*Gardner* v. *Cowles*, 3 Ch. D. 304; *Re Findlay*, 32 Ch. D. 221). Infant devisees of land as to which the testator had made an agreement of compromise (*Re Taylor* (1866), W. N. 5). The husband of a *feme covert* trustee (*Re Wood*, 3 D. F. & J. 125; *Ex p. Bradshaw*, 2 D. M. & G. 900). The heir of a person who covenated in a marriage settlement followed by marriage (*Re Bradley*, 34 W. R. 148). A mortgagor who had covenanted to surrender copyholds (*Re Crowe*, 13 Eq. 26). The heir of an equitable mortgagor who had agreed to execute a legal mortgage (*Re Jones & Co.* (1888), W. N. 217). An heir who had elected to take on the trusts of a will (*Dewar* v. *Maitland*, 2 Eq. 834). An executor where a legacy was bequeathed to persons in succession (*Re Davis*, 12 Eq. 214). As to resulting trusts, see *Re British Red Cross Fund*, [1914] 2 Ch. 419; *Re Customs Officers' Fund*, [1917] 2 Ch. 18; *Re Connell's Settlement*, [1915] 1 Ch. 867.

(*m*) As to appointing under this Act a trustee to perform the duties of a personal representative, see *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778; *Re Willey*, [1890] W. N. 1; *Eaton* v. *Daimes*, [1894] W. N. 32. Under the Judicial Trustees Act, 1896, s. 1 (*post*, p. 1125), the Court can now appoint a person to perform such duties, either in place of or in addition to an existing representative (see *Re Ratcliffe*, [1898] 2 Ch. 352); cf. sect. 41, sub-sect. 4, *ante*, p. 1069. A new trustee was appointed to act with an administrator who had cleared the estate (*Re Ponder*, [1921] 2 Ch. 59).

(*n*) The definitions of "trustee" and "new trustee" are added. 15 Geo. 5, c. 19, s. 68.
(*o*) See p. 794, *ante*.
(*p*) See L. P. Act, 1925, ss. 23 *et seq.*, *ante*.

Application of Act.

69.—(1) This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.

(2) The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

(3) This Act does not affect the legality or validity of anything done before the commencement of this Act, except as otherwise hereinbefore expressly provided, and except that the enactments mentioned in the First Schedule to this Act shall be deemed always to have had effect subject to the provisions set forth in that Schedule.

Sub-sects. 1 and 2 replace T. Act, 1893, s. 4. See also note to sect. 1, p. 1023, *ante*. For a reference to express prohibition in the trust instrument, see sect. 7; and for provisions applying, notwithstanding anything to the contrary in that instrument, sects. 14, 16, 26, and 27, *ante*.

Enactments repealed.

70. The Acts mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule:

Provided that, without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889: 52 & 53 Vict. c. 63.

(a) Nothing in this repeal shall affect any vesting order or appointment made or other thing done under any enactment so repealed, and any order or appointment so made may be revoked or varied in like manner as if it had been made under this Act;

(b) References in any document to any enactment repealed by this Act shall be construed as references to this Act or to the corresponding enactment in this Act.

See as to saving clauses in repeals *Re R.* (1906) 1 Ch. 736.

Short title, commencement, extent.

71.—(1) This Act may be cited as the Trustee Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act, except where otherwise expressly provided, extends to England and Wales only.

(4) The provisions of this Act bind the Crown.

15 Geo. 5, c. 19, s. 71.

The powers of the Court to make vesting orders under the Act extend to all property in any part of the dominions of the Crown, except Scotland (sect. 56, *ante*).

Under the T. Act, 1893, a vesting order could not be made respecting land which had vested in the Crown as trustee (see *Re Taylor*, [1904] 2 Ch. 741, and other cases quoted in note to sect. 44, *ante*, p. 1081). See generally as to how far the Crown is bound by Acts of Parliament, p. 143, *ante*.

SCHEDULES.

Section 69 (3).

FIRST SCHEDULE.

Retrospective Amendments.

(1) The investments mentioned in paragraphs (d), (i) and (k) of section one of the Trustee Act, 1893, and in the corresponding provisions of any enactment replaced by that Act, shall be deemed always to have included investments mentioned in paragraphs (d), (i) and (k) of subsection (1) of section one of this Act.

(2) In subsection (3) of section twelve of the Trustee Act, 1893, and in the enactment which it replaced, the expression "customary land" shall be deemed never to have included land in regard to which a tenant had power to dispose of the legal estate by deed, and the expression "land conveyed by way of mortgage" shall be deemed never to have included land conveyed in trust for securing debentures or debenture stock.

See sect. 40, *ante*.

(3) Section forty-seven of the Trustee Act, 1893, shall be deemed always to have had effect as if after the words "Settled Land Acts, 1882 to 1890," there had been inserted the words "and trustees for the purposes of section forty-two of the Conveyancing Act, 1881."

See sect. 64, *ante*.

(4) Subsection (1) of section eight of the Conveyancing Act, 1911, shall be deemed always to have had effect as if at the end thereof there had been inserted the words "or other the trustees or trustee for the time being of the trust."

See sect. 18, *ante*.

15 Geo. 5, c. 19, sch. 2.

SECOND SCHEDULE.

Section 70.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections twenty-three, twenty-seven, twenty-eight and twenty-nine.
44 & 45 Vict. c. 41.	The Conveyancing Act, 1881.	Subsections (4) and (5) of section forty-two.
48 & 49 Vict. c. 25.	The East India Unclaimed Stock Act, 1885.	Subsection (3) of section twenty-three.
53 Vict. c. 5.	The Lunacy Act, 1890 -	Sections one hundred and thirty-five to one hundred and thirty-eight, so far as they relate to lunatic trustees, except where the Judge or Master in Lunacy is given concurrent jurisdiction with the High Court.
56 & 57 Vict. c. 53.	The Trustee Act, 1893 -	The whole Act.
57 Vict. c. 10 -	The Trustee Act, 1893, Amendment Act, 1894.	Sections one and four.
59 & 60 Vict. c. 35.	The Judicial Trustees Act, 1896.	Section three.
1 & 2 Geo. 5, c. 37.	The Conveyancing Act, 1911.	Section eight.
1 & 2 Geo. 5, c. 40.	The Lunacy Act, 1911 -	Section one.
4 & 5 Geo. 5, c. 47.	The Deeds of Arrangement Act, 1914.	Section eighteen.
9 & 10 Geo. 5, c. 99.	The Housing (Additional Powers) Act, 1919.	Section nine.
11 & 12 Geo. 5, c. 55.	The Railways Act, 1921.	The words "the Trustee Act, 1893, and" in section fifteen.
12 & 13 Geo. 5, c. 16.	The Law of Property Act, 1922.	Subsection (4) of section eighty-three, section eighty-eight; Part IV., except subsection (7) of section one hundred and ten; subsection (3) of section one hundred and thirteen, and subsection (5) of section one hundred and twenty-three.
12 & 13 Geo. 5, c. 60.	The Lunacy Act, 1922 -	Sub-sections (3) (4) and (5) of section two.
15 Geo. 5, c. 5.	The Law of Property (Amendment) Act, 1924.	Section five and the Fifth Schedule.

THE TRUSTEE ACT (JURISDICTION IN LUNACY) RULES, 1925.
DATED DECEMBER 10, 1925.

1. In the cases mentioned in section 54 of the Trustee Act, 1925, the Judge in Lunacy shall, in relation to lunatic or defective trustees in respect of whose property a Committee or Receiver is being applied for or has been appointed and remains undischarged in Lunacy, have concurrent jurisdiction with the High Court to make any orders which the High Court has power to make under Part IV of the Trustee Act, 1925, but no order shall be made in Lunacy by virtue of such jurisdiction in relation to a trust which is subject to an order for administration made in the Chancery Division of the High Court of Justice.

2. Subject to Rules in Lunacy the Master and Assistant Master in Lunacy shall be capable of exercising the jurisdiction hereby given to the Judge in Lunacy.

3. In any case where the High Court has power to make an order under Part IV of the Trustee Act, 1925, the fact that such an order has been made in Lunacy shall be conclusive evidence of the jurisdiction to make it in any court upon any question of the validity of the order but this rule shall not prevent the court from directing a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained.

4. These Rules may be cited as the Trustee Act (Jurisdiction in Lunacy) Rules, 1925, and shall come into operation on the 1st day of January, 1926.

Dated the 14th day of December, 1925.

Cave, C.

See Trustee Act, 1925, s. 54, p. 1093, *ante*.

II.—THE LUNACY ACT, 1890.

53 VICT. c. 5, ss. 110, 120, 128, 129, 135—143, 341.

Jurisdiction in lunacy, in whom vested.

The jurisdiction in lunacy in regard to trustees and mortgagees (as to which see formerly Jud. Act, 1873, s. 17 (3); Jud. Act, 1875, s. 7), was, under sect. 108, sub-sect. 1 of the Lunacy Act, 1890, exercisable by the Lord Chancellor entrusted by sign manual with the care, and commitment of the custody, of the persons and estates of lunatics, alone or jointly with other Judges of the Supreme Court entrusted as aforesaid, or any one or more of such Judges. The Lord Chancellor is *ex officio* President of the Chancery Division of the High Court (Jud. Act, 1925, s. 4 (1)), and he has, under sect. 51 of the Jud. Act, 1873, requested the Lords Justices to act as additional Judges of the Chancery Division, for the purpose of making orders both in Chancery and Lunacy (*Re Platt*, 36 Ch. D. 410); but this jurisdiction could only be exercised in aid of their

jurisdiction in Lunacy (*Re Barber*, 39 Ch. D. 187; but see now *infra* as to lunatic and defective trustees). 53 Vict. c. 5.

Power of Masters.

Under sect. 27, sub-sect. 1 of the Lunacy Act, 1891, the jurisdiction of the Judge in Lunacy as regards administration and management may be exercised by the Masters. By virtue of this sub-section a Master may, under sects. 116 and 128 of the Lunacy Act, 1890, appoint a person to exercise a power of appointing new trustees vested in one detained as lunatic but not so found, and order the barring of an estate tail (*Re E. D. S.*, [1914] 1 Ch. 618); and also, under sect. 129, make a vesting order of the trust property (*Re Fuller*, [1900] 2 Ch. 551). But sect. 27, sub-sect. 1 of the 1891 Act did not enable a Master to make a vesting order under sect. 136 of the 1890 Act (*Re Langdale*, [1901] 1 Ch. 3).

Orders may be made by the Master for the purpose of preserving, so far as possible in administration the quality, tenure, and devolution of the property of the lunatic (Lunacy Act, 1922, s. 2; cf. Administration of Estates Act, 1925, s. 51 (2), *ante*).

By sect. 1 of the Lunacy Act, 1922, there is now only one Master in Lunacy, with an Assistant Master.

By sect. 54 of the Trustee Act, 1925 (*ante*, p. 1093), where the High Court has power, under Part IV. of the Act, to make orders in relation to lunatics and defectives (see sect. 117, sub-sect. 1 (xiii) of S. L. Act, 1925, *ante*, p. 979) who are trustees, the Judge or Master in Lunacy has no power to make such an order, except concurrently with the High Court, in the four cases named in sect. 54 (see also the Trustee Act (Jurisdiction in Lunacy) Rules, 1925, *supra*, and note to sect. 41 of the Trustee Act, 1925, *ante*, p. 1070). That Act repeals sects. 135-138 of the present Act (*infra*), so far as they relate to lunatic trustees, except where the Judge or Master in Lunacy is given concurrent jurisdiction with the High Court.

Powers to extend to British possessions.

110. The powers and authorities given by this Act to the judge in lunacy shall extend to property within any British possession.

120. The judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things:—

(a) Sell any property belonging to the lunatic;
(b) Make exchange or partition of any property belonging to the lunatic or in which he is interested, and give or receive any money for equality of exchange or partition;
(c) Carry on any trade or business of the lunatic;
(d) Grant leases of any property of the lunatic for building, agricultural, or other purposes;
(e) Grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface or other land;
(f) Surrender any lease and accept a new lease;
(g) Accept a surrender of any lease and grant a new lease;
(h) Execute any power of leasing vested in a lunatic

53 Vict. c. 5, s. 120.

having a limited estate only in the property over which the power extends;

(i) Perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy;

(j) Surrender, assign, or otherwise dispose of with or without consideration any onerous property belonging to the lunatic;

(k) Enter into any agreement touching the patronage of augmented cures under the Act one George the First, Chapter ten, which the lunatic might have entered into if he had been of sound mind;

(l) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic.

The above section does not extend to the capacity of releasing a power (*Re Hirst*, [1892] W. N. 177; see *Re Rose*, [1904] 2 Ch. 353; [1905] 1 Ch. 94); nor does clause (a) extend to barring an estate tail (*Re E. D. S.*, [1914] 1 Ch. 618). But the Judge or Master may, under clause (l), order the committee to bar the entail with a view to sale (*Re E. D. S.*, *supra*). See further the note to sect. 128.

Committee may exercise power vested in lunatic in character of trustee or guardian.

128. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs.

The following powers have been held to fall within sect. 128, as being fiduciary powers vested in the lunatic "in the character of trustee"—a power of consenting to advancements (*Re Nevill*, 31 Ch. D. 161); a power of appointing settled funds among children (*Re A.*, [1904] 2 Ch. 328); a power of appointing new trustees (*Re Shortridge*, [1895] 1 Ch. 278; see *Re Skeats*, 42 Ch. D. 522). And a power of leasing vested in a lunatic as tenant for life was held to fall within sect. 120, sub-sect. (h) (*Re Salt*, [1896] 1 Ch. 117).

In the case of a lunatic not so found, the powers of the quasi-committee were, before the Lunacy Act, 1908, limited by the words of sect. 116, sub-sect. 2 of the Lunacy Act, 1890, the last-mentioned sub-section providing that the quasi-committee might exercise "such of the powers of this Act as are exercisable by the committee." The quasi-committee accordingly could, with the sanction of the Judge, exercise the powers which fell within sects. 120 and 128. But he could not exercise the following powers which had been held not to fall within either of those sections; that is to say, the power

of sale given by the Settled Land Acts (*Re Baggs*, [1894] 2 Ch. 416); the power of sale given by sect. 7 of the L. C. C. Act, 1845 (*Re S. S. B.*, [1906] 1 Ch. 712); the power of consenting to a sale by trustees (*Re De Moleyns and Harris*, [1908] 1 Ch. 110). Now under Lunacy Act, 1908, s. 1, the quasi-committee of a lunatic not so found can (subject to the direction of the Judge) exercise any powers which, if such person were a lunatic so found, could be exercised by his committee. It will be observed that the words of the Act are narrower than the words suggested for enactment by Cozens-Hardy, L.J. (*Re S. S. B.*, [1906] 1 Ch. 725). 53 Vict. c. 5, s. 128.

Where the Court authorises the committee to appoint new trustees, it can by the same order vest the trust property (*Re Fuller*, [1900] 2 Ch. 551; *Re Shortridge*, *supra*). The form of an order is given in *Re Bowmer*, 3 De G. & J. 658. Where the donee of a power to appoint new trustees is a lunatic, the Court of Lunacy does not itself appoint, but acts under this section (*Re Garrod*, 31 Ch. D. 164). The Chancery Division can appoint (*ibid.*; *Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662). It was better that an appointment should be made under this section, even when it might be made under sect. 10 of the Trustee Act, 1893 (see sect. 36 of the Trustee Act, 1925, *ante*; *Re Blake* (1887), W. N. 173). See now Trustee Act, 1925, s. 54 (b), and the Trustee Act (Jurisdiction in Lunacy) Rules, 1925, pp. 1093, 1112, *ante*.

Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.

129. Where under this Act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees.

Where the donee of a power of appointing new trustees was lunatic, and the committee under the authority of the Court appointed new trustees, the new trustees were under this section appointed to call for a transfer of consols subject to the trust (*Re Shortridge*, [1895] 1 Ch. 278). In a similar case a vesting order was made as to freeholds (*Re Fuller*, [1900] 2 Ch. 551).

Power to vest lands and release contingent right of lunatic trustee or mortgagee.

135.—(1) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the judge in lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs.

(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

53 Vict. c. 5, s. 135.

["(3) An order under subsections one and two shall have the same effect as if the lunatic had been sane, and, if solely seised, possessed, or entitled as aforesaid, had executed, or, if jointly seised, possessed, or entitled as aforesaid with any other person or persons, he and such other person or persons had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right." *Substituted for the original subsection by sect.* 2 *of the Lunacy Act*, 1908.]

(4) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under subsections (1) and (2).

(5) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord or lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things.

This section replaces (as to England) sects. 3 and 4 and parts of sects. 20 and 28 of the Trustee Act, 1850. It and sects. 136, 137, and 138 were repealed by the Trustee Act, 1925 (*ante*), so far as they relate to lunatic trustees, except where the Judge or Master in Lunacy is given concurrent jurisdiction with the High Court (see T. Act, 1925, s. 54, and T. Act (Jurisdiction in Lunacy) Rules, 1925, pp. 1093, 1112, *ante*). See also T. Act, 1925, ss. 44, 49, and 50 (*ante*); and see Practice Note, [1923] W. N. 213. Where one of four trustees became a lunatic, the trust property was, under sub-sect. 1 of the present section, vested in the other three trustees (*Re Leon*, [1892] 1 Ch. 348). Compare the similar orders made in Chancery under sects. 26 and 35 of the Trustee Act, 1893 (sects. 44 and 51 of T. Act, 1925) (*ante*, pp. 1074, 1079, 1090). When a person who had contracted to sell leaseholds went abroad and was found lunatic there, an order was made under this section vesting the land in the purchaser, the order, however, not to be dated until after payment of the purchase-money (*Re Pagani*, [1892] 1 Ch. 236; see *Re Beaufort*, [1898] W. N. 148). Copyhold tenure (sub-sects 5 and 6) was abolished as from January 1, 1926, by L. P. Act, 1922, Part V.

Cases under Trustee Act, 1850, s. 3.

Under the Trustee Act, 1850, it was held that sect. 3 applied where, on an order for sale instead of partition, one part owner was a lunatic, and a person was appointed to convey for him (*Re Watson*, 58 L. T. 509). In the case of a lease, the legal term

could be vested, but not the benefit of a covenant for quiet enjoyment (*Cowper* v. *Harmer*, 57 L. T. 714). A mere power of sale could be vested (*Re Boyce*, 4 D. J. & S. 205). Where a lunatic held land in trust for A. absolutely, the Court refused to vest the land in A., but appointed a new trustee and vested the land in him (*Re Holland*, 16 Ch. D. 672). A mortgage vested in a lunatic mortgagee could be transferred under sect. 3 (*Re Nicholson*, 34 Ch. D. 663; *contra*, *Re Brown*, 50 L. T. 373). **53 Vict. c. 5, s. 135.**

Under the Trustee Acts, 1850 and 1852, questions frequently arose whether a vesting order should be made in Lunacy, or in Chancery and Lunacy, or in Chancery. It was held that, where a trustee or mortgagee was lunatic or of unsound mind, not so found, the vesting order could not be made in Chancery only (*Jeffryes* v. *Drysdale*, 9 W. R. 428; *Re Mason*, 10 Ch. 273; *Re Nicholl*, 18 W. R. 443; *Re Martin*, 34 Ch. D. 618); and, where it dealt exclusively with the estate of a lunatic trustee, should be made in Lunacy only (*Re Watson*, 58 L. T. 509; see *Re Watson*, 19 Ch. D. 384; *Re Jones*, 33 Ch. D. 414; *Re Chauncey*, 14 W. R. 849, where the fund was to come into Court; see *Re Dawson*, 6 N. R. 346). Where interests of sane as well as lunatic trustees were dealt with, the order was made in both Chancery and Lunacy (*Re Pearson*, 5 Ch. D. 982; *Re Druce*, 46 L. T. 669; *Re Chell*, 49 L. T. 196; *Re Davidson*, 20 L. J. Ch. 644; *Re Batho*, 39 Ch. D. 189). So also where part of the trust property was land in Ireland, as to which the Court of Lunacy had formerly no jurisdiction (*Re Lamotte*, 4 Ch. D. 325; *Re Smyth*, 55 L. T. 37; see now Lunacy Act, 1890, s. 110). A vesting order might be made in Chancery only, where there had been an order for a sale (*Herring* v. *Clark*, 4 Ch. 167; *Stamper* v. *S.*, 46 L. T. 372); or where the lunatic trustee was out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29), or was an infant (*Re Arrowsmith*, 4 Jur. (N.S.) 1123; 6 W. R. 642). Whether application should be made in Chancery or Lunacy.

Many of the above decisions were considered in a case since the Trustee Act, 1893, where, on an application in Chancery alone, the Court refused to make a vesting order as regards property vested in a sole trustee who was a lunatic not so found. As to vesting orders, the older decisions appeared to be still applicable (*Re M.*, [1899] 1 Ch. 79). As to appointments, however, an order appointing a new trustee in the place of the sole lunatic trustee was made in the last case in Chancery only (*ibid.*). See now Trustee Act, 1925, s. 54, and Trustee Act (Jurisdiction in Lunacy) Rules (*ante*, pp. 1093, 1112).

Where the fact of the lunacy was disputed, it was held under the Trustee Acts, 1850 and 1852, that the Court had no jurisdiction (*Re Walker*, Cr. & Ph. 147; *Re Campbell*, 18 L. T. 202; see *Re Combs*, 51 L. T. 45).

As to the mode and form of application, see Rules in Lunacy, *post*. For the form of a petition by committee of lunatic mortgagor, on payment off of mortgage, see Elmer, Pr. Lun. 240, 5th ed. Where the mortgagee was of unsound mind, and the mortgagor wished to pay off, it was said he should pay the money into Court, and would then be entitled to a vesting order (*Re Sparks*, 6 Ch. D. 361). See *Re Wheeler*, 1 D. M. & G. 434, where it was said that in the case of a mortgagee found lunatic, the committee should petition. Where of three trustees, A., B., and C., B. was lunatic, and C. was a new trustee appointed under a power, and it was desired to vest in A. and C., A. was appointed to convey the estate of himself and B. to himself and C. (*Re Vicat*, 33 Ch. D. 103). For vesting order in the case of a lunatic tenant in tail, see *Re Mason*, *M.* v. *M.*, 7 Ch. D. 707. See further, as Practice.

53 Vict. c. 5, s. 135.

to the form of orders vesting real estate, the note to sect. 44 of the Trustee Act, 1925 (*ante*, p. 1082). Such orders, when made in Lunacy, are to be drawn in the form employed for similar orders in Chancery (Practice Note, [1908] W. N. 75). Forms of orders appointing new trustees and vesting the trust estate, whether made in Lunacy only or in Lunacy and in Chancery, are given in Heywood and Massey's Lunacy Practice, 3rd ed. 222, 225.

Service.

A petition for an order, vesting in new trustees property, a trustee of which has been found lunatic, ought to be served on his committee (*Re Saumarez*, 8 D. M. & G. 390; and see *Re Parker*, 32 Beav. 580; *Re Wylde*, 5 D. M. & G. 25); but where the trustee is a person of unsound mind not found lunatic, he need not be served (*Re East*, 8 Ch. 735; *Re Green*, 10 Ch. 272; *Re Weston*, [1898] W. N. 151). See further, p. 1124, *post*.

Costs, where mortgagee or his heir is a lunatic;

Where a mortgagee became of unsound mind, it was said that the mortgagor should bring the money into Court and would then be entitled to a vesting order. The mortgagor would have to pay the costs of the necessary petition, but would not be ordered to pay any costs to the mortgagee (*Re Sparks*, 6 Ch. D. 361). Where the mortgagee had been found lunatic and the committee petitioned, the petitioner's costs came out of the lunatic's estate (*Re Wheeler*, 1 D. M. & G. 434). But in such a case the mortgagor should not be served (*Re Rowley*, 1 D. J. & S. 417); and in no case can have costs out of the lunatic's estate (*Re Phillips*, 4 Ch. 629). The stamp on the vesting order must in any case be paid by the mortgagor (*Re Thomas*, 22 L. J. Ch. 858; *Re Biddle*, 23 L. J. Ch. 23). Where the heir of a mortgagee was a lunatic, the mortgagor petitioning paid all costs (*Re Stuart*, 4 De G. & J. 319; *Re Jones*, 2 D. F. & J. 554). Where the lunatic mortgagee was a trustee, the trust appearing on the face of the mortgage, the mortgagor petitioning paid all costs (*Re Lewis*, 1 Mac. & G. 23); but where the trust did not appear, the costs of a petition by the committee and the co-trustees of the lunatic were paid out of the trust estate (*Re Jones*, 2 Ch. D. 70; see *Re Townsend*, 1 Mac. & G. 686).

where trustee a lunatic.

Where a trustee became lunatic, and an application in Lunacy was made for a transfer of the trust funds, no order was made as to costs (*Re Garden*, 6 N. R. 347). As to the practice under former Acts, see *Ex p. Pearce*, T. & R. 325.

Appointing a person to convey.

Sub-sect. 4 provides for the appointment of a person to convey, replacing part of sect. 20 of the Trustee Act, 1850, under which persons were appointed to convey on behalf of lunatics in the following cases. Where one of several trustees was a lunatic and a new trustee had been appointed (*Re Jones, Zincraft's Will*, 33 Ch. D. 414; see *Re Mason*, 10 Ch. 273); in such a case the person appointed may be a continuing trustee (*Re Vicat*, 33 Ch. D. 103); where the customary heir of a vendor who had covenanted to surrender copyholds was lunatic (*Re Cuming*, 5 Ch. 72); in a partition action when one part owner was lunatic (*Re Nicholson*, 34 Ch. D. 663); and where after a decree for sale in a partnership action one partner was of unsound mind (*Herring* v. *Clark*, 4 Ch. 167). But it was held that a conveyance under that section could not contain any contract binding the lunatic or his estate, such as (in the case of a lease) a covenant for quiet enjoyment (*Cowper* v. *Harmer*, 57 L. T. 714).

Power to vest right to transfer stock and sue for chose in action.

136.—(1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock,

or to receive the dividends thereof, or to sue for the chose in action. 53 Vict. c. 5, s. 136.

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

As to the meaning of "stock" and "transfer" in this section, see sect. 341, *post*, p. 1122.

The jurisdiction under this section to vest trust stock which remains in the name of a lunatic trustee cannot be exercised by a master under sect. 27, sub-sect. 1 of the Lunacy Act, 1891; this not being administration of the lunatic's estate (*Re Langdale*, [1901] 1 Ch. 3). But see the Trustee Act, &c., Rules, p. 1112, *ante*.

Criminal lunatics are not included in the above section (Lunacy Act, 1890, s. 340), but were included in sect. 5 of the Trustee Act, 1850, one of the provisions replaced by the above section. Accordingly in the case of a criminal lunatic, a vesting order was made in 1906 under sect. 5 of the Trustee Act, 1850, the repeal of the last-mentioned section by Lunacy Act, 1890, s. 342, not affecting the jurisdiction (*Re R.*, [1906] 1 Ch. 730).

The above section replaces (as to England), sects. 5, 6, and parts of sects. 20, 26, 27 and 31 of the Trustee Act, 1850, and part of sect. 6 of the Trustee Act, 1852. The following cases were decided under those Acts.

The wife of a lunatic was sole surviving trustee of stock. An

53 Vict. c. 5, s. 136.

order was made, appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock (*Re Wood*, 3 D. F. & J. 125). The sole surviving trustee of stock being of unsound mind, the beneficiaries were appointed trustees and the stock vested in them (*Re Currie*, 10 Ch. D. 93).

The executors of an executor, one of whom was lunatic, were held to be "entitled" within the Trustee Act, 1850, when the stock was standing in the name of the original testator (*Re Wacher*, 22 Ch. D. 535). Where one of the three executors of a surviving trustee of shares was of unsound mind, and the other two refused to act, an order was made vesting the right to transfer the shares in the beneficiaries (*Re White*, 5 Ch. 698).

Where one of several trustees was lunatic the Court vested the right to transfer stock in the remaining trustees (*Re Watson*, 19 Ch. D. 384); and made such an order as to the whole fund when it was immediately divisible (*Re Martyn*, 26 Ch. D. 745; see *Re Wacher*, 22 Ch. D. 535); and as to a part which was immediately payable (*Re Hodgson, Kenlis* v. *H.*, 11 Ch. D. 888). But where there was a continuing trust it was said that a new trustee must be appointed (*Re Nash*, 16 Ch. D. 503; *Re Aston*, 23 Ch. D. 217; *Re Ray*, 47 L. T. 500; *Re Hodgson, supra*; see *Re Lamb*, 28 Ch. D. 77; *Re Gardiner*, 33 Ch. D. 590; *Re Peacock*, 14 Ch. D. 212; and the note, *ante*, p. 1074). See now *Re Leon*, [1892] 1 Ch. 348, *ante*, p. 1116. Where a lunatic was entitled jointly with a person out of the jurisdiction, and it was desired to vest in two new trustees already appointed, the stock was vested in the person out of the jurisdiction and then in the new trustees (*Re Batho*, 39 Ch. D. 189; see *Re Druce*, 46 L. T. 669; *Re Rolls Hoare* (1888), W. N. 94).

Where two trustees transferred trust stock into the names of strangers, and one of the trustees subsequently became lunatic, the Court would not, under the Trustee Act, 1850, make an order as to the retransfer of the stock (*Re Stewart*, 8 W. R. 297).

Vesting orders as to stock.

Where a person of unsound mind was entitled to a sum of stock, as to part as trustee, and as to the residue beneficially, an order was made enabling new trustees to receive the arrears of dividends on the whole sum of stock, upon an undertaking to invest in the name of the old trustee the dividends to which he was entitled beneficially (*Re Stewart*, 2 D. F. & J. 1; as to the indivisibility of dividends, see also *Skynner* v. *Pelichet*, 9 W. R. 191). The form of an order vesting the right to transfer stock was settled in *Re Gregson*, [1893] 3 Ch. 233; see *Re C. M. G. Spinster*, [1898] 2 Ch. 324; and the rules given in the note to sect. 51 of the Trustee Act, 1925, *ante*, p. 1091.

As to the mode and form of application, see Rules in Lunacy, *post*, p. 1123; and see *Re Muggleton*, 68 S. J. 519.

Sub-sect. 4 replaces part of sect. 20 of the Trustee Act, 1850. As to its operation, see sect. 137; *Re C. M. G. Spinster*, [1898] 2 Ch. 324. See also Trustee Act, 1925, s. 51, *ante*, p. 1087.

Person to be appointed to transfer.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred.

This section applies, so far as sect. 136 is concerned, only to sub-sect. 4 thereof (*Re C. M. G. Spinster*, [1898] 2 Ch. 324). See also Trustee Act, 1925, s. 51 (2), *ante*, p. 1088.

Charity trustees.

138. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or

chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction. 53 Vict. c. 5, s. 138.

See sect. 52 of the Trustee Act, 1925, *ante*, p. 1092.

139. The judge in lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised. Declarations and directions.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section shall not prevent a judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained. Order to be conclusive evidence of allegation on which it is founded.

141. In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees. Power to appoint new trustees.

This section replaces sect. 10 of the Trustee Act, 1852. In cases decided under the Trustee Acts, 1850 and 1852, and before the Lunacy Act, 1890, it was held that an order might be made in Lunacy alone appointing new trustees in the place of former trustees, of whom some were dead and one a person of unsound mind not so found (*Re Owen*, 4 Ch. 782; *Re Rolls Hoare* (1888), W. N. 94; see *Re Green*, 10 Ch. 272; *Re Ormerod*, 3 De G. & J. 249); and it was also held that an order might be made in Chancery alone appointing a new trustee in the place of a person of unsound mind not so found (*Re Vickers*, 3 Ch. D. 112; *Re Martin*, 34 Ch. D. 618). In a case decided since the Trustee Act, 1893, an order was made in Chancery alone appointing a new trustee in a similar case (*Re M.*, [1899] 1 Ch. 79). See now Trustee Act, 1925, s. 54, and Trustee Act (Jurisdiction in Lunacy) Rules, 1925, pp. 1093, 1112, *ante*.

As to the consent of the new trustee to act, see r. 92 and Form 12, *post*, pp. 1124, 1125.

142. The judge in lunacy may order the costs of and incident to obtaining an order under the provisions of this Act as to vesting orders and carrying the same into effect to be paid out of the land or personal estate or the income Costs.

53 Vict. c. 5, s. 142.

thereof in respect of which the order is made, or in such manner as the judge may think fit.

See rules under this Act, No. 110 (*post*, p. 1124), and the note to sect. 60 of the Trustee Act, 1925, *ante*, p. 1097.

As to ordering payment of costs by the Bank of England, see *Re Shortridge*, [1895] 1 Ch. 278; *Re C. M. G. Spinster*, [1898] 2 Ch. 324; *Re Spurling*, [1909] 1 Ch. 206.

Saving of power of High Court.

143. The provisions of this Act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

See sects. 44 and 51 of the Trustee Act, 1925 (*ante*, pp. 1076, 1087), and *Re Arrowsmith* (6 W. R. 642); and the remarks of Stirling, J., *Re M.* ([1899] 1 Ch. 84).

Definitions.

341. In this Act, if not inconsistent with the context—

"The Bank" means the Governor and Company of the Bank of England:

"Contingent right," as applied to lands, includes a contingent and executory interest, a possibility coupled with an interest whether the object of the gift or limitation of such interest, or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands:

3 & 4 Will. 4, c. 74.

"Dividends" includes interest and other annual produce:

"Land" includes an undivided share of land:

"Lunatic" means an idiot or person of unsound mind:

"Mortgage" includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth:

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854:

17 & 18 Vict. c. 104.

"Transfer" includes assignment payment, and

other disposition, and execution, and performance, of every assurance and act to complete a transfer: 53 Vict. c. 5, s. 341.

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage.

As to constructive trustees, see note (*l*), *ante*, p. 1108. As to mortgaged estates, see *Re James' Mortgage Trust*, [1919] 1 Ch. 61.

The Rules in Lunacy, 1892.

Mode of Application.

Lunacy Rules, 1892.

After Rule 16, which provides for applications for an order for an inquisition by petition, the subsequent rules are as follows:—

17.—(a) Applications for a traverse and for a supersedeas shall be made by petition.

(b) Applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" shall be made by summons, unless the judge in lunacy or a master directs a petition to be presented.

This rule was substituted for the old rule in October, 1900.

19. All other applications under the Lunacy Acts, 1890 and 1891, or under those Acts and also in the Chancery Division, shall, unless the judge or masters shall in any particular case otherwise direct, be made by summons at chambers before the masters.

20. In all cases in which the judge has, under the Lands Clauses Acts, the Settled Estates Act, 1877, the Settled Land Acts, 1882 to 1890, or any other enactment, jurisdiction to make an order upon petition affecting the property of a lunatic, the application for the order shall, unless the judge or master in any particular case otherwise directs, be made by summons at chambers before the masters.

21. If in any case in which the application is not by these rules or by the judge or masters directed to be made by petition, a petition is presented without the direction of the judge or masters, no further costs shall be allowed than would be allowed upon a summons.

23. All matters which require to be brought before the judge, shall be brought before him out of court. The judge may make an order upon any summons or petition without the attendance of counsel, solicitors, or parties, or after such attendance, or may adjourn the summons or petition into court, or refer the same to the masters for inquiry, or further inquiry, upon any matter. Any matter may be adjourned from court for consideration by the judge out of court.

24. The judge and masters respectively may direct any person to be served with notice of any application, and may dispense with service on any person.

Vesting Orders.

Rules 57—59 were repealed by the Rules in Lunacy, 1919, dated May 1, 1919, and the following substituted:—

10. Applications under that portion of the Lunacy Act, 1890, as

Lunacy Rules, 1892.

amended by subsequent Acts which relates to vesting orders as regards lunatic mortgagees who are not also trustees may be made by the Committee or Receiver, by any person applying for the appointment of a Committee or Receiver, or by any person interested in the equity of redemption or the mortgage money. Such applications should be entitled in accordance with Form 1 in the Schedule hereto. It shall not be necessary to serve the application on any person unless the masters otherwise direct.

Evidence.

92. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by a solicitor.

Costs.

110. The rules of the Supreme Court as to costs for the time being in force shall, subject to these rules, apply to the costs of proceedings under the Lunacy Acts, 1890 and 1891, taken after the commencement of these rules in any matter.

FORMS *in* SCHEDULE TO RULES *to be used "with such variations as the circumstances require." R.* 9.

Form 1 (title of proceedings) was repealed by the Rules in Lunacy, 1919, and the following substituted:—

Form 1.—Title of all Proceedings where they are under the Lunacy Act, 1890, and the Acts amending the same alone.

53 Vict. c. 5, and amending Acts.

In the matter of A. B.

NOTE.—This title should be used in the case of every application under the Lunacy Act, 1890, and the Acts amending the same, for a vesting order as regards mortgaged property or the appointment of a person to re-convey, or for the exercise of the power of appointing new trustees or for the exercise of any power conferred by the Settled Land Acts. Such applications should not be entitled in the matter of any indenture or other instrument, or in the matter of the trusts of an instrument, or in the matter of the Settled Land Acts.

Form 2.—Title of Proceedings under the Lunacy Acts and in the Chancery Division.

(a) *General Form.*

53 Vict. c. 5 and amending Acts.
In the High Court of Justice, Chancery Division.
In the matter of A. B.

(b) *Where the powers conferred on the Chancery Division by the Settled Land Acts are invoked.*

53 Vict. c. 5 and amending Acts.
High Court of Justice, Chancery Division.
In the matter of A. B.
and
In the matter of —— Estate (*or*, of the timber upon the Estate) situate at —— in the County of ——;

(*or* of the chattels) settled by a settlement made by an Indenture dated the —— day of —— and made between ——; (*or* by the will of —— dated ——*or* as the case may be);

and

In the matter of the Settled Land Acts, 1882 to 1890.

Lunacy Rules, 1892.

Form 12.—Consent to Act.

I, A. B., of , hereby consent to act as trustee of the [*describe the instrument*].

Dated the —— day of ——. (Signed) A. B.

I, C. D., of , solicitor, hereby certify that the above-written signature is the signature of A. B., the person mentioned in the above-written consent.

Dated the —— day of ——. (Signed) C. D.

Form 13 (summons before the master) was repealed by the Rules in Lunacy, 1919.

III.—The Judicial Trustees Act, 1896.

59 & 60 Vict. c. 35.

Power of Court on application to appoint judicial trustee.

1.—(1) Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (*a*).

(2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act (*b*).

(3) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the court is not satisfied of the fitness of a person so nominated an official of the court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the court as an officer thereof (*c*).

(4) The court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof (*d*).

(5) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official

59 & 60 Vict. c. 35, s. 1.

of the court, and the remuneration so assigned to any judicial trustee shall, save as the court may for special reasons otherwise order, cover all his work and personal outlay (*e*).

(6) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the court by the prescribed persons, and, in any case where the court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

Appointment of trustees.

As to the appointment of trustees generally, see the Trustee Act, 1925, s. 36 (*ante*, p. 1060), dealing with appointments by the parties, and sect. 41 (*ante*, p. 1068), dealing with appointments by the Court.

Cases under sub-sect. 1.

(*a*) Upon an application under the present sub-section, where a testator appointed his wife sole executrix, and gave her a life interest in his estate, but appointed no trustees, the Court refused at the request of the residuary legatee, to appoint a judicial trustee, but appointed an ordinary trustee under the Trustee Act, 1893 (*Re Ratcliff*, [1898] 2 Ch. 352).

In *Re Martin* ([1900] W. N. 129) it was said that the union of a judicial trustee and an ordinary trustee was not desirable; and having regard to the opposition of the majority of the beneficiaries, the appointment of a judicial trustee to act with a sole executor and trustee was refused, but an ordinary trustee was appointed. A bank may be appointed sole judicial trustee with remuneration (*Re Cohen, C.* v. *C.*, 62 S. J. 682).

Sect. 4 of this Act gives power to make rules regulating the practice under the Act. This power has been exercised, and the Rules are stated at length in the Annual Practice (1912), Vol. II., 848, and also in the current indexes to the Law Reports, 1897 and 1899. See also Seton, 7th ed. 1234 *et seq.*

Rules 2-4 provide for applications to the Court; and under r. 6 the Court may upon an appointment make vesting orders.

As to the removal and suspension, resignation, &c., of judicial trustees, see rr. 7 (2) (4), 20-24.

Sub-sect. 2.

(*b*) Having regard to this sub-section, the Court can remove an executor and appoint a judicial trustee in his place (*Re Ratcliff*, [1898] 2 Ch. 352). See also r. 25. Compare the cases under the Trustee Acts (*ante*, p. 1108).

Sub-sect. 3.

(*c*) When the Court is not satisfied of the fitness of the person nominated by the applicant, it is not necessary to appoint an official of the Court, but any fit person may be appointed (*Douglas* v. *Bolon*, [1900] 2 Ch. 749). The Court may appoint as judicial trustee a beneficiary or relative of a beneficiary, a solicitor or other person connected with a trust, a married woman, or a person already trustee (see Rules under the Act, r. 5). Rules 7 and 26 provide for appointing officials of the Court, and r. 26 provides for appointing judicial trustees in connection with companies or clubs, or to carry on trades. As to appointing the Public Trustee, see *Re Johnston, Mills* v. *J.*, 105 L. T. 701.

Sub-sect. 4.

(*d*) Rules 8-16 provide for the administration of a trust by a judicial trustee. Except where a summons is required by the Rules, the communication between a judicial trustee and the Court is made by letter (r. 28).

Sub-sects. 5 and 6.

(*e*) Rules 17-19 provide for remuneration, and rr. 14-16 provide for accounts (cf. Trustee Act, 1925, s. 42, *ante*).

2. The jurisdiction of the court under this Act may be exercised by the High Court, and as respects trusts within its jurisdiction by a palatine court, and (subject to the prescribed definition of the jurisdiction) by any county court judge to whom such jurisdiction may be assigned under this Act.

59 & 60 Vict. c. 35, s. 2.

Court to exercise jurisdiction.

The jurisdiction under the Act may be exercised by a Master of the High Court, or by a registrar of a district registry, or of a Palatine or County Court (rr. 27, 33; see *Re Martin*, [1901] W. N. 129).

See also as to district registries, and Palatine and County Courts, rr. 29, 30, and 31.

Sect. 3, empowering the Court to relieve trustees from personal liability for breach of trust, was repealed and replaced by Trustee Act, 1925, s. 61, *ante*, p. 1098.

Sect. 4 gives power to make Rules for carrying the Act into effect. See note to sect. 1, *supra*.

5. In this Act—

Definitions.

The expression "official of the court" means the holder of such paid office in or connected with the court as may be prescribed.

The expression "prescribed" means prescribed by rules under this Act.

6.—(1) This Act may be cited as the Judicial Trustees Act, 1896.

Short title, extent, and commencement of Act.

(2) This Act shall not extend to any charity, whether subject to or exempted from the Charitable Trusts Acts, 1853 to 1894.

(3) This Act shall not extend to Scotland or Ireland.

(4) This Act, except as by this Act otherwise provided, shall come into operation on the 1st day of May, 1897.

Sect. 3 (see *supra*) came into operation on the passing of the Act.

LAND REGISTRATION ACT, 1925.

15 GEO. 5, c. 21.

An Act to consolidate the Land Transfer Acts and the statute law relating to registered land (a).

[9th April, 1925].

(a) This Act consolidates the provisions of the Land Transfer Act, 1875, and the amending Act of 1897 (except Part I. of that Act, for which see *ante*, p. 415), with numerous alterations and additions taken chiefly from the L. P. Act, 1922, and the Amendment Act of 1924. The sections replacing provisions of the earlier Acts are noted *infra*.

PART I.

PRELIMINARY.

Registers to be continued.

1. There shall continue to be kept at His Majesty's Land Registry, a register of title to freehold land and leasehold land.

What estates may be registered.

2.—(1) After the commencement of this Act, estates capable of subsisting as legal estates (*b*) shall be the only interests in land in respect of which a proprietor can be registered and all other interests in registered land (except overriding interests and interests entered on the register at or before such commencement) shall take effect in equity as minor interests (*c*), but all interests (except undivided shares in land) entered on the register at such commencement which are not legal estates shall be capable of being dealt with under this Act:

Provided that, on the occasion of the first dealing with any such interest, the register shall be rectified in such manner as may be provided by rules made to secure that the entries therein shall be similar to those which would have been made if the title to the land had been registered after the commencement of this Act (*d*).

(2) Subject as aforesaid, and save as otherwise expressly provided by this Act, this Act applies to land registered under any enactment replaced by this Act in like manner as it applies to land registered under this Act.

(*b*) See L. P. Act, 1925, s. 1 (1), *ante*.
(*c*) See sect. 3 (xv), *post*.
(*d*) The Land Registration (England) Rules, 1925, have been issued under the Act.

3. In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:— **15 Geo. 5, c. 21, s. 3.**

Interpretation.

(i) "Charge by way of legal mortgage" means a mortgage created by charge under which, by virtue of the Law of Property Act, 1925, the mortgagee is to be treated as an estate owner in like manner as if a mortgage term by demise or subdemise were vested in him, and "legal mortgage" has the same meaning as in that Act (*e*); 15 Geo. 5, c. 20.

(ii) "the Court" means the High Court of Justice, and also the Court of Chancery of the County Palatine of Lancaster or Durham, or the county court, where those courts respectively have jurisdiction;

(iii) "Death duty" means estate duty, succession duty, legacy duty, and every other duty leviable or payable on any death;

(iv) "Estate owner" means the owner of a legal estate, but an infant is not capable of being an estate owner;

(v) "Gazette" means the London Gazette;

(vi) "Income" includes rents and profits;

(vii) "Instrument" does not include a statute, unless the statute creates a settlement;

(viii) "Land" includes land of any tenure (including land, subject or not to manorial incidents, enfranchised under Part V. of the Law of Property Act, 1922), and mines and minerals, whether or not held with the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; but not an undivided share in land; and "hereditaments" mean real property which on an intestacy might, before the commencement of this Act, have devolved on an heir (*f*); 12 & 13 Geo. 5, c. 16

(ix) "Land charge" and "Local land charge" have the same meanings as in the Land Charges Act, 1925 (*g*); 15 Geo. 5 c. 22.

(x) "Lease" includes an under-lease and any tenancy or agreement for a lease, under-lease or tenancy;

(xi) "Legal estates" mean the estates interests and

15 Geo. 5, c. 21, s. 3.

charges in or over land subsisting or created at law which are by the Law of Property Act, 1925, authorised to subsist or to be created at law (*h*); and "Equitable interests" mean all the other interests and charges in or over land or in the proceeds of sale thereof; an equitable interest "capable of subsisting at law" means such as could validly subsist at law if clothed with the legal estate;

3 & 4 Will. 4, c. 27. 7 Will. 4, and 1 Vict. c. 28.

(xii) "Limitation Acts" mean the Real Property Limitation Acts, 1833, 1837 and 1874, and any Acts amending those Acts;

37 & 38 Vict. c. 57.

(xiii) "Manorial incidents" have the same meaning as in Part V. of the Law of Property Act, 1922 (*i*);

(xiv) "Mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same, but not an undivided share thereof;

(xv) "Minor interests" mean the interests not capable of being disposed of or created by registered dispositions and capable of being overridden (whether or not a purchaser has notice thereof) by the proprietors unless protected as provided by this Act, and all rights and interests which are not registered or protected on the register and are not overriding interests, and include—

(a) in the case of land held on trust for sale, all interests and powers which are under the Law of Property Act, 1925, capable of being overridden by the trustees for sale, whether or not such interests and powers are so protected (*k*); and

(b) in the case of settled land, all interests and powers which are under the Settled Land Act, 1925, and the Law of Property Act, 1925, or either of them, capable of being overridden by the tenant for life or statutory owner, whether or not such interests and powers are so protected as aforesaid (*l*);

15 Geo. 5, c. 18.

(xvi) "Overriding interests" mean all the incumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect, and in regard to land registered at the commencement of this Act include the matters which are by any enactment repealed by this Act declared not to be incumbrances;

15 Geo. 5, c. 21, s. 3.

(xvii) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court; and where there are special personal representatives for the purposes of any settled land, it means, in relation to that land, those representatives;

(xviii) "Possession" includes receipt of rents and profits or the right to receive the same, if any;

(xix) "Prescribed" means prescribed by general rules made in pursuance of this Act;

(xx) "Proprietor" means the registered proprietor for the time being of an estate in land or of a charge;

(xxi) "Purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee, or other person who for valuable consideration acquires any interest in land or in any charge on land;

(xxii) "Registered dispositions" mean dispositions which take effect under the powers conferred on the proprietor by way of transfer, charge, lease or otherwise and to which (when required to be registered) special effect or priority is given by this Act on registration;

(xxiii) "Registered estate," in reference to land, means the legal estate, or other registered interest, if any, as respects which a person is for the time being registered as proprietor, but does not include a registered charge and a "registered charge" includes a mortgage or incumbrance registered as a charge under this Act;

(xxiv) "Registered land" means land or any estate or interest in land the title to which is registered under this Act or any enactment replaced by this Act, and includes any easement, right, privilege, or benefit which is appurtenant or appendant thereto, and any mines and minerals within or under the same and held therewith;

(xxv) "Rent" includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment, in money or money's worth, issuing out of or charged upon land, but does not include mortgage interest;

15 Geo. 5, c. 21, s. 3.

(xxvi) "Settled land" "settlement" "tenant for life" "statutory owner" "trustees of the settlement" "capital money" "committee" "lunatic" "defective" "trust corporation" "trust instrument" "vesting deed" "vesting order" "vesting assent" and "vesting instrument" have the same meanings as in the Settled Land Act, 1925 (*m*);

(xxvii) A "term of years absolute" means a term of years, whether at a rent or not, taking effect either in possession or in reversion, with or without impeachment for waste, subject or not to another legal estate and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest), but does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created after the commencement of this Act, a term of years which is not expressed to take effect in possession within twenty-one years after the creation thereof where required by the Law of Property Act, 1925, to take effect within that period (*n*); and in this definition the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year;

(xxviii) "Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale;

(xxix) "Trustees for sale" mean the persons (including a personal representative) holding land on trust for sale;

(xxx) "United Kingdom" means Great Britain and Northern Ireland;

(xxxi) "Valuable consideration" includes marriage, but does not include a nominal consideration in money;

(xxxii) "Will" includes codicil.

(*e*) See L. P. Act, 1925, ss. 87 and 205 (1) (xvi), *ante*.
(*f*) See Administration of Estates Act, 1925, s. 45, *ante*.
(*g*) See Land Charges Act, 1925, ss. 10 and 15, *ante*.
(*h*) See L. P. Act, 1925, s. 1, *ante*.
(*i*) See note to sect. 28 of L. P. Act, 1925, *ante*.
(*k*) See *ibid.*, s. 2, *ante*.

(*l*) See S. L. Act, 1925, s. 72, *ante*.
(*m*) See *ibid.*, s. 117, *ante*.
(*n*) See L. P. Act, 1925, s. 149 (3), *ante*.

15 Geo. 5, c. 21, s. 3.

Part II.

Registration of Land.

Freehold Land.

Application for registration of freehold land.

4. Where the title to be registered is a title to a freehold estate in land—

(a) any estate owner holding an estate in fee simple (including a tenant for life, statutory owner (*o*), personal representative, or trustee for sale) whether subject or not to incumbrances; or

(b) any other person (not being a mortgagee where there is a subsisting right of redemption or a person who has merely contracted to buy land) who is entitled to require a legal estate in fee simple whether subject or not to incumbrances, to be vested in him;

may apply to the registrar to be registered in respect of such estate, or, in the case of a person not in a fiduciary position, to have registered in his stead any nominee, as proprietor with an absolute title or with a possessory title:

Provided that—

(i) Where an absolute title is required the applicant or his nominee shall not be registered as proprietor until and unless the title is approved by the registrar;

(ii) Where a possessory title is required the applicant or his nominee may be registered as proprietor on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed;

(iii) If, on an application for registration with possessory title, the registrar is satisfied as to the title to the freehold estate, he may register it as absolute, whether the applicant consents to such registration or not, but in that case no higher fee shall be charged than would have been charged for registration with possessory title.

(*o*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.

Effect of first registration with absolute title.

5. Where the registered land is a freehold estate, the registration of any person as first proprietor thereof with an absolute title shall vest in the person so registered an

15 Geo. 5, c. 21, s. 5.

estate in fee simple in possession in the land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject to the following rights and interests, that is to say,—

(a) Subject to the incumbrances, and other entries, if any, appearing on the register; and

(b) Unless the contrary is expressed on the register, subject to such overriding interests, if any, as affect the registered land; and

(c) Where the first proprietor is not entitled for his own benefit to the registered land subject, as between himself and the persons entitled to minor interests, to any minor interests of such persons of which he has notice,

but free from all other estates and interests whatsoever, including estates and interests of His Majesty (*p*).

(*p*) See *Re Suarez* (No. 4), [1924] 2 Ch. 19.

Effect of first registration with possessory title.

6. Where the registered land is a freehold estate, the registration of any person as first proprietor thereof with a possessory title only shall not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of the first proprietor, and subsisting or capable of arising at the time of registration of that proprietor; but save as aforesaid, shall have the same effect as registration of a person with an absolute title.

Qualified title.

7.—(1) Where an absolute title is required, and on the examination of the title it appears to the registrar that the title can be established only for a limited period, or only subject to certain reservations, the registrar may, on the application of the party applying to be registered, by an entry made in the register, except from the effect of registration any estate, right, or interest—

(a) arising before a specified date, or

(b) arising under a specified instrument or otherwise particularly described in the register,

and a title registered subject to such excepted estate, right, or interest shall be called a qualified title.

(2) Where the registered land is a freehold estate, the registration of a person as first proprietor thereof with a qualified title shall have the same effect as the registration of such person with an absolute title, save that registration with a qualified title shall not affect or prejudice the enforcement of any estate, right or interest appearing by the register to be excepted (*q*).

(*q*) Sects. 4-7 replace L. T. Act, 1875, ss. 5-9.

Leasehold Land.

15 Geo. 5, c. 21, s. 8.

Application for registration of leasehold land.

8.—(1) Where the title to be registered is a title to a leasehold interest in land—

(a) any estate owner (including a tenant for life, statutory owner (*r*), personal representative, or trustee for sale, but not including a mortgagee where there is a subsisting right of redemption), holding under a lease for a term of years absolute (*s*) of which more than twenty-one are unexpired, whether subject or not to incumbrances, or

(b) any other person (not being a mortgagee as aforesaid and not being a person who has merely contracted to buy the leasehold interest) who is entitled to require a legal leasehold estate held under such a lease as aforesaid (whether subject or not to incumbrances) to be vested in him,

may apply to the registrar to be registered in respect of such estate, or in the case of a person not being in a fiduciary position to have registered in his stead any nominee, as proprietor with an absolute title, with a good leasehold title or with a possessory title:

Provided that—

(i) Where an absolute title is required, the applicant or his nominee shall not be registered as proprietor until and unless the title both to the leasehold and to the freehold, and to any intermediate leasehold that may exist, is approved by the registrar;

(ii) Where a good leasehold title is required, the applicant or his nominee shall not be registered as proprietor until and unless the title to the leasehold interest is approved by the registrar;

(iii) Where a possessory title is required, the applicant or his nominee may be registered as proprietor on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed;

(iv) If on an application for registration with a possessory title the registrar is satisfied as to the title to the leasehold interest, he may register it as good leasehold, whether the applicant consents to such registration or not, but in that case no higher fee shall be charged than would have been charged for registration with possessory title.

(2) Leasehold land held under a lease containing an absolute prohibition against all dealings therewith inter vivos shall not be registered in pursuance of this Act; and

15 Geo. 5, c. 21, s. 8.

leasehold land held under a lease containing a restriction on any such dealings, shall not be registered under this Act unless and until provision is made in the prescribed manner for preventing any dealing therewith in contravention of the restriction by an entry on the register to that effect, or otherwise.

(3) Where on an application to register a mortgage term, wherein no right of redemption is subsisting, it appears that the applicant is entitled in equity to the superior term, if any, out of which it was created, the registrar shall register him as proprietor of the superior term without any entry to the effect that the legal interest in that term is outstanding, and on such registration the superior term shall vest in the proprietor and the mortgage term shall merge therein:

Provided that this subsection shall not apply where the mortgage term does not comprise the whole of the land included in the superior term, unless in that case the rent, if any, payable in respect of the superior term has been apportioned, or the rent is of no money value or no rent is reserved, and unless the covenants, if any, entered into for the benefit of the reversion have been apportioned (either expressly or by implication) as respects the land comprised in the mortgage term.

This section replaces L. T. Act, 1875, ss. 11 and 12.
(*r*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.
(*s*) See sect. 3 (xxvii), *ante*.

Effect of first registration with absolute title.

9. Where the registered land is a leasehold interest, the registration under this Act of any person as first proprietor thereof with an absolute title shall be deemed to vest in such person the possession of the leasehold interest described, with all implied or expressed rights, privileges, and appurtenances attached to such interest, subject to the following obligations, rights, and interests, that is to say,—

(a) Subject to all implied and express covenants, obligations, and liabilities incident to the registered land; and

(b) Subject to the incumbrances and other entries (if any) appearing on the register; and

(c) Unless the contrary is expressed on the register, subject to such overriding interests, if any, as affect the registered land; and

(d) Where such first proprietor is not entitled for his own benefit to the registered land subject, as between himself and the persons entitled to minor interests, to any minor interests of such persons of which he has notice;

but free from all other estates and interests whatsoever, including estates and interests of His Majesty.

This section replaces L. T. Act, 1875, s. 13, and rr. 52 and 53 of the L. T. Rules, 1903, 1907, and 1908; and sects. 10-12 replace rr. 56-59 of those Rules. **15 Geo. 5, c. 21, s. 9.**

Effect of first registration with good leasehold title.

10. Where the registered land is a leasehold interest, the registration of a person as first proprietor thereof with a good leasehold title shall not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the title of the lessor to grant the lease, but, save as aforesaid, shall have the same effect as registration with an absolute title.

Effect of first registration with possessory title.

11. Where the registered land is a leasehold interest, the registration of a person as first proprietor thereof with a possessory title shall not affect or prejudice the enforcement of any estate, right or interest (whether in respect of the lessor's title or otherwise) adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but save as aforesaid, shall have the same effect as registration with an absolute title.

Qualified title.

12.—(1) Where on examination it appears to the registrar that the title, either of the lessor to the reversion or of the lessee to the leasehold interest, can be established only for a limited period, or subject to certain reservations, the registrar may, upon the request in writing of the person applying to be registered, by an entry made in the register, except from the effect of registration any estate, right or interest—

(a) arising before a specified date, or

(b) arising under a specified instrument, or otherwise particularly described in the register,

and a title registered subject to any such exception shall be called a qualified title.

(2) Where the registered land is a leasehold interest, the registration of a person as first proprietor thereof with a qualified title shall not affect or prejudice the enforcement of any estate, right, or interest appearing by the register to be excepted, but, save as aforesaid, shall have the same effect as registration with a good leasehold title or an absolute title, as the case may be.

Preliminaries to Registration.

Regulations as to examination of title by registrar.

13. The examination by the registrar of any title under this Act shall be conducted in the prescribed manner:

Provided that—

(a) Due notice shall be given, where the giving of such notice is prescribed, and sufficient oppor-

15 Geo. 5, c. 21, s. 13.

tunity shall be afforded to any persons desirous of objecting to come in and state their objections to the registrar; and

(b) The registrar shall have jurisdiction to hear and determine any such objections, subject to an appeal to the court in the prescribed manner and on the prescribed conditions; and

(c) If the registrar, upon the examination of any title, is of opinion that the title is open to objection, but is nevertheless a title the holding under which will not be disturbed, he may approve of such title, or may require the applicant to apply to the court, upon a statement signed by the registrar, for its sanction to the registration.

This and sects. 14-17 replace L. T. Act, 1875, ss. 17 and 70-73.

Evidence required before registration.

14.—(1) Before the completion of the registration of any estate in land in respect of which an examination of title is required, the applicant for registration and his solicitor, shall each, if required by the registrar, make an affidavit or declaration that to the best of his knowledge and belief all deeds, wills, and instruments of title, and all charges and incumbrances affecting the title which is the subject of the application, and all facts material to such title, have been disclosed in the course of the investigation of title made by the registrar.

(2) The registrar may require any person making an affidavit or declaration in pursuance of this section to state in his affidavit or declaration what means he has had of becoming acquainted with the several matters referred to in this section; and if the registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete the registration until such further or other evidence is produced.

(3) Before the registration of any person who has not previously acquired the estate intended to be registered, the registrar shall be satisfied that all ad valorem stamp duty, if any, which, if the estate had been acquired by him, would have been payable in respect of the instrument vesting that estate in him, has been discharged.

Production of deeds.

15.—(1) When an application has been made to the registrar for the registration of any title to land, then if any person has in his possession or custody any deeds, instruments, or evidences of title relating to or affecting such title, to the production of which the applicant or any trustee for him is entitled, the registrar may require such person to show cause, within a time limited, why he should

not produce such deeds, instruments, or evidences of title to the registrar, or otherwise, as the registrar may deem fit; and, unless cause is shown to the satisfaction of the registrar within the time limited, such deeds, instruments, and evidences of title may be ordered by the registrar to be produced at the expense of the applicant, at such time and place, and in such manner, and on such terms, as the registrar thinks fit. 15 Geo. 5, c. 21, s. 15.

(2) Any person aggrieved by an order of the registrar under this section may appeal in the prescribed manner to the court, which may annul or confirm the order of the registrar with or without modification.

(3) If any person disobeys any order of the registrar made in pursuance of this section, the registrar may certify such disobedience to the court, and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the court in the same manner in all respects as if the order made by the registrar were the order of the court.

Deeds to be marked with notice of registration.

16. A person shall not be registered as proprietor until, if required by the registrar, he has produced to him such documents of title, if any, as will, in the opinion of the registrar, when stamped or otherwise marked, give notice to any purchaser or other person dealing with the land of the fact of the registration, and the registrar shall stamp or otherwise mark the same accordingly, unless the registrar is satisfied that without such stamping or marking the fact of such registration cannot be concealed from a purchaser or other person dealing with the land:

Provided that, in the case of registration with a possessory title, the registrar may act on such reasonable evidence as may be prescribed as to the sufficiency of the documents produced, and as to dispensing with their production in special circumstances.

Costs of application for registration.

17.—(1) All costs, charges, and expenses that are incurred by any parties in or about any proceedings for registration shall, unless the parties otherwise agree, be taxed by the taxing officer of the court as between solicitor and client, but the persons by whom and the proportions in which such costs, charges, and expenses are to be paid shall be in the discretion of the registrar, and shall be determined according to orders of the registrar, regard being had to the following provision, namely, that any applicant under this Act is liable primâ facie to pay all costs, charges, and expenses incurred by or in consequence of his application, except—

(a) in a case where parties object whose rights are sufficiently secured without their appearance; and

15 Geo. 5, c. 21, s. 17.

(b) where any costs, charges, or expenses are incurred unnecessarily or improperly:

Provided that any party aggrieved by any order of the registrar under this section may appeal in the prescribed manner to the court, which may annul or confirm the order of the registrar, with or without modification.

(2) If any person disobeys any order of the registrar made in pursuance of this section, the registrar may certify such disobedience to the court, and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the court in the same manner in all respects as if the order made by the registrar were the order of the court.

Part III.

Registered Dealings with Registered Land.

Dispositions of Freehold Land.

Powers of disposition of registered freeholds.

18.—(1) Where the registered land is a freehold estate the proprietor may, in the prescribed manner, transfer the registered estate in the land or any part thereof, and, subject to any entry in the register to the contrary, may in the prescribed manner—

(a) transfer the fee simple in possession of all or any mines or minerals apart from the surface; or of the surface without all or any of the mines and minerals;

(b) grant an annuity or a rentcharge in possession (either perpetual or for a term of years absolute (*t*)) in any form which sufficiently refers in the prescribed manner to the registered land charged;

(c) grant in fee simple in possession any easement, right, or privilege in, over, or derived from the registered land or any part thereof, in any form which sufficiently refers, in the prescribed manner, to the registered servient tenement and to the dominant tenement, whether being registered land or not;

(d) transfer the fee simple in possession of the registered land or any part thereof, subject to the creation thereout, by way of reservation, in favour of any person of an annuity or a rentcharge in possession (either perpetual or for a term of years absolute), or of any easement, right, or privilege in possession (either in fee simple or for a term of years absolute);

(e) grant (subject or not to the reservation of an easement, right, or privilege) a lease of the registered land or any part thereof, or of all or

any mines and minerals apart from the surface, or of the surface without all or any of the mines and minerals, or of an easement, right or privilege in or over the land, or any part thereof, for any term of years absolute for any purpose (but where by way of mortgage subject to the provisions of this Act and the Law of Property Act, 1925, relating thereto (*u*)), and in any form which sufficiently refers, in the prescribed manner, to the registered land.

(2) A perpetual annuity or rentcharge in possession may be granted or reserved to any person with or without a power of re-entry, exercisable at any time, on default of payment thereof, or on breach of covenant, and shall have incidental thereto all the powers and remedies (as varied if at all by the disposition creating the rentcharge) for recovery thereof conferred by the Law of Property Act, 1925 (*x*); and where an easement, right, or privilege is reserved in a registered disposition for a legal estate, the reservation shall operate to create the same for the benefit of the land for the benefit of which the right is reserved.

(3) A lease for a term, not exceeding twenty-one years, to take effect in possession or within one year from the date thereof at a rent without taking a fine may be granted and shall take effect under this section notwithstanding that a caution, notice of deposit of a certificate, restriction, or inhibition (other than a bankruptcy inhibition) may be subsisting, but subject to the interests intended to be protected by any such caution, notice, restriction, or inhibition.

(4) The foregoing powers of disposition shall (subject to the express provisions of this Act and of the Law of Property Act, 1925, relating to mortgages (*u*)) apply to dispositions by the registered proprietor by way of charge or mortgage; but no estate, other than a legal estate, shall be capable of being disposed of, or created under this section.

(5) In this Act "transfer" or "disposition" when referring to registered freehold land includes any disposition authorised as aforesaid; and "transferee" has a corresponding meaning.

This and sect. 19 replace L. T. Act, 1875, s. 29.

(*t*) See sect. 3 (xxvii), *ante*.

(*u*) See sects. 25 *et seq.* and 106, *post*, and L. P. Act, 1925, ss. 85 *et seq.*

(*x*) See L. P. Act, 1925, s. 121, *ante*.

Registration of disposition of freeholds.

19.—(1) The transfer of the registered estate in the land or part thereof shall be completed by the registrar

15 Geo. 5, c. 21, s. 19.

entering on the register the transferee as the proprietor of the estate transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the registered estate; and, where part only of the land is transferred, notice thereof shall also be noted on the register.

(2) All interests transferred or created by dispositions by the proprietor, other than a transfer of the registered estate in the land, or part thereof, shall, subject to the provisions relating to mortgages, be completed by registration in the same manner and with the same effect as provided by this Act with respect to transfers of registered estates and notice thereof shall also be noted on the register:

Provided that nothing in this subsection—

(a) shall authorise the registration of a lease granted for a term not exceeding twenty-one years, or require the entry of a notice of such a lease if it is granted at a rent without taking a fine; or

(b) shall authorise the registration of a mortgage term where there is a subsisting right of redemption; or

(c) shall render necessary the registration of any easement, right, or privilege except as appurtenant to registered land, or the entry of notice thereof except as against the registered title of the servient land.

Every such disposition shall, when registered, take effect as a registered disposition, and a lease made by the registered proprietor under the last foregoing section which is not required to be registered or noted on the register shall nevertheless take effect as if it were a registered disposition immediately on being granted.

(3) The general words implied in conveyances under the Law of Property Act, 1925 (*y*), shall apply, so far as applicable thereto, to dispositions of a registered estate.

(*y*) See L. P. Act, 1925, s. 62, *ante*.

Effect of registration of dispositions of freeholds.

20.—(1) In the case of a freehold estate registered with an absolute title, a disposition of the registered land, or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, including (subject to any entry to the contrary in the register) the appropriate rights and interests which

would, under the Law of Property Act, 1925, have been transferred if the land had not been registered, subject— 15 Geo. 5, c. 21, s. 20.

(a) to the incumbrances and other entries, if any, appearing on the register; and

(b) unless the contrary is expressed on the register, to the overriding interests (*z*) if any, affecting the estate transferred or created,

but free from all other estates and interests whatsoever, including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor or grantor were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit.

(2) In the case of a freehold estate registered with a qualified title a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, have the same effect as it would have had if the land had been registered with an absolute title, save that such disposition shall not affect or prejudice the enforcement of any right or interest appearing by the register to be excepted.

(3) In the case of a freehold estate registered with a possessory title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall not affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but, save as aforesaid, shall when registered have the same effect as it would have had if the land had been registered with an absolute title.

(4) Where any such disposition is made without valuable consideration, it shall, so far as the transferee or grantee is concerned, be subject to any minor interests (*a*) subject to which the transferor or grantor held the same, but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee or grantee, have the same effect as if the disposition had been made for valuable consideration.

Sects 20-24 replace L. T. Act, 1875, ss. 30-35, 38, and 39.

(*z*) See sect. 3 (xvi), *ante*.

(*a*) See *ibid.* (xv).

Dispositions of Leasehold Land.

Powers of disposition of registered leaseholds.

21.—(1) Where the registered land is a leasehold interest the proprietor may, in the prescribed manner, transfer the registered estate in the land or any part thereof, and, subject to any entry in the register to the contrary may in the prescribed manner—

15 Geo. 5, c. 21, s. 21.

(a) transfer all or any of the leasehold mines and minerals apart from the surface; or the surface without all or any of the leasehold mines and minerals;

(b) grant (to the extent of the registered estate) any annuity or rentcharge in possession, easement, right or privilege in, over, or derived from the registered land or any part thereof, in any form which sufficiently refers, in the prescribed manner, to the registered lease, and to the dominant tenement, whether being registered land or not;

(c) transfer the registered land or any part thereof subject to a reservation to any person of any such annuity, rentcharge, easement, right, or privilege;

(d) grant (subject or not to the reservation of an easement, right or privilege) an underlease of the registered land, or any part thereof, or of all or any mines and minerals apart from the surface, or of the surface without all or any of the mines and minerals, or of an easement, right or privilege, in or over the registered land or any part thereof, for any term of years absolute (*b*) of less duration than the registered estate and for any purpose (but where by way of mortgage, subject to the provisions of this Act and of the Law of Property Act, 1925, relating thereto (*c*)), and in any form which sufficiently refers in the prescribed manner to the registered land, and in the case of an easement, right, or privilege, to the dominant tenement, whether being registered land or not.

(2) A disposition of registered leasehold land may be made subject to a rent legally apportioned in the prescribed manner, or to a rent not so apportioned.

(3) An underlease for a term, not exceeding twenty-one years, to take effect in possession or within one year from the date thereof, at a rent without taking a fine, may be granted and shall take effect under this section, notwithstanding that a caution, notice of deposit of a certificate, restriction, or inhibition (other than a bankruptcy inhibition) may be subsisting, but subject to the interests intended to be protected by any such caution, notice, restriction or inhibition.

(4) The foregoing powers of disposition shall (subject to the express provisions of this Act and of the Law of Property Act, 1925, relating to mortgages (*c*)) apply to dispositions by the registered proprietor by way of charge or mortgage, but no estate, other than a legal estate, shall be capable of being disposed of or created under this section.

(5) In this Act "transfer" or "disposition" when referring to registered leasehold land includes any dis-

position authorised as aforesaid, and "transferee" has a corresponding meaning. 15 Geo. 5, c. 21, s. 21.

(*b*) See sect. 3 (xxvii), *ante*.
(*c*) See sects. 25 *et seq.* and 106, *post*, and L. P. Act, 1925, ss. 85 *et seq.*, *ante*.

Registration of dispositions of leaseholds.

22.—(1) A transfer of the registered estate in the land or part thereof shall be completed by the registrar entering on the register the transferee as proprietor of the estate transferred, but until such entry is made the transferor shall be deemed to remain the proprietor of the registered estate; and where part only of the land is transferred, notice thereof shall also be noted on the register.

(2) All interests transferred or created by dispositions by the registered proprietor other than the transfer of his registered estate in the land or in part thereof shall (subject to the provisions relating to mortgages) be completed by registration in the same manner and with the same effect as provided by this Act with respect to transfers of the registered estate, and notice thereof shall also be noted on the register in accordance with this Act:

Provided that nothing in this subsection—

(a) shall authorise the registration of an underlease originally granted for a term not exceeding twenty-one years, or require the entry of a notice of such an underlease if it is granted at a rent without taking a fine; or

(b) shall authorise the registration of a mortgage term where there is a subsisting right of redemption; or

(c) shall render necessary the registration of any easement, right, or privilege except as appurtenant to registered land, or the entry of notice thereof except as against the registered title of the servient land.

Every such disposition shall, when registered, take effect as a registered disposition, and an underlease made by the registered proprietor which is not required to be registered or noted on the register shall nevertheless take effect as if it were a registered disposition immediately on being granted.

(3) The general words implied in conveyances under the Law of Property Act, 1925 (*d*), shall apply, so far as applicable thereto, to transfers of a registered leasehold estate.

(*d*) See sect. 62 of that Act, *ante*.

Effect of registration

23.—(1) In the case of a leasehold estate registered with an absolute title, a disposition (including a subdemise

15 Geo. 5, c. 21, s. 23.

of dispositions of leaseholds.

thereof) for valuable consideration (*e*) shall, when registered, be deemed to vest in the transferee or underlessee the estate transferred or created to the extent of the registered estate, or for the term created by the subdemise, as the case may require, with all implied or expressed rights, privileges, and appurtenances attached to the estate transferred or created, including (subject to any entry to the contrary on the register) the appropriate rights and interests which would under the Law of Property Act, 1925, have been transferred if the land had not been registered, but subject as follows:—

(a) To all implied and express covenants, obligations, and liabilities incident to the estate transferred or created; and

(b) To the incumbrances and other entries (if any) appearing on the register; and

(c) Unless the contrary is expressed on the register, to the overriding interests (*f*), if any, affecting the estate transferred or created,

but free from all other estates and interests whatsoever, including estates and interests of His Majesty; and the transfer or subdemise shall operate in like manner as if the registered transferor or sublessor were (subject to any entry to the contrary on the register) absolutely entitled to the registered lease for his own benefit.

(2) In the case of a leasehold estate registered with a good leasehold title, a disposition (including a subdemise thereof) for valuable consideration shall, when registered, have the same effect as it would have had if the land had been registered with an absolute title, save that it shall not affect or prejudice the enforcement of any right or interest affecting or in derogation of the title of the lessor to grant the lease.

(3) In the case of a leasehold estate registered with a qualified title, a disposition (including a subdemise thereof) for valuable consideration shall, when registered, have the same effect as it would have had if the land had been registered with an absolute title, save that such disposition shall not affect or prejudice the enforcement of any right or interest (whether in respect of the lessor's title or otherwise) appearing by the register to be excepted.

(4) In the case of a leasehold estate registered with a possessory title, a disposition (including a subdemise thereof) for valuable consideration shall not affect or prejudice the enforcement of any right or interest (whether in respect of the lessor's title or otherwise) adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor, but save as aforesaid shall, when regis-

tered, have the same effect as it would have had if the land had been registered with an absolute title. 15 Geo. 5, c. 21, s. 23.

(5) Where any such disposition is made without valuable consideration it shall, so far as the transferee or underlessee is concerned, be subject to any minor interests subject to which the transferor or sublessor held the same; but, save as aforesaid, shall, when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee or underlessee, have the same effect as if the disposition had been made for valuable consideration.

(*e*) An order for foreclosure absolute was not a "transfer for valuable consideration" within L. T. Act, 1875, s. 35, and rr. 140 and 142 of the L. T. Rules (*Re De Leeuw*, [1922] 2 Ch. 540).

(*f*) See sect. 3 (xvi), *ante*.

Implied covenants on transfers of leaseholds.

24.—(1) On the transfer, otherwise than by way of underlease, of any leasehold interest in land under this Act, unless there be an entry on the register negativing such implication, there shall be implied—

(a) on the part of the transferor, a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and

(b) on the part of the transferee, a covenant with the transferor, that during the residue of the term the transferee and the persons deriving title under him will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor and the persons deriving title under him indemnified against all actions, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.

(2) On a transfer of part of the land held under a lease, the covenant implied on the part of the transferee by this section shall be limited to the payment of the apportioned rent, if any, and the performance and observance of the covenants by the lessee and conditions in the registered lease so far only as they affect the part transferred. Where the transferor remains owner of part of the land comprised in the lease, there shall also be implied on his part, as respects the part retained, a covenant with the transferee

15 Geo. 5, c. 21, s. 24.

similar to that implied on the part of the transferee under this subsection.

Charges on Freehold and Leasehold Land.

Proprietor's power to create charges.

25.—(1) The proprietor of any registered land may by deed—

(a) charge the registered land with the payment at an appointed time of any principal sum of money either with or without interest;

(b) charge the registered land in favour of a building society under the Building Societies Acts, 1874 to 1894, in accordance with the rules of that society.

(2) A charge may be in any form provided that—

(a) the registered land comprised in the charge is described by reference to the register or in any other manner sufficient to enable the registrar to identify the same without reference to any other document;

(b) the charge does not refer to any other interest or charge affecting the land which—

(i) would have priority over the same and is not registered or protected on the register,

(ii) is not an overriding interest.

(3) Any provision contained in a charge which purports to—

(i) take away from the proprietor thereof the power of transferring it by registered disposition or of requiring the cessation thereof to be noted on the register; or

(ii) affect any registered land or charge other than that in respect of which the charge is to be expressly registered,

shall be void.

Sects. 25 and 26 replace L. T. Act, 1875, s. 22 (see also L. T. Act, 1897, s. 9 and Sched. 1).

Registration of charges.

26.– (1) The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge.

(2) A charge may be registered notwithstanding that it contains any trust, power to appoint new trustees, or other provisions for giving effect to the security.

(3) Where the land, in respect of which a charge is registered, is registered with a good leasehold, qualified or possessory title, the charge shall take effect subject to the

provisions of this Act with respect to land registered with such a title. 15 Geo. 5, c. 21, s. 26.

Terms of years implied in or granted by charges.

27.—(1) A registered charge shall, unless made or taking effect by demise or subdemise, and subject to any provision to the contrary contained in the charge, take effect as a charge by way of legal mortgage (*g*).

(2) Subject to the provisions of the Law of Property Act, 1925, a registered charge may contain in the case of freehold land, an express demise, and in the case of leasehold land an express subdemise of the land to the creditor for a term of years absolute (*h*), subject to a proviso for cesser on redemption.

(3) Any such demise or subdemise or charge by way of legal mortgage (*g*) shall take effect from the date of the delivery of the deed containing the same, but subject to the estate or interest of any person (other than the proprietor of the land) whose estate or interest (whenever created) is registered or noted on the register before the date of registration of the charge.

(4) Any charge registered before the commencement of this Act shall take effect as a demise or subdemise of the land in accordance with the provisions of the Law of Property Act, 1925 (*i*), and the registered estate shall (without prejudice to any registered charge or any term or subterm created by a charge or by this Act) vest in the person appearing by the register to be entitled to the ultimate equity of redemption.

(*g*) See L. P. Act, 1925, s. 87, *ante*.
(*h*) See sect. 3 (xxvii), *ante*.
(*i*) See L. P. Act, 1925, ss. 85 *et seq.*, *ante*.

Implied covenants in charges.

28.—(1) Where a registered charge is created on any land there shall be implied on the part of the person being proprietor of such land at the time of the creation of the charge, unless there be an entry on the register negativing such implication—

(a) a covenant with the proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; and

(b) a covenant, if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate as well after as before any judgment is obtained in respect of the charge on so much of the principal sum as for the time being remains unpaid.

(2) Where a registered charge is created on any leasehold land there shall (in addition to the covenants aforesaid)

15 Geo. 5, c. 21, s. 28.

be implied on the part of the person being proprietor of such land at the time of the creation of the charge, unless there be an entry on the register negativing such implication, a covenant with the proprietor for the time being of the charge, that the person being proprietor of such land at the time of the creation of the charge, or the persons deriving title under him, will pay, perform, and observe the rent, covenants, and conditions, by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the proprietor of the charge, and the persons deriving title under him, indemnified against all proceedings, expenses, and claims, on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them.

Priorities of registered charges.

29. Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created.

Sects. 28 and 29 replace L. T. Act, 1875, ss. 23, 24, and 28 (see *Pantlin* v. *Evans* [1911] W. N. 80).

Protection of charges for securing further advances.

30.—(1) When a registered charge is made for securing further advances, the registrar shall, before making any entry on the register which would prejudicially affect the priority of any further advance thereunder, give to the proprietor of the charge at his registered address, notice by registered post of the intended entry, and the proprietor of the charge shall not, in respect of any further advance, be affected by such entry, unless the advance is made after the date when the notice ought to have been received in due course of post.

(2) If, by reason of any failure on the part of the registrar or the post office in reference to the notice, the proprietor of the charge suffers loss in relation to a further advance, he shall be entitled to be indemnified under this Act (*k*) in like manner as if a mistake had occurred in the register; but if the loss arises by reason of an omission to register or amend the address for service, no indemnity shall be payable under this Act.

(3) Where the proprietor of a charge is under an obligation, noted on the register, to make a further advance, a subsequent registered charge shall take effect subject to any further advance made pursuant to the obligation.

Sub-sect. 3 was added by L. P. (Amdt.) Act, 1926, s. 5 (see p. 596, *ante*).

(*k*) See sect. 83, *post*.

15 Geo. 5, c. 21, s. 31.

Alteration of charges.

31.—(1) The proprietor of a charge may by deed, in the prescribed manner, alter the terms of the charge, with the consent of the proprietor of the registered land and of the proprietors of all registered charges (if any) of equal or inferior priority, affected by the alteration.

(2) A deed of alteration of a charge may contain an express demise or subdemise in like manner as an original deed of charge, and the provisions of this Act relating to a demise or subdemise contained in a deed of charge shall apply accordingly.

(3) The alteration shall be completed by the registrar entering it on the register.

Replaces L. T. Act, 1897, s. 9 (5).

Provisions when charge registered in names of several proprietors.

32. Where a charge is registered in the names of two or more proprietors (whether jointly or in undivided shares) the mortgage term implied or comprised in the charge shall (but without prejudice to the beneficial interests in the mortgage money) vest in them as joint tenants, and the proprietors or the survivors or survivor of them or the personal representatives of the last survivor, shall have power to give valid receipts, notwithstanding that the mortgage money may be held in undivided shares, in like manner as if the money had been held on a joint account.

Transfer of charges.

33.—(1) The proprietor of any registered charge may, in the prescribed manner, transfer the charge to another person as proprietor.

(2) The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred, but the transferor shall be deemed to remain proprietor of the charge until the name of the transferee is entered on the register in respect thereof.

(3) A registered transferee for valuable consideration of a charge and his successors in title shall not be affected by any irregularity or invalidity in the original charge itself of which the transferee did not have notice when it was transferred to him.

(4) On registration of any transfer of a charge, the term or subterm (if any) granted expressly or by implication by the charge or any deed of alteration shall, without any conveyance or assignment and notwithstanding anything to the contrary in the transfer or any other instrument, vest in the proprietor for the time being of the charge.

(5) Subject to any entry to the contrary on the register, the vesting of any term or subterm in accordance with this section in the proprietor of a charge shall, subject to the right of redemption, have the same effect as if such

15 Geo. 5, c. 21, s. 33.

proprietor had been registered as the transferee for valuable consideration of the term or subterm.

Sect. 33 replaces L. T. Act, 1875, s. 40, as amended by Sched. 1 of the L. T. Act, 1897; and sects. 34 and 35 replace L. T. Act, 1875, ss. 25-28.

Powers of proprietor of charge.

34.—(1) Subject to any entry on the register to the contrary, the proprietor of a charge shall have and may exercise all the powers conferred by law on the owner of a legal mortgage (*kk*).

(2) Subject to any entry to the contrary on the register and subject to the right of any persons appearing on the register to be prior incumbrancers, the proprietor of a charge may, after entry into possession and after having acquired a title under the Limitation Acts (*l*), execute a declaration, in the prescribed form, that the right of redemption is barred, and thereupon he shall be entitled, subject to furnishing any evidence which may be prescribed in support thereof, to be registered as proprietor of the land, with the same consequences as if he had been a purchaser for valuable consideration of the land under the power of sale.

(3) An order for foreclosure shall be completed by the registration of the proprietor of the charge (or such other person as may be named in the foreclosure order absolute for that purpose) as the proprietor of the land, and by the cancellation of the charge and of all incumbrances and entries inferior thereto; and such registration shall operate in like manner and with the same consequences as if the proprietor of the charge or other person aforesaid had been a purchaser for valuable consideration of the land under a subsisting power of sale.

(4) A sale by the court or under the power of sale shall operate and be completed by registration in the same manner, as nearly as may be (but subject to any alterations on the register affecting the priority of the charge), as a transfer for valuable consideration by the proprietor of the land at the time of the registration of the charge would have operated or been completed, and, as respects the land transferred, the charge and all incumbrances and entries inferior thereto shall be cancelled.

(5) Notwithstanding the creation of a term or subterm, expressly or by implication, under this Act, such transfer shall (subject to any prior incumbrances or other entries on the register) operate to transfer the registered estate, and the mortgage term or subterm shall become merged, and any purported disposition of or dealing with the mortgage term or subterm apart from the charge, and any process or act purporting to keep alive that term or subterm after the cessation of the charge shall be void.

(6) For the purposes of this section an incumbrance or entry on the register shall not be deemed to be inferior to the charge in right of which title is made if the incumbrance or other interest is given the requisite priority by statute or otherwise. **15 Geo. 5, c. 21, s. 34.**

(*kk*) See L. P. Act, 1925, ss. 99 *et seq.*, as to the statutory powers of mortgagees.

(*l*) See sect. 3 (xii), *ante*, and sect. 75, *post*.

35.—(1) The registrar shall, on the requisition of the proprietor of any charge, or on due proof of the satisfaction (whole or partial) thereof, notify on the register in the prescribed manner, by cancelling or varying the original entry or otherwise, the cessation (whole or partial) of the charge, and thereupon the charge shall be deemed to have ceased (in whole or in part) accordingly. Discharge of charges.

(2) On the notification on the register of the entire cessation of a registered charge, whether as to the whole or part only of the land affected thereby, the term or subterm implied in or granted by the charge or by any deed of alteration, so far as it affects the land to which the discharge extends, shall merge and be extinguished in the registered estate in reversion without any surrender.

36. Rules shall be made for applying the provisions of the Law of Property Act, 1925, and of this Act to the case of charges by way of submortgage, whether registered before or after the commencement of this Act. Rules as to subcharges.

As to Dealings generally.

37.—(1) Where a person on whom the right to be registered as proprietor of registered land or of a registered charge has devolved by reason of the death of the proprietor, or has been conferred by a disposition or charge, in accordance with this Act, desires to dispose of or charge the land or to deal with the charge before he is himself registered as proprietor, he may do so in the prescribed manner, and subject to the prescribed conditions. Powers of persons entitled to be registered.

(2) Subject to the provisions of this Act with regard to registered dealings for valuable consideration, a disposition or charge so made shall have the same effect as if the person making it were registered as proprietor.

(3) Rules may be made for extending the provisions of this section to the case of any person entitled to be registered as first proprietor, and to any other case for which it may be deemed expedient to prescribe.

Sects. 37 and 38 replace provisions of L. T. Act, 1897, s. 9.

15 Geo. 5, c. 21, s. 38.

Certain provisions of the Law of Property Act to apply.

38.—(1) The provisions as to execution of a conveyance on sale contained in the Law of Property Act, 1925 (*m*), shall apply, so far as applicable thereto, to transfers on sale of registered land.

(2) Rules may be made for prescribing the effect of covenants implied by virtue of the Law of Property Act, 1925, in dispositions of registered land.

(*m*) See L. P. Act, 1925, s. 75, *ante*.

Deeds off register, how far to be void.

39.—(1) Where any transaction relating exclusively to registered land or to a registered charge is capable of being effected and is effected by a registered disposition, then, subject to any prescribed exceptions, any deed or instrument, other than the registered disposition, which is executed by the proprietor for the purpose of giving effect to the transaction shall be void, but only so far as the transaction is carried out by the registered disposition.

(2) Rules may be made for providing for cases in which any additional deed or instrument may be properly executed and for enabling the registrar to certify that in any special cases an additional deed or instrument will be proper and valid.

Creation and discharge of restrictive covenants.

40.—(1) Subject to any entry to the contrary on the register, and without prejudice to the rights of persons entitled to overriding interests (*n*) (if any) and to any incumbrances entered on the register, who may not concur therein, the proprietor may in any registered disposition or other instrument by covenant, condition, or otherwise, impose or make binding, so far as the law permits, any obligation or reservation with respect to the building on or other user of the registered land or any part thereof, or with respect to mines and minerals (whether registered separately or as part of the registered land), or with respect to any other thing in like manner as if the proprietor were entitled to the registered land for his own benefit.

(2) The proprietor may (subject as aforesaid) release or waive any rights arising or which may arise by reason of any covenant or condition, or release any obligation or reservation the benefit of which is annexed or belongs to the registered land, to the same extent and in the same manner as if the rights in respect of the breach or the benefit of the covenant, condition, obligation, or reservation had been vested in him absolutely for his own benefit.

This subsection shall authorise the proprietor in reference to the registered land to give any licence, consent or approval which a tenant for life is by the Settled Land Act, 1925 (*o*), authorised to give in reference to settled land.

(3) Entries shall be made on the register in the

prescribed manner of all obligations and reservations imposed by the proprietor, of the release or waiver of any obligation or reservation, and of all obligations and reservations acquired by him for the benefit of the registered estate. 15 Geo. 5, c. 21, s. 40.

(*n*) See sect. 3 (xvi), *ante*.
(*o*) See S. L. Act, 1925, s. 59, *ante*.

Transmissions of Land and Charges on Death and Bankruptcy.

Transmissions of land and charges on death of proprietor.

41.—(1) On the death of the sole proprietor, or of the survivor of two or more joint proprietors, of any registered land or charge, the personal representative of such sole deceased proprietor, or of the survivor of such joint proprietors, shall be entitled to be registered as proprietor in his place:

Provided that, where a special or additional personal representative is appointed by the court in reference to a registered estate, then on production of the order he shall be registered as proprietor either solely or jointly with any of the other personal representatives, as the case may require, and a copy of the order shall be filed at the registry.

(2) Pending an application for the appointment of a special or additional personal representative (*p*), a caution against dealings may be lodged under this Act by any person intending to apply to the court for the appointment.

(3) Subject as aforesaid, provision shall be made by rules for the manner in which effect is to be given on the register to transmissions on death.

(4) An assent by a personal representative shall, in the case of registered land, be in the prescribed form and the production of the assent in that form shall authorise the registrar to register the person named in the assent as the proprietor of the registered land.

Sects. 41 and 42 replace L. T. Act, 1875, ss. 41-43.
(*p*) See Administration of Estates Act, 1925, s. 23 (2), *ante*.

Transmissions on bankruptcy of proprietor.

42.—(1) Upon the bankruptcy of the proprietor of any registered land or charge his trustee shall (on production of the prescribed evidence to be furnished by the official receiver or trustee in bankruptcy that the land or charge is part of the property of the bankrupt divisible amongst his creditors) be entitled to be registered as proprietor in his place.

The official receiver shall be entitled to be registered pending the appointment of a trustee.

15 Geo. 5, c. 21, s. 42.

4 & 5 Geo. 5, c. 59.

(2) Where a trustee in bankruptcy disclaims a registered lease under section fifty-four of the Bankruptcy Act, 1914, and an order is made by the court vesting the lease in any person, the order shall direct the alteration of the register in favour of the person in whom the lease is so vested, and in such case the registrar shall, on being served with such order, forthwith (without notice to the bankrupt or any other person and without requiring production of the land certificate) alter the register accordingly, and no right to indemnify under this Act shall arise by reason of such alteration.

Effect of transmissions.

43. Any person registered in the place of a deceased or bankrupt proprietor shall hold the land or charge in respect of which he is registered upon the trusts and for the purposes upon and subject to which the same is applicable by law, and subject to any minor interests (*q*) subject to which the deceased or bankrupt proprietor held the same: but, save as aforesaid, he shall in all respects, and in particular as respects any registered dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for valuable consideration.

Sects. 43 and 45 replace L. T. Act, 1875, ss. 46 and 47; and sect. 46 replaces sects. 19 and 20 of that Act. See as to a dissolved company registered as proprietor, *Tuff* v. *Land Registry*, 34 Times L. R. 205.

(*q*) See sect. 3 (xv), *ante*.

Vesting of term or subterm on transmission of charge.

44.—(1) On the registration of any transmission of a charge the term or subterm granted (expressly or by implication) by the charge or any deed of alteration shall without any conveyance or assignment vest in the proprietor for the time being of the charge.

(2) Subject to any entry to the contrary on the register, the vesting of a term or subterm in accordance with this section in the proprietor of a charge, shall, subject to the right of redemption, have the same effect as if such proprietor had been registered as the transferee for valuable consideration of the term or subterm.

Proof of transmission of registered proprietorship.

45. The fact of any person having become entitled to any registered land or charge in consequence of the death or bankruptcy of any proprietor shall be proved in the prescribed manner.

Subsidiary Provisions.

Determination or variation of leases,

46. The registrar shall, on proof to his satisfaction of—

(a) the determination of any lease, rentcharge, or other

estate or interest the title to which is registered under this Act; or

15 Geo. 5, c. 21, s. 46.

(b) the discharge or determination (whole or partial) or variation of any lease, incumbrance, rentcharge, easement, right or other interest in land which is noted on the register as an incumbrance,

incum-brances, &c.

notify in the prescribed manner on the register the determination (whole or partial) or variation of such lease or other interest.

Vesting instruments and dispositions in name of proprietor.

47.—(1) The registrar shall give effect on the register to any vesting order or vesting declaration (express or implied) made on the appointment or discharge of a trustee or otherwise, and to dispositions made in the name and on behalf of a proprietor by a person authorised to make the disposition; and the provisions of the Trustee Act, 1925, relating to the appointment and discharge of trustees and the vesting of trust property, shall apply to registered land subject to the proper entry being made on the register (*r*).

15 Geo. 5, c. 19.

(2) The registrar shall also give effect on the register in the prescribed manner to any vesting instrument (*s*) which may be made pursuant to any statutory power.

(*r*) See Trustee Act, 1925, ss. 36, 39, 40, 41, and 44 *et seq.*, *ante*.
(*s*) See S. L. Act, 1925, s. 117 (1) (xxxi), *ante*.

Part IV.

Notices, Cautions, Inhibitions and Restrictions.

Notices.

Registration of notice of lease.

48.—(1) Any lessee or other person entitled to or interested in a lease of registered land, where the term granted is not an overriding interest (*t*), may apply to the registrar to register notice of such lease in the prescribed manner, and when so registered, every proprietor and the persons deriving title under him shall be deemed to be affected with notice of such lease, as being an incumbrance on the registered land in respect of which the notice is entered:

Provided that a proprietor of a charge or incumbrance registered or protected on the register prior to the registration of such notice shall not be deemed to be so affected by the notice unless such proprietor is, by reason of the lease having been made under a statutory or other power or by reason of his concurrence or otherwise, bound by the terms of the lease.

(2) In order to register notice of a lease, if the proprietor

15 Geo. 5, c. 21, s. 48.

of the registered land affected does not concur in the registration thereof, the applicant shall obtain an order of the court authorising the registration of notice of the lease, and shall deliver the order to the registrar, accompanied with the original lease or a copy thereof, and thereupon the registrar shall make a note in the register identifying the lease or copy so deposited, and the lease or copy so deposited shall be deemed to be the instrument of which notice is given; but if the proprietor concurs in the notice being registered, notice may be entered in such manner as may be agreed upon:

Provided that, where the lease is binding on the proprietor of the land, neither the concurrence of such proprietor nor an order of the court shall be required.

(*t*) See s. 3 (xvi), *ante*. Replaces L. T. Act, 1875, ss. 50 and 51.

Rules to provide for notices of other rights, interests and claims.

49.—(1) The provisions of the last foregoing section shall be extended by the rules so as to apply to the registration of notices of or of claims in respect of—

(a) The grant or reservation of any annuity or rent-charge in possession, either perpetual or for a term of years absolute:

(b) The severance of any mines or minerals from the surface, except where the mines and minerals severed are expressly included in the registration:

(c) Land charges until the land charge is registered as a registered charge (*tt*):

(d) The right of any person interested in the proceeds of sale of land held on trust for sale or in land subject to a settlement to require that (unless a trust corporation (*u*) is acting as trustee) there shall be at least two trustees of the disposition on trust for sale or of the settlement:

53 & 54 Vict. c. 29.

(e) The rights of any widow in respect of dower or under the Intestates' Estates Act, 1890 (*x*), and any right to free bench or other like right saved by any statute coming into force concurrently with this Act (which rights shall take effect in equity as minor interests (*y*)):

(f) Creditors' notices and any other right, interest, or claim which it may be deemed expedient to protect by notice instead of by caution, inhibition, or restriction.

(2) A notice shall not be registered in respect of any estate, right, or interest which (independently of this Act) is capable of being overridden by the proprietor under a trust for sale or the powers of the Settled Land Act, 1925, or any other statute, or of a settlement, and of being protected by a restriction in the prescribed manner:

Provided that notice of such an estate right or interest may be lodged pending the appointment of trustees of a disposition on trust for sale or a settlement, and if so lodged, shall be cancelled if and when the appointment is made and the proper restriction (if any) is entered. 15 Geo. 5, c. 21, s. 49.

(3) A notice when registered in respect of a right, interest, or claim shall not affect prejudicially—

(a) The powers of disposition of the personal representative of the deceased under whose will or by the operation of whose intestacy the right, interest, or claim arose; or

(b) The powers of disposition (independently of this Act) of a proprietor holding the registered land on trust for sale.

(*tt*) See Land Charges Act, 1925, s. 10, *ante*.

(*u*) See as to the meaning of "trust corporation," *ante*, p. 794; and as to the provisions referred to, L. P. Act, 1925, s. 27 (2), S. L. Act, 1925, s. 94, and Trustee Act, 1925, s. 14 (2), *ante*.

(*x*) See p. 403, *ante*.

(*y*) See as to these rights, Administration of Estates Act, 1925, s 45 (1), *ante*; and for "minor interests," see sect. 3 (xv), *ante*.

Notices of restrictive covenants.

50.—(1) Any person entitled to the benefit of a restrictive covenant or agreement (not being a covenant or agreement made between a lessor and lessee) with respect to the building on or other user of registered land may apply to the registrar to enter notice thereof on the register, and where practicable the notice shall be by reference to the instrument, if any, which contains the covenant or agreement, and a copy or abstract of such instrument shall be filed at the registry; and where any such covenant or agreement appears to exist at the time of first registration, notice thereof shall be entered on the register. In the case of registered land the notice aforesaid shall take the place of registration as a land charge.

(2) When such a notice is entered the proprietor of the land and the persons deriving title under him (except incumbrancers or other persons who at the time when the notice is entered may not be bound by the covenant or agreement) shall be deemed to be affected with notice of the covenant or agreement as being an incumbrance on the land.

(3) Where the covenant or agreement is discharged or modified by an order under the Law of Property Act, 1925, or otherwise (*z*), or the court refuses to grant an injunction for enforcing the same, the entry shall either be cancelled or reference made to the order or other instrument and a copy of the order, judgment, or instrument shall be filed at the registry.

(4) The notice shall, when practicable, refer to the land,

15 Geo. 5, c. 21, s. 50.

whether registered or not, for the benefit of which the restriction was made.

(*z*) See L. P. Act, 1925, s. 84 and note, *ante*.

Notice of manorial incidents.

51. Where land is affected by manorial incidents (*a*), the registrar may enter a note of that fact on the register, and may cancel such note when extinguishment of the manorial incidents has been proved to his satisfaction.

(*a*) See note to L. P. Act, 1925, s. 28, p. 619, *ante*.

Effect of notices.

52.—(1) A disposition by the proprietor shall take effect subject to all estates, rights, and claims which are protected by way of notice on the register at the date of the registration or entry of notice of the disposition, but only if and so far as such estates, rights, and claims may be valid and are not (independently of this Act) overridden by the disposition.

(2) Where notice of a claim is entered on the register, such entry shall operate by way of notice only, and shall not operate to render the claim valid whether made adversely to or for the benefit of the registered land or charge.

Cautions.

Cautions against first registration.

53.—(1) Any person having or claiming such an interest in land not already registered as entitles him to object to any disposition thereof being made without his consent, may lodge a caution with the registrar to the effect that the cautioner is entitled to notice in the prescribed form, and to be served in the prescribed manner, of any application that may be made for the registration of an interest in the land affecting the right of the cautioner.

(2) The caution shall be supported by an affidavit or declaration in the prescribed form, stating the nature of the interest of the cautioner, the land and estate therein to be affected by such caution, and such other matters as may be prescribed.

(3) After a caution has been lodged in respect of any estate, which has not already been registered, registration shall not be made of such estate until notice has been served on the cautioner to appear and oppose, if he thinks fit, such registration, and the prescribed time has elapsed since the date of the service of such notice, or the cautioner has entered an appearance, whichever may first happen.

Sects. 53-56, relating to cautions, replace L. T. Act, 1875, ss. 60-63, 53-56, and 64.

Cautions against dealings.

54.—(1) Any person interested under any unregistered instrument, or interested as a judgment creditor, or otherwise howsoever, in any land or charge registered in the name of any other person, may lodge a caution with the registrar to the effect that no dealing with such land or charge on the part of the proprietor is to be registered until notice has been served upon the cautioner:

Provided that a person whose estate, right, interest, or claim has been registered or protected by a notice or restriction shall not be entitled (except with the consent of the registrar) to lodge a caution in respect of such estate, right, interest, or claim, but this provision shall not operate to prevent an incumbrancer or assignee of a life interest, remainder, reversion or executory interest, from lodging a priority caution in a specially prescribed form.

(2) A caution lodged under this section shall be supported by such evidence as may be prescribed.

Effect of cautions against dealings.

55.—(1) After any such caution against dealings has been lodged in respect of any registered land or charge, the registrar shall not, without the consent of the cautioner, register any dealing or make any entry on the register for protecting the rights acquired under a deposit of a land or charge certificate (*b*) or other dealing by the proprietor with such land or charge until he has served notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of the prescribed number of days next following the date at which such notice is served; and after the expiration of such time as aforesaid the caution shall cease unless an order to the contrary is made by the registrar, and upon the caution so ceasing the registered land or charge may be dealt with in the same manner as if no caution had been lodged.

(2) If before the expiration of the said period the cautioner, or some person on his behalf, appears before the registrar, and where so required by the registrar gives sufficient security to indemnify every party against any damage that may be sustained by reason of any dealing with the registered land or charge, or the making of any such entry as aforesaid, being delayed, the registrar may thereupon, if he thinks fit to do so, delay registering any dealing with the land or charge or making any such entry for such period as he thinks just.

(*b*) See sects. 63-68, *post*.

General provisions as to cautions.

56.—(1) Any person aggrieved by any act done by the registrar in relation to a caution under this Act may appeal to the court in the prescribed manner.

15 Geo. 5, c. 21, s. 56.

(2) A caution lodged in pursuance of this Act shall not prejudice the claim or title of any person and shall have no effect whatever except as in this Act mentioned.

(3) If any person lodges a caution with the registrar without reasonable cause, he shall be liable to make to any person who may have sustained damage by the lodging of the caution such compensation as may be just, and such compensation shall be recoverable as a debt by the person who has sustained damage from the person who lodged the caution.

(4) The personal representative of a deceased cautioner may consent or object to registration or a dealing in the same manner as the cautioner.

Inhibitions.

Power for Court or registrar to inhibit registered dealings.

57.—(1) The court, or, subject to an appeal to the court, the registrar, upon the application of any person interested, made in the prescribed manner, in relation to any registered land or charge, may, after directing such inquiries (if any) to be made and notices to be given and hearing such persons as the court or registrar thinks expedient, issue an order or make an entry inhibiting for a time, or until the occurrence of an event to be named in such order or entry, or generally until further order or entry, the registration or entry of any dealing with any registered land or registered charge.

(2) The court or registrar may make or refuse to make any such order or entry, and annex thereto any terms or conditions the court or registrar may think fit, and discharge such order or cancel such entry when granted, with or without costs, and generally act in the premises in such manner as the justice of the case requires.

(3) Any person aggrieved by any act done by the registrar in pursuance of this section may appeal to the court in the prescribed manner.

(4) The court or the registrar may, in lieu of an inhibition, order a notice or restriction to be placed on the register.

This section replaces L. T. Act, 1875, s. 57.

Restrictions.

Power to place restrictions on register.

58.—(1) Where the proprietor of any registered land or charge desires to place restrictions on transferring or charging the land or on disposing of or dealing with the land or charge in any manner in which he is by this Act authorised to dispose of or deal with it, or on the deposit by way of security of any certificate, the proprietor may

apply to the registrar to make an entry in the register that no transaction to which the application relates shall be effected, unless the following things, or such of them as the proprietor may determine, are done— 15 Geo. 5, c. 21, s. 58.

(a) unless notice of any application for the transaction is transmitted by post to such address as he may specify to the registrar;

(b) unless the consent of some person or persons, to be named by the proprietor, is given to the transaction;

(c) unless some such other matter or thing is done as may be required by the applicant and approved by the registrar:

Provided that no restriction under this section shall extend or apply to dispositions of or dealings with minor interests (*c*).

(2) The registrar shall thereupon, if satisfied of the right of the applicant to give the directions, enter the requisite restriction on the register, and no transaction to which the restriction relates shall be effected except in conformity therewith; but it shall not be the duty of the registrar to enter any such restriction, except upon such terms as to payment of fees and otherwise as may be prescribed, or to enter any restriction that the registrar may deem unreasonable or calculated to cause inconvenience.

(3) In the case of joint proprietors the restriction may be to the effect that when the number of proprietors is reduced below a certain specified number no disposition shall be registered except under an order of the court, or of the registrar after inquiry into title, subject to appeal to the court, and, subject to general rules, such an entry under this subsection as may be prescribed shall be obligatory unless it is shown to the registrar's satisfaction that the joint proprietors are entitled for their own benefit, or can give valid receipts for capital money, or that one of them is a trust corporation.

(4) Any such restrictions, except such as are in this section declared to be obligatory, may at any time be withdrawn or modified at the instance of all the persons for the time being appearing by the register to be interested in such directions, and shall also be liable to be set aside by an order of the court.

(5) Rules may be made to enable applications to be made for the entry of restrictions by persons other than the proprietor.

Replaces L. T. Act, 1875, ss. 58, 59, amended by Sched. 1 of L. T. Act, 1897.

(*c*) See sect. 3 (xv), *ante*.

15 Geo. 5, c. 21, s. 59.

Protection of various Interests.

Writs, orders, deeds of arrangement, pending actions, &c.

59.—(1) A writ, order, deed of arrangement, pending action, or other interest which in the case of unregistered land may be protected by registration under the Land Charges Act, 1925 (*d*), shall, where the land affected or the charge securing the debt affected is registered, be protected only by lodging a creditor's notice, a bankruptcy inhibition or a caution against dealings with the land or the charge.

(2) Registration of a land charge (other than a local land charge (*e*)) shall, where the land affected is registered, be effected only by registering under this Act a notice caution or other prescribed entry:

Provided that before a land charge including a local land charge affecting registered land (being a charge to secure money) is realised, it shall be registered and take effect as a registered charge under this Act in the prescribed manner, without prejudice to the priority conferred by the land charge.

(3) A person interested under a writ or order for enforcing a judgment against registered land or a registered charge, may inspect and make copies of and extracts from the register and documents referred to therein which are in the custody of the registrar, so far as the same relate to the registered land or charge, and may, in accordance with this Act, lodge a caution against dealings therewith.

(4) When a land charge protected by notice has been discharged as to all or any part of the land comprised therein, the notices relating thereto and to all devolutions of and dealings therewith shall be vacated as to the registered land affected by the discharge.

(5) The foregoing provisions of this section shall apply only to writs and orders, deeds of arrangement, pending actions and land charges which if the land were unregistered would for purposes of protection be required to be registered or re-registered after the commencement of this Act under the Land Charges Act, 1925 (*d*); and for the purposes of this section a land charge does not include a puisne mortgage or an Inland Revenue charge (*f*).

(6) Subject to the provisions of this Act relating to fraud and to the title of a trustee in bankruptcy (*g*), a purchaser acquiring title under a registered disposition, shall not be concerned with any pending action, writ, order, deed of arrangement, or other document, matter, or claim (not being an overriding interest (*h*)) which is not protected by a caution or other entry on the register, whether he has or has not notice thereof, express, implied, or constructive.

(7) In this section references to registration under the Land Charges Act, 1925, apply to any registration made

under any other statute which, in the case of unregistered land, is by the Land Charges Act, 1925, to have effect as if the registration had been made under that Act (*i*). **15 Geo. 5, c. 21, s. 59.**

(*d*) See Land Charges Act, 1925, ss. 6, 8, 2, and 10, *ante*.
(*e*) See *ibid.*, s. 15.
(*f*) See *ibid.*, s. 10, Class C (i) and Class D (i).
(*g*) See sects. 114-116 and 61, *post*.
(*h*) See sect. 3 (xvi), *ante*.
(*i*) See Land Charges Act, 1925, s. 24, *ante*.

Notice of incumbrances registered under the Companies Act.

60.—(1) Where a company, registered under the Companies (Consolidation) Act, 1908, is registered as proprietor of any estate or charge already registered, the registrar shall not be concerned with any mortgage, charge, debenture, debenture stock, trust deed for securing the same, or other incumbrance created or issued by the company, whether or not registered under that Act, unless the same is registered or protected by caution or otherwise under this Act. 8 Edw. 7, c. 69.

(2) No indemnity shall be payable under this Act by reason of a purchaser acquiring any interest under a registered disposition from the company free from any such incumbrance.

Protection of creditors prior to registration of trustee in bankruptcy.

61.—(1) The registrar shall as soon as practicable after registration of a petition in bankruptcy as a pending action under the Land Charges Act, 1925 (*k*), register a notice (in this Act called a creditors' notice) against the title of any proprietor of any registered land or charge which appears to be affected, and such notice shall protect the rights of all creditors, and unless cancelled by the registrar in the prescribed manner such notice shall remain in force until a bankruptcy inhibition is registered or the trustee in bankruptcy is registered as proprietor.

No fee shall be charged for the registration of the notice.

(2) Until a creditors' notice is registered, a petition in bankruptcy filed after the commencement of this Act shall not, as respects any registered disposition for money or money's worth of any registered land or charge, be notice or evidence of any act of bankruptcy therein alleged.

(3) The registrar shall, as soon as practicable after registration of a receiving order in bankruptcy under the Land Charges Act, 1925 (*l*), enter an inhibition (in this Act called a bankruptcy inhibition) against the title of any proprietor of any registered land or charge which appears to be affected.

No fee shall be charged for the registration of the inhibition.

(4) From and after the entry of a bankruptcy inhibition

15 Geo. 5, c. 21, s. 61.

(but without prejudice to dealings with or in right of interests or charges having priority over the estate or charge of the bankrupt proprietor), no dealing affecting the registered land or charge of the proprietor, other than the registration of the trustee in bankruptcy, shall be entered on the register until the inhibition is vacated as to the whole or part of the land or charge dealt with.

(5) If and when a proprietor of any registered land or charge is adjudged bankrupt, his registered estate or interest, if belonging to him beneficially, and whether acquired before or after the date of adjudication, shall vest in the trustee in bankruptcy in accordance with the statutory provisions relating to bankruptcy for the time being in force.

(6) Where under a disposition to a purchaser in good faith for money or money's worth such purchaser is registered as proprietor of an estate or a charge, then, notwithstanding that an available act of bankruptcy has been committed by the person making the disposition, the title of his trustee in bankruptcy acquired after the commencement of this Act shall, as from the date of such disposition, be void as against such purchaser unless at the date of such disposition, either a creditors' notice or a bankruptcy inhibition has been registered, but a purchaser who, at the date of the execution of the registered disposition, has notice of an available act of bankruptcy, or of the receiving order, or adjudication, shall not be deemed to take in good faith.

Nothing in this section shall impose on a purchaser a liability to make any search under the Land Charges Act, 1925.

(7) Where the estate or assets of a bankrupt proprietor suffer loss by reason of the omission of the registrar to register a creditors' notice or bankruptcy inhibition, as required by this section, or on account of the execution or registration of a disposition after a petition is registered as a pending action or after a receiving order is registered and before the registration of a creditors' notice or bankruptcy inhibition, the trustee in bankruptcy shall be entitled to indemnity as a person suffering loss by reason of an error or omission in the register.

(8) If neither a creditors' notice nor a bankruptcy inhibition is registered against a bankrupt proprietor, nothing in this section shall prejudicially affect a registered disposition of any registered land or charge acquired by the bankrupt after adjudication which would have been valid by virtue of section forty-seven of the Bankruptcy Act, 1914, if the land or charge had not been registered.

4 & 5 Geo. 5, c. 59.

(9) If and when a bankruptcy inhibition is wholly or

partially vacated, for any cause other than by reason of the registration of the trustee in bankruptcy, any registered estate or interest vested in the trustee in bankruptcy shall, as respects the registered land or charge to which the vacation extends, be divested and the same shall vest in the proprietor in whom it would have been vested if there had been no adjudication in bankruptcy. 15 Geo. 5, c. 21, s. 61.

(10) The official receiver or trustee in bankruptcy may inspect the register so far as it relates to any proprietor against whom a receiving order has been made, and any creditor, on behalf of himself and all other creditors, or the official receiver or trustee in bankruptcy, may lodge a caution against any such proprietor in respect of any minor interest (*m*) affecting the registered land.

(*k*) See L. Charges Act, 1925, s. 2, *ante*.
(*l*) See *ibid.*, s. 6 (1) (c).
(*m*) See sect. 3 (xv), *ante*.

62. Rules shall be made under this Act— Rules to be made as to certain details.

(a) For postponing the registration of a creditors' notice or bankruptcy inhibition, where the name, address and description of the debtor appearing in the application for the registration of the pending action or receiving order are not identical with those stated in the register, until the registrar is satisfied as to the identity of the debtor;

(b) For requiring the official receiver to notify to the registrar any mistake occurring in the receiving order or any other fact relevant to any proposed amendment in the register; and for enabling the registrar to make any consequential amendment;

(c) For providing for the whole or partial vacation (subject to notice to the official receiver or trustee in bankruptcy and to his right to appeal to the court) of a bankruptcy inhibition, where the receiving order is rescinded or the bankruptcy is annulled, or the registrar is satisfied that the bankruptcy proceedings do not affect or have ceased to affect the statutory powers of the bankrupt to deal with the registered land or charge.

Part V.

Land and Charge Certificates.

63.—(1) On the first registration of a freehold or leasehold interest in land, and on the registration of a charge, a land certificate, or charge certificate, as the case Issue of land and charge certificates.

15 Geo. 5, c. 21, s. 63.

may be, shall be prepared in the prescribed form: it shall state whether the title is absolute, good leasehold, qualified or possessory, and it shall be either delivered to the proprietor or deposited in the registry as the proprietor may prefer.

(2) If so deposited in the registry it shall be officially endorsed from time to time, as in this Act provided, with notes of all subsequent entries in the register affecting the registered land or charge to which it relates.

(3) The proprietor may at any time apply for the delivery of the certificate to himself or to such person as he may direct, and may at any time again deposit it in the land registry.

(4) The preparation, issue, endorsement, and deposit in the registry of the certificate shall be effected without cost to the proprietor.

Sects. 63-68 replace L. T. Act, 1875, ss. 10, 22, 29, 40, 79, and 80, and L. T. Act, 1897, s. 8.

Certificates to be produced and noted on dealings.

64.—(1) So long as a land certificate or charge certificate is outstanding, it shall be produced to the registrar—

(a) on every entry in the register of a disposition by the proprietor of the registered land or charge to which it relates; and

(b) on every registered transmission; and

(c) in every case (except as hereinafter mentioned) where under this Act or otherwise notice of any estate right or claim or a restriction is entered or placed on the register, adversely affecting the title of the proprietor of the registered land or charge, but not in the case of the lodgment of a caution or of an inhibition or of a creditors' notice, or of the entry of a notice of a lease at a rent without taking a fine.

(2) A note of every such entry or transmission shall be officially entered on the certificate and the registrar shall have the same powers of compelling the production of certificates as are conferred on him by this Act as to the production of maps, surveys, books, and other documents (*n*).

(3) On the completion of the registration of a transferee or grantee of any registered land or charge the registrar shall deliver to him a land certificate or charge certificate, and where part only of the land is dealt with shall also deliver to the transferor or grantor a land certificate containing a description of the land retained by him.

(4) Where a transfer of land is made by the proprietor of a registered charge in exercise of any power vested in him, it may be registered, and a new land certificate may

be issued to the purchaser, without production of the former land certificate (when not deposited at the registry), but the charge certificate, if any, must be produced or accounted for in accordance with this section. 15 Geo. 5, c. 21, s. 64.

The provisions of this subsection shall be extended in the prescribed manner to the cases of—

(a) an order for foreclosure absolute;

(b) a proprietor of a charge or a mortgagee obtaining a title to the land under the Limitation Acts (*o*);

(c) title being acquired under a title paramount to the registered estate, including a title acquired pursuant to a vesting or other order of the court or other competent authority.

(*n*) See sect. 128 (1), *post.*

(*o*) See sect. 3 (xii), *ante*, and sect. 75, *post.*

Deposit at registry of certificate of mortgaged land.

65. Where a charge or mortgage (otherwise than by deposit) is registered, or is protected by a caution in a specially prescribed form, the land certificate shall be deposited at the registry until the charge or mortgage is cancelled.

Creation of liens by deposit of certificates.

66. The proprietor of any registered land or charge may, subject to the overriding interests (*p*), if any, to any entry to the contrary on the register, and to any estates, interests, charges, or rights registered or protected on the register at the date of the deposit, create a lien on the registered land or charge by deposit of the land certificate or charge certificate; and such lien shall, subject as aforesaid, be equivalent to a lien created in the case of unregistered land by the deposit of documents of title or of the mortgage deed by an owner entitled for his own benefit to the registered estate, or a mortgagee beneficially entitled to the mortgage, as the case may be.

(*p*) See sect. 3 (xvi), *ante.*

Issue of new certificates.

67.—(1) The registrar may when a land certificate or charge certificate is produced to him grant a new land certificate or charge certificate in the place of the one produced.

(2) A new land certificate or charge certificate may be issued in place of one lost or destroyed, or in the possession of a person out of the jurisdiction of the High Court, on such terms as to advertisement notice or delay as may be prescribed.

Certificates to be evidence.

68. Any land certificate or charge certificate shall be admissible as evidence of the several matters therein contained.

15 Geo. 5, c. 21, s. 69.

Part VI.

General Provisions as to Registration and the Effect thereof.

Effect of registration on the legal estate.

69.—(1) The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold the legal term created by the registered lease, but subject to the overriding interests (*q*), if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act, 1925, or this Act (*r*) or otherwise which has priority to the registered estate.

(2) Where any legal estate or term left outstanding at the date of first registration (whether before or after the commencement of this Act), or disposed of or created under section forty-nine of the Land Transfer Act, 1875 (*s*), before the commencement of this Act, becomes satisfied, or the proprietor of the land becomes entitled to require the same to be vested in or surrendered to him, and the entry, if any, for protecting the same on the register has been cancelled, the same shall thereupon, without any conveyance, vest in the proprietor of the land, as if the same had been conveyed or surrendered to him as the case may be.

38 & 39 Vict. c. 87.

(3) If and when any person is registered as first proprietor of land in a compulsory area (*t*) after the commencement of this Act, the provisions of the Law of Property Act, 1925, for getting in legal estates (*u*) shall apply to any legal estate in the land which was expressed to be conveyed or created in favour of a purchaser or lessee before the commencement of this Act but which failed to pass or to be created by reason of the omission of such purchaser or lessee to be registered as proprietor of the land under the Land Transfer Acts, 1875 and 1897, and shall operate to vest that legal estate in the person so registered as proprietor on his registration, but subject to any mortgage term or charge by way of legal mortgage (*r*) having priority thereto.

(4) The estate for the time being vested in the proprietor shall only be capable of being disposed of or dealt with by him in manner authorised by this Act.

(5) Nothing in this section operates to render valid a lease registered with possessory or good leasehold title.

(*q*) See sect. 3 (xvi), *ante*.

(*r*) See L. P. Act, 1925, ss. 85 *et seq.*, and sects. 25 *et seq.* of the present Act, *ante*, and sect. 106, *post*.

(*s*) By this section the registered proprietor alone could transfer or charge registered land by a registered disposition; but subject to the maintenance of the estate and right of such proprietor, other persons having a sufficient estate or interest could create estates, rights, interests, and equities in the same manner as if the land were not registered. Under L. T. Act, 1875, a transfer by registered disposition took effect by virtue of an overriding power, not by virtue of any estate in the registered proprietor (*Capital, &c., Bank* v. *Rhodes*, [1903] 1 Ch. 631). See now sub-sect. 1 of this section; see also sect. 101, *post*. **15 Geo. 5, c. 21, s. 69.**

(*t*) See sect. 120, *post*.

(*u*) See L. P. Act, 1925, s. 39 and Sched. 1.

Liability of registered land to overriding interests.

70.—(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests (*x*) as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say):—

(a) Rights of common, drainage rights, customary rights (until extinguished (*y*)), public rights, profits à prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register (*z*);

(b) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges (until extinguished (*y*)) having their origin in tenure;

(c) Liability to repair the chancel of any church;

(d) Liability in respect of embankments, and sea and river walls;

(e) Land tax, tithe rentcharge, payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rentcharges;

(f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts (*a*);

(g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed;

(h) In the case of a possessory, qualified, or good leasehold title, all estates, rights, interests and powers excepted from the effect of registration;

(i) Rights under local land charges (*b*) unless and until registered or protected on the register in the prescribed manner;

(j) Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished (*y*)), and franchises;

15 Geo. 5, c. 21, s. 70.

(k) Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine;

(l) In respect of land registered before the commencement of this Act, rights to mines and minerals, and rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals or of property in mines or minerals, being rights which, where the title was first registered before the first day of January, eighteen hundred and ninety-eight, were created before that date, and where the title was first registered after the thirty-first day of December, eighteen hundred and ninety-seven, were created before the date of first registration (*c*):

Provided that, where it is proved to the satisfaction of the registrar that any land registered or about to be registered is exempt from land tax, or tithe rentcharge or payments in lieu of tithe, or from charges or annuities payable for the redemption of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner.

(2) Where at the time of first registration any easement, right, privilege, or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register.

(3) Where the existence of any overriding interest (*x*) mentioned in this section is proved to the satisfaction of the registrar or admitted, he may (subject to any prescribed exceptions) enter notice of the same or of a claim thereto on the register, but no claim to an easement, right, or privilege not created by an instrument shall be noted against the title to the servient land if the proprietor of such land (after the prescribed notice is given to him) shows sufficient cause to the contrary.

This section replaces L. T. Act, 1875, s. 18, amended by Sched. 1 of L. T. Act, 1897.

(*x*) See sect. 3 (xvi), *ante*.

(*y*) See L. P. Act, 1922, Parts V. and VI.

(*z*) See sects. 19, sub-sect. 2 (c) and 22 (2) (c), and Land Charges Act, 1925, s. 10, Class D. (iii), *ante*.

(*a*) See sect. 3 (xii), *ante*, and sect. 75, *post*.

(*b*) See Land Charges Act, 1925, s. 15, *ante*.

(*c*) See L. T. Act, 1875, s. 18 (4) (5) and Sched. 1 of L. T. Act, 1897, which came into operation on January 1, 1898.

Dispositions by virtue of overriding interests.

71. Where by virtue of any interest or power which is an overriding interest (*d*) a mortgagee or other person disposes of any estate, charge, or right in or upon a registered estate, and the disposition is capable of being

registered, the registrar shall, if so required, give effect to the disposition on the register. 15 Geo. 5, c. 21, s. 71.

(*d*) See sect. 3 (xvi), *ante*.

Appurtenances.

72. If before the registration of any freehold or leasehold interest in land with an absolute or good leasehold title any easement, right, or privilege has been acquired for the benefit thereof, then, on such registration, the easement, right, or privilege shall, subject to any entry to the contrary on the register, become appurtenant to the registered land in like manner as if it had been granted to the proprietor who is registered as aforesaid.

Provisions as to death duties.

73.—(1) A registered disposition in favour of a purchaser shall operate to vest in him the estate or interest transferred or created by the disposition free from all claims of His Majesty for death duties, notwithstanding that notice of a claim for duties may be noted on the register under this section.

(2) A disposition to any person, other than a purchaser, shall take effect subject to any charge for payment of death duties and the interest thereon, whether notice of a claim for the duties is entered on the register or not.

(3) A personal representative, in whom the registered estate vests on a death, shall be accountable for all death duties which may become leviable or payable on the death of the deceased in respect of the registered land or any interest therein.

(4) In every other case the proprietor of a registered estate (other than a purchaser who acquires a registered estate free from the charge for duties) shall be accountable for all the death duties which become leviable or payable in respect of that estate or of any minor interest (*e*) capable of being overridden by a registered disposition made by him.

(5) A personal representative or other proprietor who disposes of any interest in registered land to a purchaser by a disposition which is registered or protected on the register, and the proceeds of sale, funds and other property, if any, derived from the disposition and the income thereof, shall (subject as hereinafter provided) be and remain liable in respect of and stand charged with the payment of the duties the charge for which is overridden by the disposition, together with any interest payable in respect of the same.

(6) Notwithstanding that any duties may be payable by instalments, on a disposition of a registered estate by way of sale, exchange, or charge, all death duties payable in respect of the estate dealt with remaining unpaid, the charge for which is overridden by such disposition, shall

15 Geo. 5, c. 21, s. 73.

immediately become payable and carry interest at the rate of four pounds per centum per annum from the date of the disposition:

Provided that, where by reason of this subsection an amount is paid or becomes payable for duties in excess of the amount which would have been payable if the duties had continued to be paid by instalments, such excess shall be repaid or allowed as a deduction by the Commissioners of Inland Revenue.

(7) Where on the death of a proprietor it appears to the registrar that a charge for death duties has arisen, the registrar shall enter notice of the charge on the register in the prescribed manner.

(8) When any such notice is entered, the registrar shall, before registering or entering notice of any disposition which would operate to override the charge for duties, give notice of the intended registration or entry to the said Commissioners, and cancel the notice of the claim for duties so far as it relates to the land or interest therein comprised in the disposition.

(9) When all claims for duties have been satisfied, or no such claims arise, or the said Commissioners are satisfied that the duties will be paid or commuted, they shall notify the fact to the registrar, who shall thereupon cancel the notice, if any, of the claim.

(10) For the purpose of raising the duty and the costs of raising the same, the personal representative or other proprietor accountable as aforesaid shall have all the powers which are by any statute conferred on any person for raising the duty.

(11) Notwithstanding that any duties are by this section made payable by the personal representative or proprietor of the land, nothing herein contained shall affect the liability of the persons beneficially interested or of their minor interests (*e*) in respect of any duty, and such persons shall accordingly account for or repay the same, and any interest and costs attributable thereto, to the said Commissioners or to the personal representative or other proprietor made accountable, and nothing in this section shall affect the remedies of the said Commissioners against any person other than a purchaser.

(12) Capital money liable to be laid out in the purchase of land to be settled in the same manner as the land in respect of which the duty became payable, and personal estate held on the same trusts as the proceeds of sale of land (in respect of which the duty became payable) held on trust for sale, may, by the direction of the person accountable, and although the duty is only payable in respect of a minor interest (*e*) which is or is capable of

being overridden by a disposition to a purchaser, be applied in discharging all or any of the duties and costs aforesaid. 15 Geo. 5, c. 21, s. 73.

(13) Where the duties would not, except by virtue of the last subsection, be payable out of capital money, the amount so paid shall be repaid by the person liable for the duty to the trustees of the settlement or trustees for sale, by the like instalments and at the like rate of interest by and at which the unpaid duty and the interest thereon might have been paid if the land had not been disposed of, and the minor (*e*) or other interests of the persons liable and remaining subject to the settlement of the land or of the proceeds of the sale, shall stand charged with the repayment of the instalments and interest aforesaid; and the trustees of the settlement or the trustees for sale shall be entitled to recover and receive any excess of duty which may become repayable by the said Commissioners.

(14) Nothing in this section shall impose on a personal representative, trustee, or other person in a fiduciary position, as such, any liability for payment of duty in excess of the assets (including real estate) vested in him or in the trustees of the settlement which may for the time being be available in his or their hands for the payment of the duty, or which would have been so available but for his or their own neglect or default, or impose on the proprietor of a registered charge any liability to discharge death duties unless the claim was paramount to his charge.

(15) In this section "purchaser" includes only a purchaser for money or money's worth (*f*).

(16) This section only applies to death duties which become payable or leviable after the commencement of this Act.

With respect to death duties which become payable or leviable before that date section thirteen of the Land Transfer Act, 1897, and all the other provisions of the Land Transfer Acts, 1875 and 1897, relating to death duties shall, notwithstanding any repeal, continue to apply. 60 & 61 Vict. c. 65.

(*e*) See sect. 3 (xv), *ante*.

(*f*) For the general definition of "purchaser," see sect. 3 (xxi), *ante*.

74. Subject to the provisions of this Act as to settled land (*g*), neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express implied or constructive, and references to trusts shall, so far as possible, be excluded from the register. Notice of trust not to affect registered dealing.

This section replaces a provision in L. T. Act, 1897, sched. 1.

(*g*) See sects. 86 *et seq.*, *post*.

15 Geo. 5, c. 21, s. 75.

Acquisition of title by possession.

75.—(1) The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.

(2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.

(3) The registrar shall, on being satisfied as to the applicant's title, enter the applicant as proprietor either with absolute, good leasehold, qualified, or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts, and such registration shall, subject as aforesaid, have the same effect as the registration of a first proprietor; but the proprietor or the applicant or any other person interested may apply to the court for the determination of any question arising under this section.

(4) If, in the opinion of the registrar, any purchaser or person deriving title under him whose title, being registered or protected on the register, is prejudicially affected by any entry under this section, ought, in the special circumstances of the case, to be compensated, the registrar may award to him indemnity of such amount as he may consider just, in like manner as if such purchaser or person had suffered loss by the rectification of the register:

Provided that no sum shall be payable for indemnity under this section, unless that sum can be paid out of the indemnity fund without recourse to the Consolidated Fund.

(5) Rules may be made for applying (subject to any necessary modifications) the provisions of this section to cases where an easement, right or privilege has been acquired by prescription.

"The Limitation Acts" are the Real Property Limitation Acts, 1833, 1837, and 1874 (see pp. 132-243, *ante*) and any Acts amending them (sect. 3 (xii), *ante*). L. T. Act, 1897, s. 12, replacing L. T. Act, 1875, s. 21, provided that a title to registered land adverse to or in derogation of the title of the registered proprietor should not be acquired by any length of possession, and that the registered proprietor might at any time make an entry or bring an action to recover possession of the land accordingly. Provided that where a person would, but for the provisions of sect. 21 of L. T. Act, 1875, or sect. 12 of L. T. Act, 1897, have obtained a title by possession he might apply for an order for rectification of

the register, and the Court might, subject to any estates or rights acquired by registration for valuable consideration, order the register to be rectified accordingly. Rights of persons in possession of land at the time of the registration of a person as first proprietor with a possessory title only were also saved. See as to indemnity, sects. 83-85, *post*; and as to the acquiring by prescription of easements, &c., pp. 1-34, *ante*. For "purchaser," see sect. 3 (xxi), *ante*. Cf. on the section, *Belize Estate Co.* v. *Quilter*, [1897] A. C. 367 (a case under the statutes in force in British Honduras); and *Re Hayden*, [1904] 1 I. R. 1 (a case under the Registration of Title (Ireland) Act, 1891). 15 Geo. 5, c. 21, s. 75.

Description of registered land.

76. Registered land may be described—

(a) by means of a verbal description and a filed plan or general map, based on the ordnance map; or

(b) by reference to a deed or other document, a copy or extract whereof is filed at the registry, containing a sufficient description, and a plan or map thereof; or

(c) otherwise as the applicant for registration may desire, and the registrar, or, if the applicant prefers, the court, may approve,

regard being had to ready identification of parcels, correct descriptions of boundaries, and, so far as may be, uniformity of practice; but the boundaries of all freehold land and all requisite details in relation to the same, shall whenever practicable, be entered on the register or filed plan, or general map, and the filed plan, if any, or general map shall be used for assisting the identification of the land.

Conversion of possessory into absolute or good leasehold title.

77.—(1) Where land has been registered with a possessory title before the commencement of this Act, and the registrar is satisfied as to the title, he may register it at any time as absolute or good leasehold, whether the proprietor consents to such registration or not, but, unless the registration is made at the request of the proprietor, without charging any fee therefor.

(2) Where the registrar is satisfied as to the title he may, on a transfer for valuable consideration of land registered with a qualified, good leasehold or possessory title, enter the title of a transferee or grantee as absolute or good leasehold, as the case may require or admit, whether the transferee or grantee consents or not, but in that case no additional fee shall be charged.

(3) The following provisions shall apply with respect to land registered with a qualified or possessory title:—

(a) Where the title registered is possessory, the application for the registration of a transfer for valuable consideration shall, subject to any provisions to the contrary which may be prescribed, be accompanied by all the documents of or relating to the

15 Geo. 5, c. 21, s. 77.

title (including contracts, abstracts, counsel's opinions, requisitions and replies, and other like documents), in the applicant's possession or under his control; and where the title registered is qualified, such application shall be accompanied by such documents, if any, as may relate to the matters excepted from the effect of registration;

(b) Where the land has been registered, if freehold land, for fifteen years, or if leasehold land, for ten years, with a possessory title, the registrar shall, if satisfied that the proprietor is in possession, and after giving such notices, if any, as may be prescribed, enter the title of the proprietor of the freehold land as absolute, and the title of the proprietor of the leasehold land as good leasehold, save that if the date of first registration occurred before the first day of January, nineteen hundred and nine, the registrar shall have power to postpone the registration of an absolute or good leasehold title until, after investigation, he is satisfied in regard to the title.

(4) Where the land has been registered with a good leasehold title for at least ten years, the registrar may, subject to the payment of any additional insurance fee and to any advertisements or inquiries which may be prescribed, and if he is satisfied that the proprietor or successive proprietors has or have been in possession during the said period, at the request of the proprietor enter his title as absolute.

(5) If any claim adverse to the title of the proprietor has been made, an entry shall not be made on the register under this section unless and until the claim has been disposed of.

(6) Any person, other than the proprietor, who suffers loss by reason of any entry on the register made by virtue of this section shall be entitled to be indemnified under this Act as if a mistake had been made in the register (*h*).

(*h*) See sects. 82, 83, *post*.

Provisions as to undivided shares in land.

78.—(1) Where in the case of land belonging to persons in undivided shares the entirety of the land is registered at the commencement of this Act, and the persons entitled to the several undivided shares are registered as proprietors, the registrar shall, on the occasion of the first dealing affecting the title after the commencement of this Act, rectify the register by entering as the proprietors of the entirety of the land the persons in whom the legal estate therein has become vested by virtue of the Law of Property

Act, 1925 (*i*), and it shall be the duty of the persons registered as the proprietors of the undivided shares in the land to furnish to the registrar such evidence as he may require to enable him to ascertain the persons in whom such legal estate has become so vested as aforesaid. 15 Geo. 5, c. 21, s. 78.

(2) Where at the commencement of this Act the title to an undivided share in land is registered but the entirety of the land is not registered, the registrar may, at any time, after giving notice to the proprietor and to the other persons, if any, who appear by the register to be interested therein, remove from the register the title to the undivided share, and such removal shall have the like effect as if it had been effected by the proprietor with the assent of such other persons as aforesaid in pursuance of the power in that behalf contained in this Act:

Provided that, if within one year from the commencement of this Act or such extended time as the registrar may allow, and before the removal of the undivided share from the register in manner aforesaid, the persons in whom the legal estate of the entirety of the land is vested by virtue of the Law of Property Act, 1925, or any persons interested in more than an undivided half of the land or the income thereof, make an application in the prescribed manner for the purpose and furnish the prescribed evidence, the registrar shall, without charging any fee, register the persons in whom such legal estate is so vested as proprietors of that estate, subject to any incumbrance capable of registration affecting the entirety of the land, but free from any charge or incumbrance (whether formerly registered or not) affecting an undivided share, and when the title to the entirety of the land is so registered, the title to the undivided share shall be closed.

(3) If the person in whom the legal estate in the entirety of the land is so vested is the Public Trustee, he shall not be registered as proprietor pursuant to this section unless and until he has been duly requested to act in accordance with the Law of Property Act, 1925 (*k*), and has accepted the trust.

(4) After the commencement of this Act, no entry other than a caution against dealings with the entirety shall be made in the register as respects the title to an undivided share in land.

(*i*) See L. P. Act, 1925, s. 39 and Sched. 1, Part IV., *ante*.
(*k*) See *ibid.*, Sched. 1, Part IV. (4).

79.—(1) Every person whose name is entered on the register as proprietor of any registered land or charge, or as cautioner, or as entitled to receive any notice, or in any Addresses for service and notices.

15 Geo. 5, c. 21, s. 79.

other character shall furnish to the registrar a place of address in the United Kingdom (*l*).

(2) Every notice by this Act required to be given to any person shall be served personally, or sent through the post in a registered letter marked outside "His Majesty's Land Registry," and directed to such person at the address furnished to the registrar, and, unless returned, shall be deemed to have been received by the person addressed within such period, not less than seven days, exclusive of the day of posting, as may be prescribed.

(3) The Postmaster-General shall give directions for the immediate return to the registrar of all letters marked as aforesaid, and addressed to any person who cannot be found, and on the return of any letter containing any notice, the registrar shall act in the matter requiring such notice to be given in such manner as may be prescribed.

(4) A purchaser shall not be affected by the omission to send any notice by this Act directed to be given or by the non-receipt thereof.

Replaces L. T. Act, 1875, ss. 89-92.
(*l*) Great Britain and Northern Ireland (sect. 3 (xxx), *ante*).

Bona vacantia and forfeiture.

80. Subject to the express provisions of this Act relating to the effect of first registration of title and the effect of registration of a disposition for valuable consideration, nothing in this Act affects any right of His Majesty to any bona vacantia or forfeiture.

Replaces L. T. Act, 1875, s. 105. See sects. 4, 5, 6, 8-11, 20, and 23, *ante*; and *Re Suarez* (No. 4), [1924] 2 Ch. 19. L. T. Act, 1875, s. 105, referred to escheat, abolished by Admon. of Estates Act, s. 45 (1) (d), *ante*.

Power to remove land from the register.

81.—(1) The proprietor of registered land not situated in an area where the registration of title is compulsory, and, in every case where the entirety of the land is not registered, the proprietor of an undivided share in land, may, with the consent of the other persons (if any) for the time being appearing by the register to be interested therein, and on delivering up the land certificate and, if the land is subject to any registered charges, the charge certificates, remove the land (including an undivided share) from the register.

(2) After land is removed from the register no further entries shall be made respecting it, and inspection of the register may be made and office copies of the entries therein may be issued, subject to such regulations as may be prescribed.

(3) If the land so removed from the register is situated within the jurisdiction of the Middlesex or Yorkshire

registries, it shall again be subject to such jurisdiction as from the date of the removal. 15 Geo. 5, c. 21, s. 81.

Re-enacts L. T. Act, 1897, s. 17. See as to compulsory areas, sects. 120-125, *post*.

Part VII.

Rectification of Register and Indemnity.

Rectification of the register.

82.—(1) The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:—

(a) Subject to any express provisions of this Act to the contrary, where a court of competent jurisdiction has decided that any person is entitled to any estate right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, and makes an order to that effect;

(b) Subject to any express provision of this Act to the contrary, where the court, on the application in the prescribed manner of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register, or by any default being made, or unnecessary delay taking place, in the making of any entry in the register, makes an order for the rectification of the register;

(c) In any case and at any time with the consent of all persons interested;

(d) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud;

(e) Where two or more persons are, by mistake, registered as proprietors of the same registered estate or of the same charge;

(f) Where a mortgagee has been registered as proprietor of the land instead of as proprietor of a charge and a right of redemption is subsisting;

(g) Where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner (*m*); and

(h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.

(2) The register may be rectified under this section, notwithstanding that the rectification may affect any

15 Geo. 5, c. 21, s. 82.

estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.

(3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest (*n*), so as to affect the title of the proprietor who is in possession—

(a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; or

(b) unless the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void; or

(c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.

(4) Where a person is in possession of registered land in right of a minor interest (*o*), he shall, for the purposes of this section, be deemed to be in possession as agent for the proprietor.

(5) The registrar shall obey the order of any competent court in relation to any registered land on being served with the order or an official copy thereof.

(6) On every rectification of the register the land certificate and any charge certificate which may be affected shall be produced to the registrar unless an order to the contrary is made by him.

This section replaces L. T. Act, 1875, ss. 95-97. For form of order, see *Weymouth* v. *Davis*, [1908] 2 Ch. 169.

(*m*) See sect. 3 (iv), *ante*.

(*n*) See *ibid.* (xvi).

(*o*) See *ibid.* (xv).

Right to indemnity in certain cases.

83.—(1) Subject to the provisions of this Act to the contrary, any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified.

(2) Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission, shall, subject to the provisions of this Act, be entitled to be indemnified.

(3) Where any person suffers loss by reason of the loss or destruction of any document lodged at the registry for inspection or safe custody or by reason of an error in any official search, he shall be entitled to be indemnified under this Act.

(4) Subject as hereinafter provided, a proprietor of any

registered land or charge claiming in good faith under a forged disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act. 15 Geo. 5, c. 21, s. 83.

(5) No indemnity shall be payable under this Act in any of the following cases:—

(a) Where the applicant has himself caused or substantially contributed to the loss by his fraud, or derives title (otherwise than under a disposition for valuable consideration which is registered or protected on the register) from a person so committing fraud;

(b) On account of any mines or minerals or of the existence of any rights to work or get mines or minerals, unless a note is entered on the register that the mines or minerals are included in the registered title;

(c) On account of costs incurred in taking or defending any legal proceedings without the consent of the registrar.

(6) Where an indemnity in paid in respect of the loss of an estate or interest in or charge on land the amount so paid shall not exceed—

(a) Where the register is not rectified, the value of the estate, interest or charge at the time when the error or omission which caused the loss was made;

(b) Where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge, immediately before the time of rectification.

(7) The registrar may, if the applicant desires it, and subject to an appeal to the court, determine whether a right to indemnity has arisen under this section, and, if so, award indemnity. In the event of an appeal to the court the applicant shall not be required to pay any costs except his own, even if unsuccessful, unless the court considers that the appeal is unreasonable.

(8) In granting any indemnity the registrar may have regard to any costs and expenses properly incurred in relation to the matter, and may add the same to the amount of the indemnity money which would otherwise be payable.

(9) Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his fraud.

(10) The registrar shall be entitled to enforce, on behalf of the Crown, any express or implied covenant or other right which the person who is indemnified would have been

15 Geo. 5, c. 21, s. 83.

entitled to enforce in relation to the matter in respect of which indemnity has been paid.

(11) A liability to pay indemnity under this Act shall be deemed a simple contract debt; and for the purposes of the Limitation Act, 1623 (*p*), the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might have known, of the existence of his claim:

21 Jac. 1, c. 16.

Provided that, when a claim to indemnity arises in consequence of the registration of an estate in land with an absolute or good leasehold title, the claim shall be enforceable only if made within six years from the date of such registration, except in the following cases:—

(a) Where at the date of registration the person interested is an infant, the claim by him may be made within six years from the time he attains full age;

(b) In the case of settled land, or land held on trust for sale, a claim by a person interested in remainder or reversion, may be made within six years from the time when his interest falls into possession;

(c) Where a claim arises in respect of a restrictive covenant or agreement affecting freehold land which by reason of notice or the registration of a land charge or otherwise was binding on the first proprietor at the time of first registration, the claim shall only be enforceable within six years from the breach of the covenant or agreement;

(d) Where any person interested is entitled as a proprietor of a charge or as a mortgagee protected by a caution in the specially prescribed form, the claim by him may be made within six years from the last payment in respect of principal or interest.

(12) This section applies to the Crown in like manner as it applies to a private person.

Replaces L. T. Act, 1897, s. 7 (see *Att.-Gen.* v. *Odell*, [1906] 2 Ch. 47, where a transferee under a forged transfer was held not entitled to indemnity).

(*p*) See pp. 254-266, *ante*.

Application of indemnity in case of settled land.

84. Where any indemnity is paid in respect of settled land, and not in respect of any particular estate, remainder, or reversion therein, the money shall be paid to the trustees of the settlement and held by them as capital money for the purposes of the Settled Land Act, 1925, arising from the settled land.

Insurance fund for

85.—(1) Any indemnity payable by reason of the rectification or non-rectification of the register shall be

paid out of the insurance fund established under the Land Transfer Act, 1897. 15 Geo. 5, c. 21, s. 85.

(2) There shall be set aside and paid into the said fund at the end of each financial year such portion of the receipts from fees taken in the land registry under this Act as the Lord Chancellor and the Treasury may by order determine. providing indemnity.

(3) The insurance fund shall be invested in such names and manner as the Treasury from time to time direct.

(4) If the insurance fund is at any time insufficient to pay indemnity for any loss chargeable thereon, the deficiency shall (except where otherwise expressly provided by this Act) be charged on and paid out of the Consolidated Fund, or the growing produce thereof, but any sum so paid out of the Consolidated Fund, or the growing produce thereof, shall be repaid out of the money subsequently standing to the credit of the insurance fund.

(5) Accounts of the fund shall be kept and be audited as public accounts, in accordance with such regulations as the Treasury from time to time make.

Part VIII.

Application to particular Classes of Land.

86.—(1) Settled land shall be registered in the name of the tenant for life or statutory owner (*q*). Registration of settled land.

(2) The successive or other interests created by or arising under a settlement shall (save as regards any legal estate which cannot be overridden under the powers of the Settled Land Act, 1925, or any other statute) take effect as minor interests (*r*) and not otherwise; and effect shall be given thereto by the proprietor of the settled land as provided by statute with respect to the estate owner (*s*), with such adaptations, if any, as may be prescribed in the case of registered land by rules made under this Act.

(3) There shall also be entered on the register such restrictions as may be prescribed, or may be expedient, for the protection of the rights of the persons beneficially interested in the land, and such restrictions shall (subject to the provisions of this Act relating to releases by the trustees of a settlement and to transfers by a tenant for life whose estate has ceased in his lifetime (*t*)) be binding on the proprietor during his life, but shall not restrain or otherwise affect a disposition by his personal representative.

(4) Where land already registered is acquired with capital money, the same shall be transferred by a transfer in a specially prescribed form to the tenant for life or

15 Geo. 5, c. 21, s. 86.

statutory owner (*q*), and such transfer shall state the names of the persons who are trustees of the settlement for the purposes of the Settled Land Act, 1925, and contain an application to register the prescribed restrictions applicable to the case; a transfer made in the specially prescribed form shall be deemed to comply with the requirements of that Act, respecting vesting deeds (*u*); and where no capital money is paid but land already registered is to be made subject to a settlement, it shall not be necessary for the trustees of the settlement to concur in the transfer.

(5) References in this Act to the "tenant for life" shall, where the context admits, be read as referring to the tenant for life, statutory owner (*q*), or personal representative who is entitled to be registered.

This section replaces provisions of L. T. Act, 1897, s. 6 (cf. L. T. Act, 1875, ss. 7 (3) and 68).

(*q*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.
(*r*) See sect. 3 (xv), *ante*.
(*s*) See *ibid.* (iv).
(*t*) See sect. 87, sub-sects. 4 and 6, *post*.
(*u*) See S. L. Act, 1925, s. 10, *ante*.

Changes of ownership of settled land.

87.—(1) On the death of a proprietor, or of the survivor of two or more joint proprietors of settled land (whether the land is settled by his will or by an instrument taking effect on or previously to his death), his personal representative shall hold the settled land subject to payment or to making provision for payment of all death duties and other liabilities affecting the land, and having priority to the settlement, upon trust to transfer the same by an assent in the prescribed manner to the tenant for life or statutory owner (*x*), and in the meantime upon trust to give effect to the minor interests (*y*) under the settlement; but a transfer shall not be made to an infant.

(2) Rules may be made—

(a) for enabling a personal representative or proprietor in proper cases to create legal estates by registered dispositions for giving effect to or creating interests in priority to the settlements;

(b) to provide for the cases in which application shall be made by the personal representative or proprietor for the registration of restrictions or notices; and

(c) for discharging a personal representative or former proprietor who has complied with the requirements of this Act and rules from all liability in respect of minor interests (*y*) under a settlement.

(3) Where a tenant for life or statutory owner (*x*) who, if the land were not registered, would be entitled to have

the settled land vested in him, is not the proprietor, the proprietor shall (notwithstanding any stipulation or provision to the contrary) be bound at the cost of the trust estate to execute such transfers as may be required for giving effect on the register to the rights of such tenant for life or statutory owner (*x*). 15 Geo. 5, c. 21, s. 87.

(4) Where the trustees of a settlement have in the prescribed manner released the land from the minor interests under such settlement, the registrar shall be entitled to assume that the settlement has determined, and the restrictions for protecting the minor interests thereunder shall be cancelled.

(5) Where an order is made under the Settled Land Act, 1925 (*z*), authorising the trustees of the settlement to exercise the powers on behalf of a tenant for life who is registered as proprietor, they may in his name and on his behalf do all such acts and things under this Act as may be requisite for giving effect on the register to the powers authorised to be exercised in like manner as if they were registered as proprietors of the land, but a copy of the order shall be filed at the registry before any such powers are exercised.

(6) Where a proprietor ceases in his lifetime to be a tenant for life, he shall transfer the land to his successor in title, or, if such successor is an infant, to the statutory owner (*x*), and on the registration of such successor in title or statutory owner it shall be the duty of the trustees of the settlement, if the same be still subsisting, to apply for such alteration, if any, in the restrictions as may be required for the protection of the minor interests (*y*) under the settlement.

(*x*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.
(*y*) See sect. 3 (xv), *ante*.
(*z*) See S. L. Act, 1925, s. 24, *ante*.

88.—(1) The settlement, or an abstract or copy thereof, may be filed in the registry for reference in the prescribed manner, but such filing shall not affect a purchaser from the proprietor with notice of its provisions, or entitle him to call for production of the settlement, or for any information or evidence as to its contents. Settlement may be filed in registry.

(2) In this section "settlement" includes any deed stating who are the trustees of the settlement, and the vesting instrument (*a*), and any transfer or assent in the prescribed form taking the place, in the case of registered land, of a vesting instrument, as well as the trust instrument and any other instruments creating the settlement.

Replaces L. T. Act, 1897, s. 6 (6).
(*a*) See S. L. Act, 1925, s. 117 (1), (xxxi), *ante*.

15 Geo. 5, c 21, s. 89.

Registrar's certificate authorising proposed dealing with settled land.

89. The registrar may, notwithstanding any restriction entered on the register, grant a certificate that an intended registered disposition is authorised by a settlement or otherwise, and will be registered, and a purchaser (*b*) who obtains such a certificate shall not be concerned to see that the disposition is authorised, but where capital money is paid to the persons to whom the same is required to be paid by a restriction or into court no such certificate shall be required.

(*b*) See sect. 3 (xxi), *ante*.

Charges for money actually raised.

90. The proprietor of settled land which is registered and all other necessary parties, if any, shall, on the request, and at the expense of any person entitled to an estate, interest, or charge conveyed or created for securing money actually raised at the date of such request, charge the land in the prescribed manner with the payment of the money so raised, but so long as the estate, interest or charge is capable of being overridden under the Settled Land Act, 1925, or the Law of Property Act, 1925, no charge shall be created or registered under this section.

Replaces L. T. Act, 1897, s. 6 (7).

Minorities.

91. The following provisions shall have effect as respects settled land (being registered land) during a minority:—

(1) The personal representatives under the will or intestacy under which the settlement is created or arises shall, during the minority, be registered as proprietors, and in reference to the settled land shall have all the powers conferred by the Settled Land Act, 1925, on a tenant for life and on the trustees of the settlement; but if and when the personal representatives would, if the infant had been of full age, have been bound to transfer the registered land to him, the personal representatives shall (unless themselves the statutory owners (*c*)) thenceforth during the minority give effect on the register to the directions of the statutory owner (*c*), and shall apply for the registration of any restriction which may be prescribed, but shall not be concerned with the propriety of any registered disposition so directed to be made if the same appears to be a proper disposition under the powers of the statutory owner (*c*) and the capital money, if any, arising under the disposition is paid to the trustees of the settlement or into court; but a purchaser (*d*) dealing with the personal representatives, who complies with the restrictions, if any,

which may be entered on the register, shall not be concerned to see or inquire whether any such directions have been given: 15 Geo. 5, c. 21, s. 91.

(2) If an infant becomes entitled in possession (or will become entitled in possession on attaining full age) to registered land otherwise than on a death, the statutory owners (*c*) during the minority shall be entitled to require the settled land to be transferred to them and shall be registered as proprietors accordingly:

(3) If and when the registered land would (if not registered) have become vested in the trustees of the settlement pursuant to the Law of Property Act, 1925, such trustees shall (unless they are already registered) be entitled to be registered as proprietors thereof, and shall in the prescribed manner apply for registration accordingly, and no fee shall be charged in respect of such registration or consequential alteration in the register.

(*c*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.
(*d*) See sect. 3 (xxi), *ante*.

Rights of tenants for life and statutory owners to be registered as proprietors.

92. The foregoing provisions of this Part of this Act relating to settled land apply in every case where pursuant to the Settled Land Act, 1925, settled land is to be vested in a tenant for life or statutory owner (*e*) whether the estate was registered before or after the commencement of this Act, and the proprietor of settled land (not being the tenant for life or statutory owner (*e*) entitled to the same) shall be bound to make such dispositions as may be required for giving effect to the rights of the tenant for life or statutory owner (*e*):

Provided that, where the registered land is not, at the commencement of this Act, registered in the name of a tenant for life or statutory owner (*e*), or personal representative who, if the land were not registered, would by virtue of the Settled Land Act, 1925, or of the Law of Property Act, 1925, be entitled to have the settled land vested in him, any such person shall (without any transfer) be entitled to be registered as proprietor thereof, and shall in the prescribed manner apply for registration accordingly, and no fee shall be charged in respect of such registration or consequential alteration in the register.

(*e*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.

As to persons in a fiduciary position.

93. A person in a fiduciary position may apply for, or concur in, or assent to, any registration authorised by the provisions of this Act, and, if he is a proprietor, may

15 Geo. 5, c. 21, s. 93.

execute a charge or other disposition in favour of any person whose registration is so authorised.

Replaces L. T. Act, 1897, s. 6 (9).

Land held on trust for sale.

94.—(1) Where registered land is subject to a trust for sale, express or implied, whether or not there is power to postpone the sale, the land shall be registered in the names of the trustees for sale.

(2) Where an order, obtained under section seven of the Settled Land Act, 1884 (*f*), is in force at the commencement of this Act, the person authorised by the order to exercise any of the powers conferred by the Settled Land Act, 1925, may, in the names and on behalf of the proprietors, do all such acts and things under this Act as may be requisite for giving effect on the register to the powers authorised to be exercised in like manner as if such person were registered as proprietor of the land, and a copy of the order shall be filed at the registry.

(3) Where, by virtue of any statute, registered land is made subject to a trust for sale, the trustees for sale (unless already registered) shall be registered as proprietors thereof, and shall in the prescribed manner apply for registration accordingly, and no fee shall be charged in respect of such registration or consequential alteration of the register, but this subsection has effect subject to the provisions of this Act relating to the registration of the Public Trustee and the removal of an undivided share from the register (*g*) before the title to the entirety of the land is registered.

(*f*) See L. P. Act, 1925, s. 29 (4), *ante*, p. 620.
(*g*) See sect. 78, *ante*.

Restriction on number of trustees.

95. The statutory restrictions affecting the number of persons entitled to hold land on trust for sale and the number of trustees of a settlement apply to registered land.

See Trustee Act, 1925, ss. 34 and 36 (6), *ante*.

Crown and Duchy land.

96.—(1) With respect to land or any estate, right, or interest in land vested in His Majesty, either in right of the Crown or of the Duchy of Lancaster, or otherwise, or vested in any public officer or body in trust for the public service, the public officer or body having the management thereof, if any, or, if none, then such person as His Majesty may by writing under his sign manual appoint, may represent the owner of such land, estate, right, or interest for all the purposes of this Act, and shall be entitled to such notices, and may make and enter any such application or cautions, and do all such other acts as any owner of land, or of any estate, right, or interest therein, as the

case may be, is entitled to receive, make, enter, or do under this Act. 15 Geo. 5, c. 21, s. 96.

(2) With respect to land or any estate, right, or interest in land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall for the time being, or as the person for the time being entitled to the revenues and possessions of the Duchy of Cornwall, may in writing appoint, may act as and represent the owner of such land, estate, right, or interest for all the purposes of this Act, and shall be entitled to receive such notices, and may make and enter any such application or cautions, and do all such other acts as any owner of land or of any estate, right, or interest in land (as the case may be) is entitled to make, enter, or do under this Act.

This section and sect. 97 replace L. T. Act, 1875, ss. 65 and 66 (amended by L. T. Act, 1897, Sched. 1).

97.—(1) If it appears to the registrar that any land, application for registration whereof is made to him, comprises foreshore (*h*), he shall not register an estate in the land unless and until he is satisfied that at least one month's notice in writing of the application has been given to the Board of Trade, and— Foreshore.

(a) in case of land in the county palatine of Lancaster, also to the proper officer of the Duchy of Lancaster; and

(b) in case of land in the counties of Cornwall or Devon, also to the proper officer of the Duke of Cornwall; and

(c) in the case of land within the jurisdiction of the Port of London Authority, also to that authority; and

(d) in all other cases, also to the Commissioners of Woods.

(2) This section does not apply to the registration of an estate with a possessory title or with a good leasehold title.

(*h*) See, generally, as to foreshore, pp. 108-110, *ante*.

98. Where an application is made to register a legal estate in land subject to charitable trusts and that estate is vested in the official trustee of charity lands, he shall, notwithstanding that the powers of disposition are vested in the managing trustees or committee, be registered as proprietor thereof. Land subject to charitable trusts.

See as to the registration of charitable trustees *Att.-Gen.* v. *Church Army*, [1906] W. N. 73; *Re Wesleyan Methodist Chapel*, [1909] 1 Ch. 454.

15 Geo. 5, c. 21, s. 99.

Land belonging to benefices.

1 & 2 Vict. c. 23.
2 & 3 Vict. c. 49.
51 & 52 Vict. c. 20.

99.—(1) Where the incumbent of a benefice and his successors are the registered proprietors of land—

(i) No disposition thereof shall be registered unless a certificate in the prescribed form has been obtained—

(a) in case of sales under the Parsonages Acts, 1838, or the Church Building Act, 1839, or any Acts amending or extending the same respectively, from Queen Anne's Bounty; or

(b) in case of sales under the Glebe Lands Act, 1888, or any Acts amending or extending the same, from the Minister of Agriculture and Fisheries; or

(c) in any other case from the Ecclesiastical Commissioners;

(ii) No lien shall be created by deposit of the land certificate, and an inhibition shall be placed on the register and on the land certificate accordingly.

The production of a certificate from any of the above-mentioned bodies shall be a sufficient authority to the registrar to register the disposition in question, and it shall be the duty of the proper body to grant such certificate in all cases in which the facts admit thereof.

(2) On the registration of the incumbent of a benefice and his successors as the proprietors of a legal estate in land, if it is certified by Queen Anne's Bounty, or otherwise appears, that the land was originally purchased by Queen Anne's Bounty or was otherwise appropriated or annexed by or with the consent or the concurrence of Queen Anne's Bounty to the benefice for the augmentation thereof, the registrar shall enter a note to that effect on the register.

(3) Where the incumbent of a benefice is entitled to indemnity under the provisions of this Act, the money shall be paid to Queen Anne's Bounty and appropriated by them to the benefice.

(4) "Benefice" in this section includes all rectories with cure of souls, vicarages, perpetual curacies, donatives, endowed public chapels and parochial chapelries, and chapelries or districts belonging, or reputed to belong, or annexed, or reputed to be annexed, to any church or chapel.

Replaces L. T. Act, 1897, s. 15.

Small holdings.

8 Edw. 7 c. 36.

100.—(1) Where a county council apply in pursuance of the Small Holdings and Allotments Act, 1908, for registration as proprietors, they may be registered as proprietors with any such title as is authorised by this Act.

(2) Where a county council, after having been so registered, dispose of any interest in the land for the purposes of a small holding to a purchaser (*i*) or lessee,

he shall be registered as proprietor of the interest transferred or created (being an interest capable of registration) with an absolute title, subject only to such incumbrances as may be created under the Small Holdings and Allotments Act, 1908, but freed from all other liabilities not being overriding interests (*k*), and in any such case the remedy of any person claiming by title paramount to the county council in respect either of title or incumbrances shall be in damages only, and such damages shall be recoverable against the county council. 15 Geo. 5, c. 21, s. 100.

(3) Where under the powers conferred by subsection (4) of section twelve of the said Act, a county council by notice require registered land to be sold to themselves, the council shall, after such date as may be specified by the notice mentioned in that subsection and on production to the registrar of evidence—

(a) of service of such notice; and

(b) of the payment of the sum agreed or determined in manner provided by that subsection or of the tender of such payment

be registered as the proprietors of the land in place of the proprietor, and such registration shall operate as a registration on a transfer for valuable consideration under this Act.

(4) Rules under this Act may—

(a) adapt this Act to the registration of small holdings with such modifications as appear to be required; and

(b) on the application and at the expense of a county council provide by the appointment of local agents or otherwise for the carrying into effect of the objects of this section; and

(c) enable the registrar to obtain production of the land certificate.

(5) For the purposes of this section "county council" includes "county borough council."

(*i*) See sect. 3 (xxi), *ante*.
(*k*) See *ibid.* (xvi).

Part IX.

Unregistered Dealings with Registered Land.

Powers of dealing with Registered Land off the Register.

Dispositions off register creating "minor interests."

101.—(1) Any person, whether being the proprietor or not, having a sufficient interest or power in or over registered land, may dispose of or deal with the same, and create any interests or rights therein which are permissible in

15 Geo. 5, c. 21, s. 101.

like manner and by the like modes of assurance in all respects as if the land were not registered, but subject as provided by this section.

(2) All interests and rights disposed of or created under subsection (1) of this section (whether by the proprietor or any other person) shall, subject to the provisions of this section, take effect as minor interests (*l*), and be capable of being overridden by registered dispositions for valuable consideration.

(3) Minor interests (*l*) shall, subject to the express exceptions contained in this section, take effect only in equity, but may be protected by entry on the register of such notices, cautions, inhibitions and restrictions as are provided for by this Act or rules.

(4) A minor interest (*l*) in registered land subsisting or capable of taking effect at the commencement of this Act, shall not fail or become invalid by reason of the same being converted into an equitable interest; but after such commencement a minor interest (*l*) in registered land shall only be capable of being validly created in any case in which an equivalent equitable interest could have been validly created if the land had not been registered.

(5) Where after the commencement of this Act, the proprietor of the registered estate which is settled, disposes of or deals with his beneficial interest in possession in favour of a purchaser (*m*), and accordingly the minor interest disposed of or created would, but for the restrictions imposed by the Law of Property Act, 1925 (*n*), and this section, on the creation of legal estates, have been a legal estate, the purchaser (*m*) (subject as provided by the next following section in regard to priorities) may exercise all such rights and remedies as he might have exercised had the minor interest (*l*) been a legal estate, and the reversion (if any) on any leases or tenancies derived out of the registered estate had been vested in him.

(6) A minor interest (*l*) created under this section does not operate to prevent a registered estate passing to the personal representative of a deceased proprietor, or to the survivor or survivors of two or more joint proprietors, nor does this section affect the right of any person entitled to an overriding interest (*o*), or having any power to dispose of or create an overriding interest, to dispose of or create the same.

(*l*) See sect. 3 (xv), *ante*.
(*m*) See *ibid.* (xxi).
(*n*) See L. P. Act, 1925, s. 1 (1), *ante*.
(*o*) See sect. 3 (xvi), *ante*.

Priorities as between

102.—(1) If a minor interest (*p*) subsisting or capable of taking effect at the commencement of this Act, would,

if the Law of Property Acts, 1922 and 1925, and this Act had not been passed have taken effect as a legal estate, then (subject and without prejudice to the estate and powers of the proprietor whose estate is affected) the conversion thereof into an equitable interest shall not affect its priority over other minor interests (*p*). **15 Geo. 5, c. 21, s. 102.** minor interests.

(2) Priorities as regards dealings effected after the commencement of this Act between assignees and incumbrancers of life interests, remainders, reversions and executory interests shall be regulated by the order of the priority cautions or inhibitions lodged (in a specially prescribed form) against the proprietor of the registered estate affected, but, save as aforesaid, priorities as between persons interested in minor interests (*p*) shall not be affected by the lodgment of cautions or inhibitions.

(3) The lodgment of a priority caution or inhibition shall not affect the powers of the proprietor whose estate is affected by the minor interest (*p*).

Cf. L. P. Act, 1925, s. 137, *ante*.
(*p*) See sect. 3 (xv), *ante*.

103.—(1) Where by the operation of any statute or statutory or other power, or by virtue of any vesting order of any court or other competent authority, or an order appointing a person to convey, or of a vesting declaration (express or implied) or of an appointment or other assurance, a minor interest (*q*) in the registered land is disposed of or created which would, if registered, be capable of taking effect as a legal estate or charge by way of legal mortgage (*r*), then— Obligation to give effect on the register to certain minor interests.

(i) if the estate owner (*s*) would, had the land not been registered, have been bound to give effect thereto by conveying or creating a legal estate or charge by way of legal mortgage (*r*), the proprietor shall, subject to proper provision being made for payment of costs, be bound to give legal effect to the transaction by a registered disposition:

(ii) if the proprietor is unable or refuses to make the requisite disposition or cannot be found, or if for any other reason a disposition by him cannot be obtained within a reasonable time, or if, had the land not been registered, no conveyance by the estate owner would have been required to give legal effect to the transaction, the registrar shall give effect thereto in the prescribed manner in like manner and with the like consequences as if the transaction had been carried out by a registered disposition:

15 Geo. 5, c. 21, s. 103.

Provided that—

(a) So long as the proprietor has power under the Settled Land Act, 1925, or any other statute conferring special powers on a tenant for life or statutory owner (*t*), or under the settlement, to override the minor interest (*q*) so disposed of or created, no estate or charge shall be registered which would prejudicially affect any such powers:

(b) So long as the proprietor holds the land on trust for sale, no estate or charge shall be registered in respect of an interest which, under the Law of Property Act, 1925, or otherwise, ought to remain liable to be overridden on the execution of the trust for sale:

(c) Nothing in this subsection shall impose on a proprietor an obligation to make a disposition unless the person requiring the disposition to be made has a right in equity to call for the same:

(d) Nothing in this subsection shall prejudicially affect the rights of a personal representative in relation to the administration of the estate of the deceased.

(2) On every alteration in the register made pursuant to this section the land certificate and any charge certificate which may be affected shall be produced to the registrar unless an order to the contrary is made by him.

(*q*) See sect. 3 (xv), *ante*.
(*r*) See L. P. Act, 1925, s. 87, *ante*.
(*s*) See sect. 3 (iv), *ante*.
(*t*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.

Protection of leases granted under statutory powers by persons other than registered proprietor and restriction on power.

104. All leases at a rent for a term of years absolute (*u*) authorised by the powers conferred by the Law of Property Act, 1925, or the Settled Land Act, 1925, or any other statute (whether or not as extended by any instrument) may be granted in the name and on behalf of the proprietor by any other person empowered to grant the same, and shall be valid at law or in equity (as the case may require) and shall be protected by notice on the register and registered in the same cases, in like manner and with the same effect as if the lease had been granted by the proprietor of the land, and without prejudice to any priority acquired by the exercise of the power; but nothing in this section shall authorise any person granting any lease in the name of the proprietor to impose (save in regard to the usual qualified covenant for quiet enjoyment) any personal liability on such proprietor.

See as to leases by mortgagors and mortgagees, L. P. Act, 1925, s. 99; and as to leases under the S. L. Act, 1925, ss. 41 *et seq.* of that Act, *ante*. 15 Geo. 5, c. 21, s. 104.

(*u*) See sect. 3 (xxvii), *ante*.

105. Rules may be made for applying the provisions of this Part of this Act as to minor interests (*x*) to the case of minor interests in a debt secured by a registered charge. As to minor interests in mortgage debts.

(*x*) See sect. 3 (xv), *ante*.

106.—(1) The proprietor of any registered land may, subject to any entry to the contrary on the register, mortgage, by deed or otherwise, the land or any part thereof in any manner which would have been permissible if the land had not been registered and with the like effect: Provided that the registered land comprised in the mortgage is described (whether by reference to the register or in any other manner) in such a way as is sufficient to enable the registrar to identify the same without reference to any other document. Mortgages protected on the register.

(2) A mortgage made under this section may, if by deed, be protected by a caution in a specially prescribed form and in no other way, and if not by deed, by a caution.

(3) The entry of a caution in a specially prescribed form under this section shall be deemed a dealing capable of being restrained by caution.

(4) Until the mortgage is protected on the register under this section, it shall be capable of taking effect only in equity and of being overridden as a minor interest (*y*).

(5) Where a mortgage by deed has been protected by a caution in the specially prescribed form, the mortgagee, or the persons deriving title under him, may, subject to furnishing sufficient evidence of title, and notwithstanding that any interest or charge affecting the land not registered or protected on the register which has priority to the mortgage is disclosed, require the mortgage to be registered as a charge with the same priority as the caution.

Neither the registrar or any person interested under a registered disposition shall be affected with notice of any such interest or charge so disclosed.

(6) Where a mortgage by deed has been so registered, the proprietor thereof shall, subject to any entry to the contrary on the register, have all the powers which are by this Act conferred on the proprietor of a registered charge (*z*); but so long as the mortgage is protected only by a caution, the mortgagee shall not be capable of dealing with the registered land by a registered disposition.

(7) Any mortgage to which this section applies shall devolve and may be transferred, discharged, surrendered,

15 Geo. 5, c. 21, s. 106.

or otherwise dealt with by the same instruments and in the same manner as if the land had not been registered:

Provided that—

(a) Where the mortgage has been registered as a charge, the devolutions, dealings and notification of cessation shall be registered in the same manner and with the same consequences as in the case of a registered charge:

(b) Where the mortgage has been protected only by a caution in a specially prescribed form, then such devolutions and dealings shall be protected in like manner and in no other way:

(c) Subject to any entry to the contrary on the register, the priorities arising in respect of devolutions and dealings shall be regulated by the order of application for registration or for the entry of a caution in the specially prescribed form.

(8) An ad valorem fee may be charged for a caution in a specially prescribed form, but, if and when a mortgage protected by such a caution is registered as a charge, any ad valorem fee paid in respect of the caution shall be taken in or towards satisfaction of the fees payable on such registration.

(9) Rules shall be made for giving effect to the provisions of this section, and in particular for providing in what case documents, or copies thereof, shall be left at the registry, for providing for the marking of documents not retained at the registry, and for extending and adapting the provisions of this section to the case of submortgages:

Provided that where—

(a) The mortgage relates also to property other than registered land; or

(b) The mortgage is only protected by a caution whether in a specially prescribed form or not; or

(c) The nature of the security is such that it is not expedient or practicable that the mortgage should be retained at the registry;

neither the mortgage nor any instruments dealing therewith nor discharges affecting other property besides the registered land shall be required to be permanently retained at the registry.

(*y*) See sect. 3 (xv), *ante*.
(*z*) See sects. 33 and 34, *ante*.

Power for proprietors to bind successors

107.—(1) Subject to any entry to the contrary on the register, the proprietor of any registered land or charge may enter into any contract in reference thereto in like

manner as if the land or charge had not been registered, and, subject to any disposition for valuable consideration which may be registered or protected on the register before the contract is completed or protected on the register, the contract may be enforced as a minor interest (*a*) against any succeeding proprietor in like manner and to the same extent as if the land or charge had not been registered. **15 Geo. 5, c. 21, s. 107.**

and to enforce contracts.

(2) A contract entered into for the benefit of any registered land or charge may (if the same would have been enforceable by the owner for the time being of the land or charge, if not registered, or by a person deriving title under the party contracting for the benefit) be enforced by the proprietor for the time being of the land or charge.

(*a*) See sect. 3 (xv), *ante*.

108. The proprietor of registered land may accept for the benefit thereof the grant of any easement, right, or privilege or the benefit of any restrictive covenant or provision (affecting other land, whether registered or not) in like manner and to the same extent as if he were legally and beneficially entitled to the fee simple in possession, or to the term created by the registered lease, for his own benefit free from incumbrances. Acquisition of easements and other benefits.

109. Subject to the express provisions relating to leases and mortgages, nothing in this Part of this Act shall be construed as authorising any disposition of any estate, interest, or right or other dealing with land to be effected under this Part of this Act if the disposition or dealing is one which could be effected under another Part of this Act, and any such disposition or dealing shall be effected under and in the manner required by such other Part of this Act, and when so required shall be registered or protected as provided by this Act or the rules. Restriction on exercise of powers off the register.

Part X.

Miscellaneous Provisions.

110. On a sale or other disposition of registered land to a purchaser other than a lessee or chargee— Provisions as between vendor and purchaser.

(1) The vendor shall, notwithstanding any stipulation to the contrary, at his own expense furnish the purchaser with an authority to inspect the register, and, if required, with a copy of the subsisting entries in the register and of any filed plans and copies or abstracts of any documents or any part thereof noted on the register so far as they respectively affect the land to be dealt with (except

15 Geo. 5, c. 21, s. 110.

charges or incumbrances registered or protected on the register which are to be discharged or overridden at or prior to completion):

Provided that—

(a) unless the purchase money exceeds one thousand pounds the cost of the copies and abstracts of the said entries plans and documents shall, in the absence of any stipulation to the contrary, be borne by the purchaser requiring the same;

(b) nothing in this section shall give a purchaser a right to a copy or abstract of a settlement filed at the registry:

(2) The vendor shall, subject to any stipulation to the contrary, at his own expense furnish the purchaser with such copies, abstracts and evidence (if any) in respect of any subsisting rights and interests appurtenant to the registered land as to which the register is not conclusive, and of any matters excepted from the effect of registration as the purchaser would have been entitled to if the land had not been registered:

(3) Except as aforesaid, and notwithstanding any stipulation to the contrary, it shall not be necessary for the vendor to furnish the purchaser with any abstract or other written evidence of title, or any copy or abstract of the land certificate, or of any charge certificate:

(4) Where the register refers to a filed abstract or copy of or extract from a deed or other document such abstract or extract shall as between vendor and purchaser be assumed to be correct, and to contain all material portions of the original, and no person dealing with any registered land or charge shall have a right to require production of the original, or be affected in any way by any provisions of the said document other than those appearing in such abstract, copy or extract, and any person suffering loss by reason of any error or omission in such abstract, copy or extract shall be entitled to be indemnified under this Act:

(5) Where the vendor is not himself registered as proprietor of the land or the charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a disposition from the proprietor to the purchaser:

(6) Unless the certificate is deposited at the registry the vendor shall deliver the land certificate, or the charge certificate, as the case may be, to the purchaser on completion of the purchase, or, if only a part of the land comprised in the certificate is dealt with, or only a derivative estate is created, he shall, at his own expense, produce, or procure the production of, the certificate in accordance with this Act for the completion of the purchaser's registration. Where the certificate has been lost or destroyed, the vendor shall, notwithstanding any stipulation to the contrary, pay the costs of the proceedings required to enable the registrar to proceed without it: 15 Geo. 5, c. 21, s. 110.

(7) The purchaser shall not, by reason of the registration, be affected with notice of any pending action, writ, order, deed of arrangement or land charge (other than a local land charge) to which this subsection applies, which can be protected under this Act by lodging or registering a creditors' notice, restriction, inhibition, caution or other notice, or be concerned to make any search therefor if and so far as they affect registered land.

This subsection applies only to pending actions, writs, orders, deeds of arrangement and land charges (not including local land charges) required to be registered or re-registered after the commencement of this Act, either under the Land Charges Act, 1925, or any other statute registration whereunder has effect as if made under that Act.

Sub-sect. 5 of the present section reproduces L. T. Act, 1897, s. 16 (2). A mortgagee, by sub-demise of registered leaseholds selling under his statutory power, was held not to be the "vendor" within the sub-section (*Re Voss and Saunders*, [1911] 1 Ch. 42). On sub-sect. 7 see Land Charges Act, 1925, ss. 2, 3, 6-10, and 15, *ante*, and sects. 49 *et seq.*, *ante*.

Infants, defectives and lunatics.

111.—(1) A purported disposition (*aa*) of any registered land or charge to an infant made after the commencement of this Act, or by the will of a proprietor dying after such commencement, shall not entitle the infant to be registered as proprietor of the registered land or charge until he attains full age, but in the meantime shall operate only as a declaration binding on the proprietor or personal representative that the registered land or charge is to be held on trust to give effect to minor interests (*b*) in favour of the infant corresponding, as nearly as may be, with the interests which the disposition purports to transfer or create; and the disposition or a copy thereof or extract therefrom shall be deposited at the registry, and shall,

15 Geo. 5, c. 21, s. 111.

unless and until the tenants for life, statutory owners (*c*), personal representatives or trustees for sale are registered as proprietors, be protected by means of a restriction or otherwise on the register:

Provided that—

(a) If the disposition is made to the infant jointly with another person of full age, that person shall, during the minority, be entitled to be registered as proprietor, and the infant shall not be registered until he attains full age;

(b) Where the registered land or charge is subject to any trusts or rights of redemption in favour of any person other than the infant, nothing in this section shall affect such trusts or rights of redemption;

(c) Where by reason of the minority or otherwise the land is settled land, the provisions of this Act relating to settled land (*d*) shall apply thereto.

(2) Where an infant becomes entitled under a will or on an intestacy to any registered land or charge, the same shall not be transferred by the personal representative to the infant until he attains full age.

(3) Where an infant becomes entitled to the benefit of a registered charge, the charge shall during the minority be registered in the names of the personal representatives, trustees, or other persons who if the charge had affected unregistered land would have been able to dispose of the same, and they shall for the purposes of this Act have the same powers in reference thereto as the infant would have had if of full age.

(4) A caution may be lodged in the name or on behalf of an infant by his parent, trustee or guardian.

(5) Where a proprietor of any registered land or charge is a lunatic or a defective (*e*), the committee of his estate or his receiver shall, under an order in lunacy, or of the court, or under any statutory power, have and may exercise in the name and behalf of the lunatic or defective all the powers which under this Act the lunatic or defective could have exercised if free from disability, and a copy of every such order shall be filed with the registrar and may be referred to on the register.

(6) All the provisions of the Trustee Act, 1925, and of the Lunacy Act, 1890 (*f*), and of any Act amending the same, shall apply to estates and charges registered under this Act, subject to the express provisions of this Act and to the rules made thereunder.

Cf. L. P. Act, 1925, ss. 19 and 22, *ante*.

(*aa*) See sect. 18, sub-sect. 5, and sect. 21, sub-sect. 5, *ante*.

(*b*) See sect. 3 (xv), *ante*.
(*c*) See S. L. Act, 1925, s. 117 (1) (xxvi), *ante*.
(*d*) See sects. 86 *et seq.*, *ante*.
(*e*) See S. L. Act, s. 117 (1) (xiii), *ante*.
(*f*) See the Trustee Act, 1925, and parts of the Lunacy Act, 1890, *ante*.

15 Geo. 5, c. 21, s. 111.

Inspection of register and other documents at land registry.

112. Subject to the provisions of this Act as to furnishing information to Government departments and local authorities and to such regulations and exceptions and to the payment of such sums as may be made or fixed by general rules, any person registered as proprietor of any land or charge, and any person authorised by any such proprietor, or by an order of the court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge.

Replaces L. T. Act, 1875, s. 104.

Office copies to be evidence.

113. Office copies of and extracts from the register and of and from documents and plans filed in the registry shall be admissible in evidence in all actions and matters, and between all persons or parties, to the same extent as the originals would be admissible, but any person suffering loss by reason of the inaccuracy of any such copy or extract shall be entitled to be indemnified under this Act (*g*), and no solicitor, trustee, personal representative, or other person in a fiduciary position shall be answerable in respect of any loss occasioned by relying on any such copy or extract.

(*g*) See sect. 83, *ante*.

Fraudulent dispositions how far to be void.

114. Subject to the provisions in this Act contained with respect to indemnity (*h*) and to registered dispositions for valuable consideration (*i*), any disposition of land or of a charge, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.

Replaces L. T. Act, 1875, s. 98. Compare *Crowly* v. *Bergtheil*, [1899] A. C. 374, where a transaction was set aside on the ground of *dolus malus* under Roman-Dutch law.
(*h*) See sect. 83, *ante*.
(*i*) See sects. 20 and 23, *ante*.

Penalty for suppression of deeds and evidence.

115. If in the course of any proceedings before the registrar or the court in pursuance of this Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of, any document or fact,

15 Geo. 5, c. 21, s. 115.

the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor.

Sects. 115-117 replace L. T. Act, 1875, ss. 99, 100.

Penalty for certain fraudulent acts.

116.—(1) If any person fraudulently procures, attempts fraudulently to procure, or is privy to the fraudulent procurement of, any entry on, erasure from or alteration of the register, or any land or charge certificate, he shall be guilty of a misdemeanor.

(2) Any entry, erasure, or alteration so made by fraud, shall be void as between all persons who are parties or privy to the fraud.

Punishment of misdemeanors.

117. A person guilty of a misdemeanor under this Act shall—

(a) on conviction on indictment, be liable to imprisonment for a term not exceeding two years, or to a fine not exceeding five hundred pounds;

(b) on summary conviction, be liable to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred pounds or to both such imprisonment and fine.

Penalty for unqualified persons drawing instruments.

118. Every person who not being a barrister or a duly certificated solicitor, notary public, or conveyancer, either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument of transfer or charge, or makes any application or lodges any document for registration at the registry, shall on summary conviction be liable to a fine not exceeding fifty pounds:

Provided that this section shall not extend to—

(a) any public officer drawing or preparing instruments and applications in the course of his duty; or

(b) any person employed merely to engross any instrument or application.

Replaces L. T. Act, 1897, s. 10.

Civil remedies and discovery.

119.—(1) No proceeding or conviction for any act declared by this Act to be a misdemeanor affects any remedy to which any person aggrieved by such act may be entitled, either at law or in equity.

(2) Nothing in this Act entitles any person to refuse to make a complete discovery by answer in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any court of law; but no answer to any such question or interrogatory shall be admissible in

evidence against such person in any criminal proceeding under this Act. 15 Geo. 5, c. 21, s. 119.

Replaces L. T. Act, 1875, ss. 102 and 103.

Part XI.

Compulsory Registration.

Power to make orders rendering registration compulsory in certain areas.

120.—(1) His Majesty may, by Order in Council, declare, as respects any county or part of a county mentioned or defined in the Order, that, on and after a day specified in the Order, registration of title to land is to be compulsory on sale:

Provided that nothing in this Act or in any such Order shall render compulsory the registration of the title to an incorporeal hereditament or to mines and minerals apart from the surface, or to corporeal hereditaments parcel of a manor and included in the sale of a manor as such.

(2) Any such Order may be made—

(a) at any time at the instance of the county council concerned; and

(b) at any time after the expiration of ten years from the commencement of this Act otherwise than at the instance of a county council;

subject in either case to compliance with the provisions hereinafter contained relating to such Orders respectively:

Provided that any proceedings preliminary to the making of the first Order to be made otherwise than at the instance of a county council may be taken before the expiration of the said period.

(3) Any Order made under this section shall be made with due regard to the utilisation, if practicable, of any land registry existing in the county to which the order relates or conveniently near thereto.

(4) In the event of any portion of a county as regards which an order has been made under this Part of this Act or under any corresponding provision in any enactment replaced by this Act being included in another county as regards which no Order has been so made, such Order shall cease to be in force within such included portion of the county.

(5) In the event of any portion of a county as regards which no Order has been made being included in another county as regards which an Order has been so made, such Order shall apply to such included portion of the county.

(6) Any Order made under this Part of this Act or under any corresponding provision in any enactment replaced by this Act may be revoked or varied by a subsequent Order.

15 Geo. 5, c. 21, s. 120.

(7) For the purposes of this Part of this Act, "county" means the administrative county, and includes, a county borough, and "county council" includes, the council of such a borough.

The provisions of this part of the Act replace those of L. T. Act, 1897, s. 20, under which registration of title might be made compulsory on sale, unless the county council resolved to the contrary.

Provisions as to Orders made at the instance of a county council.

121.—(1) If at a meeting of a county council, at which at least two-thirds of the members of the council are present, a resolution is passed signifying the desire of the county council that registration of title should be compulsorily applied to the county over which the council has jurisdiction, or any part thereof, such an Order in Council as aforesaid may be made as respects that county or any part to which the resolution extends, and is in this Part of the Act referred to as an Order made at the instance of a county council.

(2) Every such Order shall within thirty days from the date thereof, if Parliament be then sitting, or within twenty days from the commencement of the next session if Parliament be not sitting, be laid on the table of both Houses of Parliament, and if within forty days of any Order being so laid an Address in either House disapproving of the Order be carried, the Order shall be void and of no effect.

Provisions as to Orders made otherwise than at the instance of a county council.

122. The making of an Order otherwise than at the instance of a county council shall be subject to the following provisions:—

(i) Notice of every Order proposed to be made shall, not less than six months before the Order is made and not more than eighteen months before the date on which it is to take effect, be given to the council of the county to which such Order is proposed to be applied. A draft of the proposed Order, together with the name of at least one place within or conveniently near to the county where a district registry office is proposed to be established, shall accompany the notice, and shall also be published in the Gazette:

(ii) The county council within ten days of the receipt of such notice shall furnish a copy thereof to any law society whose district will be affected by the proposed Order:

(iii) The county council and any such law society or either of them, may, within six months after receipt of notice by the county council of any proposed Order, pass a resolution that a public inquiry shall be held in the county proposed to be affected,

as to the desirability of extending compulsory registration of title on sale to the county or part of the county intended to be affected:

(iv) A copy of the resolution shall be sent to the Lord Chancellor:

(v) After the receipt of a copy of the resolution the Lord Chancellor shall, after consultation with the Law Society, appoint a person, being a practising member of the legal profession to hold and conduct the inquiry and shall fix the date and place on and in which the inquiry is to be held:

(vi) The Lord Chancellor may make rules as to the conduct of such inquiries, the manner in which the expenses thereof are to be borne, and any other matters relating to the inquiries:

(vii) At any such inquiry the county council and such other persons as may be admitted by the person holding the inquiry, or may be nominated by or on behalf of any such law society as aforesaid and all other persons willing to give evidence, shall be entitled to submit reasons, whether local or general, for or against the extension of compulsory registration of title on sale to the county or part of the county intended to be affected:

(viii) The person holding the inquiry shall, after the completion thereof, forthwith report in writing to the Lord Chancellor the result, stating the facts and reasons upon which the result is arrived at, and the Lord Chancellor shall cause the report to be published in the Gazette or in such other manner as he may direct:

(ix) If, after the publication of the report, or after the period within which a resolution that an inquiry be held may be passed has expired without any such resolution being passed, the Lord Chancellor decides to proceed with the draft Order, with or without amendment, he shall cause such draft to be laid upon the table of each House of Parliament:

(x) The Order shall not be made unless both Houses by resolution approve the draft, either without modification or with modifications to which both Houses agree; but, upon such approval being given, the Order may be made in the form in which the draft has been approved:

(xi) Not more than one such Order shall be made within the period of eleven years from the commencement of this Act:

(xii) The first Order shall not affect more than one

15 Geo. 5, c. 21, s. 122.

county with any county borough surrounded by or contiguous to such county.

Effect of Act in areas where registration is compulsory.

123.—(1) In any area in which an Order in Council declaring that registration of title to land within that area is to be compulsory on sale is for the time being in force, every conveyance on sale of freehold land and every grant of a term of years absolute (*k*) not being less than forty years from the date of the delivery of the grant, and every assignment on sale of leasehold land held for a term of years absolute having not less than forty years to run from the date of delivery of the assignment, shall (save as hereinafter provided), on the expiration of two months from the date thereof or of any authorised extension of that period, become void so far as regards the grant or conveyance of the legal estate in the freehold or leasehold land comprised in the conveyance, grant, or assignment, or so much of such land as is situated within the area affected, unless the grantee (that is to say, the person who is entitled to be registered as proprietor of the freehold or leasehold land) or his successor in title or assign has in the meantime applied to be registered as proprietor of such land:

Provided that the registrar, or the court on appeal from the registrar, may, on the application of any persons interested in any particular case in which the registrar or the court is satisfied that the application for first registration cannot be made within the said period, or can only be made within that period by incurring unreasonable expense, or that the application has not been made within the said period by reason of some accident or other sufficient cause, make an order extending the said period; and if such order be made, then, upon the registration of the grantee or his successor or assign, a note of the order shall be endorsed on the conveyance, grant or assignment:

In the case of land in an area where, at the date of the commencement of this Act, registration of title is already compulsory on sale, this subsection shall apply to every such conveyance, grant, or assignment, executed on or after that date (*kk*).

(2) Rules under this Act may provide for applying the provisions thereof to dealings with the land which may take place between the date of such conveyance, grant, or assignment and the date of application to register as if such dealings had taken place after the date of first registration, and for registration to be effected as of the date of the application to register.

(3) In this section the expressions "conveyance on sale" and "assignment on sale" mean an instrument made on sale by virtue whereof there is conferred or completed a title under which an application for registration as first

proprietor of land may be made under this Act, and include a conveyance or assignment by way of exchange where money is paid for equality of exchange, but do not include an enfranchisement or extinguishment of manorial incidents, whether under the Law of Property Act, 1922 (*l*), or otherwise, or an assignment or surrender of a lease to the owner of the immediate reversion containing a declaration that the term is to merge in such reversion. 15 Geo. 5, c. 21, s. 123.

(*k*) See sect. 3 (xxvii), *ante*.
(*kk*) See on sect. 20 of L. T. Act, 1897, *Capital, &c., Bank* v. *Rhodes*, [1903] 1 Ch. 631.
(*l*) See note to sect. 28 of L. P. Act, 1925, *ante*.

124. This Part of this Act, as respects transactions completed after the commencement of this Act, binds the Crown. Compulsory provisions bind the Crown.

125. Where an order is made under this Part of this Act which applies to any of the Ridings of Yorkshire the order may provide for the transfer to the Land Registry of the business of the local deed registry established for the Riding, or for the local deed registry being constituted a district registry under this Act and for such district registry being administered by the county council, or, with the consent of the county council, may contain such other provisions as appear expedient with respect to the local deed registry; and the order may contain such supplemental, incidental, and consequential provisions (including provisions for the modification of the enactments relating to the constitution and administration of the local deed registry, and for the payment of compensation to the county council of the Riding in respect of future loss of fees or otherwise, and to the officers of the registry) as appear necessary or expedient for the purposes of the order. Special provisions as to orders affecting Ridings of Yorkshire.

Part XII.

Administrative and Judicial Provisions.

His Majesty's Land Registry.

126. —(1) There shall continue to be an office in London to be called His Majesty's Land Registry, the business of which shall be conducted by a registrar to be appointed by the Lord Chancellor and known as the Chief Land Registrar, with such officers (namely, registrars, assistant registrars, clerks, messengers, and servants), as the Lord Chancellor, with the concurrence of the Treasury as to number, may appoint. His Majesty's Land Registry.

15 Geo. 5, c. 21, s. 126.

(2) A person shall not be qualified to be appointed Chief Land Registrar unless he is a barrister of not less than ten years' standing, and a person shall not be qualified to be appointed a registrar or an assistant registrar unless he is either a barrister or solicitor of not less than five years' standing.

(3) The Chief Land Registrar, registrars, assistant registrars, clerks, messengers, and servants shall receive such salaries or remuneration as the Treasury may from time to time direct.

(4) The salaries of the Chief Land Registrar, registrars, assistant registrars, clerks, messengers, and servants, and such incidental expenses of carrying this Act into effect as may be sanctioned by the Treasury, shall continue to be paid out of money provided by Parliament.

(5) The Lord Chancellor may make regulations for the land registry, and for assigning the duties to the respective officers, and determining the acts of the registrar which may be done by a registrar or assistant registrar, and for altering or adding to the official styles of the Chief Land Registrar and other officers of the land registry. Subject to such regulations, anything authorised or required by this Act to be done to or by the registrar shall be done to or by the Chief Land Registrar. All such regulations for the time being in force shall have effect as if they were enacted in this Act.

(6) The Lord Chancellor may also make regulations as to the conduct of business at the land registry during any vacancy in the office of Chief Land Registrar, and for distributing the duties amongst the respective officers, and for assigning to a registrar or assistant registrar all or any of the functions and authorities by this Act or any other Act assigned to or conferred on the registrar, and all acts done by a registrar or assistant registrar under any such regulations shall have the same effect in all respects as if they had been done by the Chief Land Registrar.

(7) There shall continue to be a seal of the land registry and any document purporting to be sealed with that seal shall be admissible in evidence.

The Land Registry was established by L. T. Act, 1875, ss. 106 *et seq.*

Conduct of business by registrar.

127. Subject to the provisions of this Act, the Chief Land Registrar shall conduct the whole business of registration under this Act, and shall frame and cause to be printed and circulated or otherwise promulgated such forms and directions as he may deem requisite or expedient for facilitating proceedings under this Act.

15 Geo. 5, c. 21, s. 128.

Power for registrar to summon witnesses.

128.—(1) The Chief Land Registrar, or any officer of the land registry authorised by him in writing, may administer an oath or take a statutory declaration in pursuance of this Act in that behalf for any of the purposes of this Act, and the Chief Land Registrar may, by summons under the seal of the land registry, require the attendance of all such persons as he may think fit in relation to the registration of any title; he may also, by a like summons, require any person having the custody of any map, survey, or book made or kept in pursuance of any Act of Parliament to produce such map, survey, or book for his inspection; he may examine upon oath any person appearing before him and administer an oath accordingly; and he may allow to every person summoned by him the reasonable charges of his attendance:

Provided that no person shall be required to attend in obedience to any summons or to produce such documents as aforesaid unless the reasonable charges of his attendance and of the production of such documents be paid or tendered to him.

(2) Any charges allowed by the registrar in pursuance of this section shall be deemed to be charges incurred in or about proceedings for registration and may be dealt with accordingly.

(3) If any person, after the delivery to him of such summons as aforesaid, or of a copy thereof, and payment or tender of his reasonable charges for attendance, wilfully neglects or refuses to attend in pursuance of such summons, or to produce such maps, surveys, books, or other documents as he may be required to produce under the provisions of this Act, or to answer upon oath or otherwise such questions as may be lawfully put to him by the registrar under the powers of this Act, he shall be liable on summary conviction to a fine not exceeding twenty pounds.

Interchange of information between Land Registry and other Departments.

129. The Commissioners of Inland Revenue and other Government Departments, and local authorities, may furnish to the registrar on his request such particulars and information in regard to land and charges, and the registrar may in like manner furnish to the Commissioners of Inland Revenue, other Government Departments, and local authorities on their request such particulars and information as they are respectively by law entitled to require owners of property to furnish to them direct.

Statutory acknowledgments on return of documents.

130. When any document is delivered or returned by the registrar to any person he may, at the cost of the registry, require such person to give a statutory acknowledgment (*m*) of the right of the registrar and his successors in office to production of such document and to delivery of

15 Geo. 5, c. 21, s. 130.

copies thereof, and may endorse notice of such right on the document, and the acknowledgment shall not be liable to stamp duty.

(*m*) See L. P. Act, 1925, s. 64, *ante*.

Indemnity to officers of registry.

131. The Chief Land Registrar shall not, nor shall a registrar or assistant registrar nor any person acting under the authority of the Chief Land Registrar or a registrar or assistant registrar, or under any order or general rule made in pursuance of this Act, be liable to any action or proceeding for or in respect of any act or matter done or omitted to be done in good faith in the exercise or supposed exercise of the powers of this Act, or any order or general rule made in pursuance of this Act.

Replaces L. T. Act, 1875, s. 86.

District Registries.

Power to form district registries by general orders.

132.—(1) The Lord Chancellor, with the concurrence of the Treasury, shall have power by general orders from time to time to do all or any of the following things:—

(a) To create district registries for the purposes of registration of titles to land within the defined districts respectively, and to alter any districts which may have been so created:

(b) To fix, by notice to be published in the Gazette, the time for the commencement of registration at a district registry so created of titles to land within a district so defined:

(c) To direct registration of land to be commenced in any one or more district or districts pursuant to any such notice:

(d) To appoint district registrars, assistant district registrars, clerks, messengers, and servants to perform the business of registration in any district which may from time to time be created a district for registration under this Act:

(e) To provide for the mode in which district registrars are to be remunerated:

(f) To modify the provisions of this Act with respect to the formation and constitution of district registries, except the provision relating to the qualifications of district registrars, and assistant district registrars.

(2) A person shall not be qualified to be appointed district registrar under this Act unless he is a barrister or solicitor or certificated conveyancer of not less than ten years' standing, and a person shall not be qualified to be

appointed an assistant district registrar under this Act unless he is either a barrister or solicitor or certificated conveyancer of not less than five years' standing. 15 Geo. 5, c. 21, s. 132.

(3) A district registrar or assistant district registrar may, with the assent of the Lord Chancellor, follow another calling.

(4) A seal shall be prepared for each district registry and any instrument purporting to be sealed with such seal shall be admissible in evidence.

The provisions as to district registries replace L. T. Act, 1875, ss. 118-122.

133. Subject to general rules each district registrar, and assistant district registrar shall, as regards the land within his jurisdiction, have the same powers and indemnity as are herein given to the registrars and assistant registrars in the land registry, and there shall be the same right to appeal as in the case of the registrar; an order of a district registrar may be enforced and any breach thereof punished in like manner as if the order had been made by the Chief Land Registrar: Powers of district registrar, and appeals from him.

Provided that the Lord Chancellor may, by general rules, make provision—

(a) for the duties of a district registrar as regards all or any of the proceedings preliminary to first registration, or as regards any matters which the district registrar has to determine, or any other matters being performed by the Chief Land Registrar or a registrar or assistant registrar in the land registry; and

(b) for any district registrar obtaining directions from or acting with the sanction of the Chief Land Registrar or a registrar or assistant registrar.

134. The general orders, rules, forms, directions, and fees for the time being applying to and payable in the land registry shall also apply to and be payable in all the district registries, subject to any alteration or addition for the time being made for any district by the Lord Chancellor with the advice and assistance of the Rule Committee, and, so far as they relate to fees, with the concurrence of the Treasury. Application of general orders, &c., to districts.

Local Registries of Deeds.

135.—(1) Any land situated within the jurisdiction of any of the following local deed registries (that is to say): — Exemption of land registered under Act from registry of deeds.

(a) The registry for the county of Middlesex; or

(b) The registry for the West Riding of Yorkshire; or

(c) The registry for the North Riding of Yorkshire; or

15 Geo. 5, c. 21, s. 135.

(d) The registry for the East Riding of Yorkshire and the town and county of the town of Kingston-upon-Hull;

an estate wherein is registered under this Act, shall from and after the date of the registration thereof, be exempt, as respects the estate so registered, from such jurisdiction; and no document relating to any such registered estate executed, and no testamentary instrument relating to any such registered estate coming into operation, subsequently to such date as last aforesaid, shall be required to be registered in any of the said local deed registries.

(2) This section does not apply to estates and interests excepted from the effect of registration under a possessory or qualified title, or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to the registration of the title to the land.

Replaces L. T. Act, 1875, s. 127, amended by L. T. Act, 1897, Sched. 1.

Power to transfer Yorkshire registries to land registry.

136.—(1) Subject to the provisions of this Act relating to compulsory registration, the Lord Chancellor may enter into an agreement with the county council of any of the three ridings of Yorkshire for the transfer of the business of the local deed registry established in that riding to the land registry.

(2) The agreement shall be drawn up in accordance with the principles of sections one, three, and four of the 54 & 55 Vict. c. 64. Land Registry (Middlesex Deeds) Act, 1891, which provided for the transfer of the Middlesex registry of deeds to the land registry, and shall, after approval by the Treasury, take effect accordingly.

(3) The whole of the property, assets, and liabilities of the county council, in relation to the local deed registry, shall be included in the transfer, and shall be taken over by the State at a price to be specified in or ascertained under the terms of the agreement.

(4) Unless and until an agreement as aforesaid is concluded the county council may from time to time, at intervals of five years, in the event of their suffering loss owing to the business of the local deed registry being diminished by reason of this Act, apply to the Treasury for compensation, and the Treasury shall award such compensation accordingly.

(5) The compensation shall be made by the payment of a capital sum to the county fund to be determined in case of dispute by arbitration on the basis of the receipts and expenditure in respect of the local deed registry during the three years previous to the claim being made, and that the county fund shall not be placed in a worse financial position by the operation of this Act.

(6) All payments under this section shall be made out of money to be provided by Parliament. 15 Geo. 5, c. 21, s. 136.

Replaces L. T. Act, 1897, s. 23.

Provisions as to the Land Registry Act, 1862.

Provisions as to the Land Registry Act, 1862.

137.—(1) No application for the registration of an estate under the Land Registry Act of 1862 shall be entertained.

(2) The Lord Chancellor may, by order, provide for the registration under this Act, without cost to the parties interested, of all titles registered under the Land Registry Act, 1862, and care shall be taken in such order to protect any rights acquired in pursuance of registration under such last-mentioned Act, and any order so made by the Lord Chancellor shall have the same effect as if it were enacted in this Act; and until such estate is registered under this Act, the Act of 1862 shall apply thereto in the same manner as if this Act had not been passed. 25 & 26 Vict. c. 53.

(3) The officers of the land registry shall for all the purposes of the Land Registry Act, 1862, so far as it remains in operation, and for all the purposes of the Improvement of Land Act, 1864, and of the Mortgage Debenture Act, 1865, be deemed to be officers acting under the Land Registry Act, 1862, and having to discharge the duties belonging to officers acting under those Acts as occasion may require. 27 & 28 Vict. c. 114. 28 & 29 Vict. c. 78.

Replaces L. T. Act, 1875, ss. 125, 126.

Description and Powers of the Court.

Jurisdiction of High Court and county Courts.

138.—(1) For the purposes of this Act, "the court" means the High Court and also the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham or the county court, where those courts respectively have jurisdiction, according as the one or other of such courts may be prescribed by the general rules made for carrying this Act into effect.

(2) All matters within the jurisdiction of the High Court under this Act shall, subject to the enactments for the time being in force, relating to the Supreme Court of Judicature, be assigned to the Chancery Division of the court; and every application to the Court under this Act shall, except where it is otherwise expressed and subject to any rules of court to the contrary, be by summons at chambers.

(3) The county court shall, in cases where it has

15 Geo. 5, c. 21, s. 138.

jurisdiction under this Act, have, for all the purposes of such jurisdiction, all the powers of the High Court.

(4) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges and expenses of all or any of the parties to any application.

(5) The Lord Chancellor may from time to time assign the duties vested in the High Court in relation to all or any matters under this Act, including appeals from the county court, to any particular judge or judges of that court.

Cf. notes to S. L. Act, 1925, s. 113, *ante*.

Powers of Court in action for specific performance.

139.—(1) Where an action is instituted for the specific performance of a contract relating to registered land, or a registered charge, the court having cognizance of the action may, by summons, or by such other mode as it deems expedient, cause all or any parties who have registered interests or rights in the registered land or charge, or have entered up notices, cautions, restrictions, or inhibitions against the same to appear in such action, and show cause why such contract should not be specifically performed, and the court may direct that any order made by the court in the action shall be binding on such parties or any of them.

(2) All costs incurred by any parties so appearing in an action to enforce against a vendor specific performance of his contract to sell any registered land or charge shall be taxed as between solicitor and client, and, unless the court otherwise orders, be paid by the vendor.

Replaces L. T. Act, 1875, ss. 93, 94.

Power of registrar to state case for the Court.

140.—(1) Whenever, upon the examination of the title to any interest in land, the registrar entertains a doubt as to any matter of law or fact arising upon such title, he may (whether or not the matter has been referred to a conveyancing counsel in the prescribed manner), upon the application of any party interested in such land—

(a) refer a case for the opinion of the High Court and the court may direct an issue to be tried before a jury for the purpose of determining any fact;

(b) name the parties to such case;

(c) give directions as to the manner in which proceedings in relation thereto are to be brought before the court.

(2) The opinion of any court to whom any case is referred by the registrar shall be conclusive on all the parties to the case, unless the court permits an appeal.

This and sects. 141 and 142 replace L. T. Act, 1875, ss. 74-77.

141. Where a person under disability, or person outside the jurisdiction of the High Court, or person yet unborn, is interested in the land in respect of the title to which any question arises as aforesaid, any other person interested in such land may apply to the court for a direction that the opinion of the court shall be conclusively binding on the person under disability, person outside the jurisdiction, or unborn person.

15 Geo. 5, c. 21, s. 141.

Intervention of Court in case of persons under disability.

142.—(1) The court shall hear the allegations of all parties appearing.

(2) The court may disapprove altogether or may approve, either with or without modification, of the directions of the registrar respecting any case referred to the court.

(3) The court may, if necessary, appoint a guardian, next friend or other person to appear on behalf of any person under disability, person outside the jurisdiction, or unborn person.

(4) If the court is satisfied that the interest of any person under disability, outside the jurisdiction, or unborn, will be sufficiently represented in any case, it shall make an order declaring that all persons, with the exceptions, if any, named in the order, are to be conclusively bound, and thereupon all persons, with such exceptions, if any, as aforesaid, shall be conclusively bound by any decision of the court in which any such person is concerned.

Power for Court to bind interests of persons under disability.

143.—(1) Any person aggrieved by any order of a judge of a county court may, within the prescribed time and in the prescribed manner, appeal to the High Court.

(2) The court on hearing such appeal may give judgment affirming, reversing, or modifying the order appealed from, and may finally decide thereon, and make such order as to costs in the court below and of the appeal as may be agreeable to justice; and if the court alter or modify the order, the order so altered or modified shall be of the like effect as if it were the order of the county court.

The High Court may also, in cases where the court thinks it expedient so to do, instead of making a final order, remit the case, with such directions as the court may think fit, to the court below.

(3) Any person aggrieved by an order made under this Act by the High Court otherwise than on appeal from a county court, or by the Court of Chancery of Lancaster or Durham, may appeal within the prescribed time in the same manner and with the same incidents in and with which orders made by the High Court or such Court of Chancery respectively in cases within the ordinary jurisdiction of such court may be appealed from.

Appeals.

Replaces L. T. Act, 1875, ss. 116, 117.

15 Geo. 5, c. 21, s. 144.

Part XIII.

Rules, Fee Orders, Regulations, Short Title, Commencement and Extent.

Power to make general rules.

144.—(1) Subject to the provisions of this Act, the Lord Chancellor may, with the advice and assistance of a judge of the Chancery Division of the High Court to be chosen by the judges of that division, the Chief Land Registrar, and three other persons, one to be chosen by the General Council of the Bar, one by the Minister of Agriculture and Fisheries, and one by the Council of the Law Society (which body of persons are in this Act referred to as the Rule Committee), make general rules for all or any of the following purposes:—

(i) For regulating the mode in which the register is to be made and kept;

(ii) For prescribing the forms to be observed, the precautions to be taken, the instruments to be used, the notices to be given, and the evidence to be adduced in all proceedings before the registrar or in connexion with registration, and in particular with respect to the reference to a conveyancing counsel of any title to land proposed to be registered with an absolute title;

(iii) For regulating the procedure on application for first registration, provided that the applicant or his solicitor shall not be bound to make any declaration where a documentary title is shown which would operate as a guarantee in regard to matters not disclosed by the abstract;

(iv) For enabling registration with a possessory title to be provisionally effected pending the investigation of the title;

(v) For regulating the custody of any documents from time to time coming into the hands of the registrar, with power to direct the destruction of any such documents where they have become altogether superseded by entries in the register, or have ceased to have any effect;

(vi) For the taxation of costs charged by solicitors or certificated conveyancers in or incidental to or consequential on the registration of an estate in land or any other matter required to be done for the purpose of carrying this Act into execution, and for determining the persons by whom such costs are to be paid;

(vii) For carrying out the provisions of this Act with respect to compulsory registration;

(viii) For adapting to sub-mortgages and to incumbrances prior to registration the provisions of this Act with regard to charges; 15 Geo. 5, c. 21, s. 144.

(ix) For the conduct of official searches against cautions, inhibitions, and such matters of a like nature as may be prescribed, and for enabling the proprietor or any person authorised by him to apply for such searches by telegraph or telephone, and for the replies being returned in like manner to him or to such other person as he may direct;

(x) For enabling cautions to be entered against the registration of possessory and qualified titles as qualified, good leasehold, or absolute and against the registration of good leasehold title as absolute;

(xi) For enabling a mortgagee by deposit to give notice to the registrar by registered letter or otherwise of the deposit or intended deposit with him of the land certificate, or charge certificate: Provided that the fee for the entry of any such notice shall not exceed one shilling;

(xii) For allowing the insertion in the register, and in land certificates, of the price paid or value declared on first registrations, transfers, and transmissions of land;

(xiii) For making such adaptations as changes in the general law (including changes effected by the Law of Property Act, 1922, or any Acts of the present session of Parliament amending or re-enacting any provisions of that Act) may render expedient, with a view to the practice under this Act being from time to time adapted, so far as expedient, to the practice in force in regard to unregistered land;

(xiv) For enabling the registrar, without further investigation, to accept a title as absolute or good leasehold, in proper cases, on the faith of certificates given by counsel or solicitors or both;

(xv) For clearing the registered title on suitable occasions, and for enabling the registrar to permit any person interested to inspect entries on the register which have been cancelled, whether or not the title has been closed;

(xvi) For giving notice on land certificates of the general effect of registration;

(xvii) For the registration, by way of notice, on the

15 Geo. 5, c. 21, s. 144.

first registration of the land, of any easement, right, or privilege, created by an instrument and operating at law which appears to affect adversely the land, and so far as practicable by reference to the instrument creating the same;

(xviii) For enabling any person who acquires any such easement, right, or privilege, after the date of first registration of the land, to require (subject to notice being given to the owner of the servient land) entry to be made in the register of notice of the same, and so far as practicable by reference to the instrument creating the right;

(xix) For enabling the first or any subsequent proprietor to require that notice of his title to any such right or interest, whether acquired under an instrument or by prescription or otherwise, being appurtenant or appendant to the registered land, be entered on the register, and, so far as practicable, by reference to the instrument (if any) creating the right or interest, and for prescribing the effect of any such entry;

(xx) For providing for the registration of the title to an annuity or a rentcharge in possession (either perpetual or for a term of years absolute), or to mines and minerals when held separately from the surface, and as to notices to be entered of any exception of mines and minerals; and for preventing the registration of the benefit of any easement, right, privilege, or restrictive covenant, otherwise than as belonging to registered land;

(xxi) For regulating the issue and forms of certificates, and, if deemed desirable, for prescribing any special notification on the certificate to be given by way of warning when incumbrances, notices, and other adverse entries appear on the register;

(xxii) For providing for the cases in which the registrar may grant a certificate that an intended disposition is authorised and will be registered if presented;

(xxiii) For prescribing the effect of priority notices and of priority cautions and inhibitions;

(xxiv) For enabling a proprietor of any registered land or charge to register not more than three addresses (including, if he thinks fit, the

address of his solicitor or firm of solicitors) to which notices are to be sent; 15 Geo. 5, c. 21, s. 144.

(xxv) For providing any special precautions to be taken against forgery when the land certificate is not in the possession of the proprietor of the registered land;

(xxvi) For prescribing any matter by this Act directed or authorised to be prescribed and for effecting anything with respect to which rules are by this Act authorised or required to be made;

(xxvii) For adapting the provisions of this Act relating to transfers of registered land to other dispositions authorised to be made by a proprietor;

(xxviii) For prescribing—

(a) the procedure to be adopted when land is or becomes subject to any charitable, ecclesiastical or public trusts,

(b) any consents to be given before a title to such land is registered,

(c) the duties, if any, to be performed by the managing trustees or committee, and

(d) the restrictions, if any, to be entered on the register in regard to such land;

(xxix) For enabling entries to be made in the register on the surrender, extinguishment or discharge of any subsisting interest without previously registering the title to the interest which is merged or extinguished;

(xxx) For enabling such alterations to be made in the register as may be consequential on the conversion of perpetually renewable leases into long terms by the Law of Property Act, 1922, as amended;

(xxxi) For regulating any matter to be prescribed or in respect of which rules are to or may be made under this Act and any other matter or thing, whether similar or not to those above mentioned, in respect of which it may be expedient to make rules for the purpose of carrying this Act into execution.

(2) Any rules made in pursuance of this section shall be of the same force as if enacted in this Act.

(3) Any rules made in pursuance of this section shall be laid before both Houses of Parliament within three weeks after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within three weeks after the beginning of the then next session of Parliament.

See the Land Registration (England) Rules, 1925.

15 Geo. 5, c. 21, s. 145.

Power to make Fee Orders and principles on which fees determined.

145.—(1) The Lord Chancellor may, with the advice and assistance of the Rule Committee and with the concurrence of the Treasury, make orders with respect to the amount of fees payable under this Act, regard being had to the following matters:—

(a) In the case of the registration of an estate in land or of any transfer of an estate in land on the occasion of a sale, to the value of the estate as determined by the amount of purchase money; and

(b) In the case of the registration of an estate in land, or of any transfer of an estate in land not upon a sale, to the value of the estate, to be ascertained in such manner as may be prescribed; and

(c) In the case of registration of a charge or of any transfer of a charge, to the amount of such charge.

(2) Where the personal representatives of a deceased person are registered as proprietors of the registered land on his death, a fee shall not be chargeable for registering any disposition of the land by them unless the disposition is for valuable consideration.

(3) Specially reduced fees may be authorised to be charged on the registration of title to land wholly acquired for the purpose of being used as a street, or for street widening or improvements, or when acquired by a Government Department, a local authority, or other statutory body for permanent objects not involving a resale or other disposition.

(4) The fee orders relating and incidental to registration of title shall be arranged from time to time so as to produce an annual amount sufficient to discharge the salaries and other expenses (including the annual contribution to the insurance fund) incidental to the working of this Act, and no more.

(5) The Lord Chancellor may, with the consent of the Treasury, by order, from time to time provide for the manner in which the money advanced for the acquisition of the site and the erection of new offices at the registry (so far as not already provided for by the existing sinking fund) shall be repaid, secured, or otherwise provided for; and also for the manner in which accounts of receipts and expenditure as between the several departments of the land registry are to be kept.

See the Land Registration Fee Order, 1925.

Orders as to remuneration of solicitors.

44 & 45 Vict. c. 44.

146.—(1) The remuneration of solicitors in conveyancing and other non-contentious business under this Act shall from time to time be prescribed and regulated by general orders made by the Committee in England constituted under section two of the Solicitors Remuneration Act,

1881; provided that the Chief Land Registrar shall, for the purposes aforesaid, be an additional member of that committee. 15 Geo. 5, c. 21, s. 146.

(2) The provisions of the last-mentioned Act apply to any general order made under this section.

Repeals, savings and construction.

147.—(1) The Acts mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule:

Provided that, without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889:— 52 & 53 Vict. c. 63.

(a) Nothing in this repeal shall, save as otherwise expressly provided in this Act, affect any transfer of any interest in land or entry in the register made before the commencement of this Act, or any title or right acquired or appointment made before the commencement of this Act:

(b) Nothing in this repeal shall affect any rules, regulations, orders, or other instruments made under any enactment so repealed, but all such rules, regulations, orders, and instruments shall, until superseded, continue in force as if made under the corresponding provision of this Act:

(c) Nothing in this repeal shall affect the tenure of office or salary or right to pension or superannuation allowance of any officer appointed before the commencement of this Act:

(d) References in any document to any enactment repealed by this Act shall be construed as references to the corresponding provisions of this Act.

(2) References to registration under the Land Charges Act, 1925, apply to any registration made under any other statute which is by the Land Charges Act, 1925, to have effect as if the registration had been made under that Act.

See Land Charges Act, 1925, s. 24, *ante*.

Short title, commencement and extent.

148.—(1) This Act may be cited as the Land Registration Act, 1925.

(2) This Act shall come into operation on the first day of January nineteen hundred and twenty-six, but shall be deemed to come into operation immediately after the Law of Property Act, 1925, the Settled Land Act, 1925, the Land Charges Act, 1925, the Trustee Act, 1925, and the Administration of Estates Act, 1925, come into operation.

(3) This Act extends to England and Wales only.

15 Geo. 5, c. 21, sched.

Section 147.

SCHEDULE.

Enactments repealed.

Session and Chapter.	Short Title.	Extent of Repeal.
38 & 39 Vict. c. 87.	The Land Transfer Act, 1875.	The whole Act.
49 & 50 Vict. c. 1.	The Land Registry Act, 1886.	The whole Act.
60 & 61 Vict. c. 65.	The Land Transfer Act, 1897.	The whole Act except Part I. thereof.
8 Edw. 7, c. 36.	The Small Holdings and Allotments Act, 1908.	Subsection (4) of section twelve, from "and thereupon" to "Land Transfer Acts, 1875 to 1897," and section thirteen.
12 & 13 Geo. 5, c. 16.	The Law of Property Act, 1922.	Subsections (8) and (10) of section one hundred and fifty-eight; subsection (8) of section one hundred and sixty; Part X.; section seven of Part I. of the First Schedule, and the Sixteenth Schedule.
15 Geo. 5, c. 5.	The Law of Property (Amendment) Act, 1924.	Section eight and the Eighth Schedule.

EFFECT OF THE LAW OF PROPERTY ACT, 1922, ON PREVIOUS LEGISLATION.

Sect. 9 of the Law of Property (Amendment) Act, 1924, provided as follows:—

9. The enactments mentioned in the Ninth Schedule to this Act are affected by the principal Act (*n*) in the manner and to the extent specified in that Schedule. Statutes affected by the principal Act.

NINTH SCHEDULE. Section 9.

Enactments affected.	How affected on the commencement of the principal Act (*o*).
1. The Inheritance Act, 1833, as amended by section nineteen of the Law of Property Amendment Act, 1859.	1. Remains in force for the purpose (so far as applicable) of ascertaining the devolution of entailed interests as equitable interests, and of ascertaining the persons who are to take equitable interests as heirs by purchase, but in other respects ceases to apply (save in the case of a lunatic or defective provided for by the principal Act) on intestacies.

(*n*) By sect. 1 of the Act of 1924, "the principal Act" means the L. P. Act, 1922. The whole of that Act, except sect. 43 as to glebes (see p. 1003, *ante*), sects. 128-137 and Sched. 12 (abolishing copyhold and customary tenure), sects. 138-144A and Sched. 13 (extinguishment of manorial incidents), sect. 145 and Sched. 15 (conversion of perpetually renewable leaseholds), and sects. 188-191 (definitions and extent) appears to be repealed by the various Property Acts passed in 1925 and printed with notes in this volume; though the provisions of the Act of 1922 are for the most part reproduced in those Acts. (See, *e.g.*, Administration of Estates Act, 1925, ss. 45 and 51 (2), and L. P. Act, 1925, ss. 130 *et seq.*, for the provisions referred to in paragraph 1 of Sched. 9 to the Act of 1924, *supra*.) Sect. 2 and Sched. 2 of that Act made amendments in the Schedules of the Act of 1922, above referred to; and the L. P. (Amendment) Act, 1926, s. 7 (p. 595, *ante*) amended sect. 43 of the Act of 1922 (*supra*) and Sched. 13.

(*o*) The Act, except the unrepealed parts above mentioned, never came into force (see pp. 44 and 599, *ante*).

2. The Lands Clauses Acts and other statutes giving powers to make title in case of persons under disability.	2. Take effect as if the references to the disabilities which have been removed had been omitted.
3. The Wills Act, 1837.	3. Takes effect to enable equitable interests to be disposed of subject and without prejudice to the estate and powers of a personal representative.
4. The Fines and Recoveries Act, 1833, as amended.	4. Remains in force in regard to dealings with entailed interests as equitable interests.
5. The Small Dwellings Acquisition Act, 1899, and other statutes prescribing the mode of effecting mortgages of land.	5. Take effect as if the modes prescribed were by charge by way of legal mortgage or by demise or subdemise, but without prejudice to any statutory power to effect mortgages by deposit of documents.
6. All previous statutory provisions relating to the disposition of copyhold or customary lands.	6. Become obsolete.
7. All statutory provisions requiring a remainderman or reversioner to concur in a conveyance by a tenant for life or statutory owner of settled land.	7. Are inoperative as respects the transfer or creation of a legal estate; a consent in writing by the remainderman or reversioner shall be a sufficient compliance with the statutory provision.

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